

CHAPTER 2

Issues

Amendments arising from the Fair Work Act Review Panel

2.1 The bill contains a number of amendments to the Fair Work Act 2009 that reflect, in part, the findings of the Fair Work Act (FWA) Review Panel.¹ The Department of Education, Employment and Workplace Relations (DEEWR) explained the findings of the Review Panel:

In [its] report, the Panel found that the [Fair Work] Act was operating as intended, consistent with the objects of the legislation. The Panel also found that important economic outcomes such as wages growth, industrial disputation, the responsiveness of wages to supply and demand, the rate of employment growth and the flexibility of work patterns have been favourable to Australia's continuing prosperity under the...Act. The Panel did not recommend wholesale changes, but instead made 53 mainly technical recommendations to further promote productivity, improve equity or correct anomalies with the...Act.²

2.2 Many submitters to this inquiry offered general support for the bill. For example, the Australian Council of Trade Unions (ACTU) provided the following statement of support:

The Bill represents a balanced package of largely technical and administrative amendments which we support. We would urge the prompt enactment of the Bill, noting its widespread support and the thorough consultation process that preceded it. Accordingly, the ACTU suggests that its passage be recommended to the Senate.³

2.3 However, a significant proportion of submitters, while overall in support of the bill, called for amendments.⁴ While a number of specific amendments are argued for, many objections are couched in terms of what they see as the Government's failure to adopt the recommendations of the FWA Review Panel as a package. The Chamber of Commerce and Industry of Western Australia (CCI) was typical of a number of submitters in arguing that:

1 See, for example, Australian Council of Trade Unions, *Submission 8*, p. 1; Australian Manufacturing Workers' Union, *Submission 11*, p. 1.

2 Department of Education, Employment and Workplace Relations, *Submission 28*, p. 4.

3 Australian Council of Trade Unions, *Submission 8*, p. 1.

4 See, for example, JobWatch, *Submission 12*, p. 1; Chamber of Commerce and Industry of Western Australia, *Submission 15*, p. 5; Master Builders Australia, *Submission 18*, p. 5; Maritime Union of Australia, *Submission 21*, p. 1; Ai Group, *Submission 26*, p. 3.

...it is disappointing that the Bill only seeks to introduce approximately 18 of the 53 recommendations which were made...the Bill fails to implement many reasonable recommendations made by the Expert Panel.⁵

2.4 The bill is clearly described by its Explanatory Memorandum (EM) as the first tranche of amendments to the Fair Work Act. It is therefore intended that other recommendations may be implemented in the future. To this end, DEEWR further explained that:

As a result of [stakeholder] consultations it was clear there is broad support for around one third of the recommendations. These recommendations are reflected in the Bill. The Minister has committed to continue to work with stakeholders on the remaining recommendations with a view to introducing further legislation in the new year. In doing so, the Minister has publicly stated that he has neither ruled in nor out any of the Panel's remaining recommendations.⁶

2.5 Issues identified and discussed in this chapter are those which are relevant to provisions in this bill, and emphasis is given to key issues identified by submitters. Discussion of suggested amendments which may be picked up in a future bill will be discussed if and when such a bill comes before the committee.

Standing to apply to vary awards

2.6 The bill proposes to give registered organisations standing to apply to vary awards. This provision attracted broad support, including from the ACTU, the Housing Industry Association (HIA), the Maritime Union of Australia (MUA), THE Australian Chamber of Commerce and Industry (ACCI) and Ai Group.⁷ The Chamber of Commerce and Industry of Western Australia also offered support, but argued that unregistered organisations should also have standing.⁸

5 Chamber of Commerce and Industry of Western Australia, *Submission 15*, pp 1–2. See also, for example, Business Council of Australia, *Submission 20*, pp 3–6; Australian Federation of Employers and Industries, *Submission 23*, p. 1; Australian Chamber of Commerce and Industry, *Submission 25*, p. 7; Ai Group, *Submission 26*, p. 3. These concerns were reiterated by ACCI and AMMA during the public hearing in Canberra: Mr Daniel Mammone, Director of Workplace Policy and Legal Affairs, Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 21 November 2012, p. 4; Ms Lisa Matthews, Senior Workplace Policy Adviser, Australian Mines and Metals Association, *Proof Committee Hansard*, 21 November 2012, p. 7.

6 Department of Education, Employment and Workplace Relations, *Submission 28*, p. 5. See also, Mr John Kovacic, Deputy Secretary, Workplace Relations and Economic Strategy, Department of Education, Employment and Workplace Relations, *Proof Committee Hansard*, 21 November 2012, p. 19.

7 See, for example, Australian Council of Trade Unions, *Submission 8*, p. 2; Housing Industry Association, *Submission 14*, p. 6; Maritime Union of Australia, *Submission 21*, p. 2; Australian Chamber of Commerce and Industry, *Submission 25*, p. 27; Ai Group, *Submission 26*, p. 8.

8 Chamber of Commerce and Industry of Western Australia, *Submission 15*, p. 1.

Union officials only to act as bargaining representatives for workers the union is eligible to represent.

2.7 The bill would provide that an official of an employee organisation cannot be a bargaining representative for an employee unless that organisation is itself entitled to represent the industrial interests of the employee in relation to work that will be performed under the proposed enterprise agreement. This amendment responds to Review Panel recommendation 21.

2.8 The proposal had widespread support, including but not limited to the ACTU, HIA, Chamber of Commerce WA, and Australian Mineral and Metals Association (AMMA).⁹

2.9 The MUA was opposed to the amendment, taking the view that:

...the philosophy underpinning the bargaining representative regime is that an employee should be able to be represented by a person or organisation of their own free choice. Given the fundamental importance of freedom of association as enshrined in the ILO Convention Concerning Freedom of Association and Protection of the Right to Organise, we feel it inappropriate to restrict an employee's free choice of bargaining representative in the manner proposed by [the bill].¹⁰

Agreement clauses that permit "opting out" to be unlawful terms.

2.10 The bill would clarify, consistent with recent decisions of the full bench of Fair Work Australia, that terms which enable employees to 'opt out' of an enterprise agreement are prohibited.¹¹

2.11 A group of submitters, including the HIA, ACCI and Ai Group were opposed to the amendment.¹² The HIA submitted that, while it recognised that opt out clauses had the potential to undermine bargaining certainty, its overall position was that parties should be free to include them if desired. Similarly, the Business Council of Australia (BCA) submitted that:

The proposal to prevent opt-out clauses in enterprise agreements is disappointing. Such clauses provide for the situation where individual employees for a range of reasons may wish to have an alternative employment arrangement with their employer. It is of particular concern

9 Australian Council of Trade Unions, *Submission 8*, p. 3; Housing Industry Association, *Submission 14*, p. 5; Chamber of Commerce and Industry of WA, *Submission 15*, p. 1; Australian Mines and Metals Association, *Submission 30*, p. 3.

10 Maritime Union of Australia, *Submission 21*, p. 3.

11 Department of Education, Employment and Workplace Relations, *Submission 28*, p. 7, citing *Construction, Forestry, Mining, and Energy Union v Queensland Bulk Handling Pty Ltd* [2012] FWAFB 7551 (3 September 2012); *Aldi Foods Pty Ltd v Transport Workers' Union of Australia*; *National Union of Workers, NSW Branch* [2012] FWAFB 9398 (1 November 2012).

12 Housing Industry Association, *Submission 14*, p. 8; Australian Chamber of Commerce and Industry, *Submission 25*, p. 28; Ai Group, *Submission 26*, p. 9.

that this amendment is retrospective and will remove the opportunity to use opt-out clauses in current agreements in the future.¹³

2.12 On the other hand, the Australian Manufacturing Workers Union (AMWU) supported the amendment, arguing that:

[P]ermitting opt-out clauses can lead to manipulation of bargaining and agreement-making to undermine good faith bargaining entirely. When the good faith bargaining framework provided by the Act is premised on a majority vote for an agreement following good faith negotiations with the group of employees to be covered by that agreement, the facility of “opting out” of an agreement renders the framework meaningless. Those who can “opt out” can negotiate and bargain for a new agreement, including potentially taking protected industrial action. Those who do not “opt out” are at risk from manipulation of the real group of employees ultimately to be covered by the agreement.¹⁴

Prohibition on single employee enterprise agreements

2.13 The bill proposes to prohibit single employee enterprise agreements. This measure was opposed by a number of submitters, including the HIA, ACCI, and Ai Group.¹⁵ Master Builders Australia also opposed this prohibition, preferring a 'better off overall test' as the test for allowing EAs, regardless of employee numbers.¹⁶

2.14 Master Electricians considered that the amendment was unfair on small businesses, many of which have fewer than three staff, and proposed instead to limit the operation of the provision to proprietary limited companies with more than 1 employee, and specifically exclude partnerships and sole traders.¹⁷

2.15 However, the ACTU supported the provision, submitting that:

The practical reality is that such agreements serve to artificially “lock down” the terms and conditions in an enterprise before a sufficient workforce has been engaged to genuinely participate in good faith bargaining. Single employee agreements would therefore be attractive to newer businesses seeking to satisfy the limited “market rate” conditions associated with sponsoring guest workers. This amendment resolves the legal dispute in a manner which is consistent with the underlying policy of genuine good faith collective bargaining.¹⁸

2.16 The AMWU felt similarly, explaining that:

13 Business Council of Australia, *Submission 20*, p. 5.

14 Australian Manufacturing Workers' Union, *Submission 11*, p. 1.

15 Housing Industry Association, *Submission 14*, p. 8; Australian Chamber of Commerce and Industry, *Submission 25*, p. 27; Ai Group, *Submission 26*, p. 8.

16 *Submission 18*, p. 8.

17 *Submission 3*, pp 1–2.

18 Australian Council of Trade Unions, *Submission 8*, p. 4.

As we further submitted to the Panel, to provide that a collective enterprise agreement can be made with a single employee flies in the face of a structure of bargaining and agreement making in an Act premised upon collective bargaining, that is, employees negotiating collectively with their employer. The extensive public discussion, and phasing out of Australian Workplace Agreements through the use of Individual Transitional Enterprise Agreements prior to the commencement of the Act, together with the explicit provisions of the Explanatory Memorandum make it abundantly clear that an individual agreement is not a collective agreement, and collective agreement making provisions in the Act should not be able to be manipulated in this way.¹⁹

Aligning the period for lodgement of unfair dismissal applications with the limitation period for unfair dismissal-related general protections claims

2.17 The bill would extend the period for lodgement of unfair dismissal claims and reduce the limitation period for unfair dismissal-related general protection claims. These measures would increase the allowable period in which to lodge a claim for unfair dismissal from 14 to 21 days, and reduce from 60 to 21 days the allowable period in which to lodge a dismissal-related general protection claim. The Department set out the background of the amendments this way:

Aligning the timeframes for applications at 21 days reflects [Review]Panel recommendations 40 and 49, which were made in response to concerns raised by both employers and unions. Employers raised concerns that many general protections dismissal claims were in fact more properly characterised as out of time unfair dismissal claims and that different timeframes allow employees to withdraw an unfair dismissal claim after an unfavourable conciliation and lodge a general protections dismissal claim instead. These practices undermine the intent of the provisions and downplay the seriousness of general protections claims. Unions argued that the current 14 day time frame for unfair dismissal applications did not allow for sufficient time for dismissed employees to seek advice.²⁰

2.18 In respect of the proposed increase in the time allowed to lodge an unfair dismissal claim, submitters' opinions were divided. The committee notes support for the measure from AMWU, the National Tertiary Education Union (NTEU), the MUA and the ACTU. For example, the ACTU submitted that:

We believe that 21 days is an appropriate period to enable employees to seek advice on potential unfair dismissal applications. We accept that an alignment of the time limits for termination of employment matters in the context of the package of amendments as a whole.²¹

19 *Submission 11*, pp 2–3.

20 Department of Education, Employment and Workplace Relations, *Submission 28*, p. 5.

21 Australian Council of Trade Unions, *Submission 8*, p. 5. See also Australian Manufacturing Workers' Union, *Submission 11*, p. 4; National Tertiary Education Union, *Submission 6*, p. 5; Maritime Union of Australia, *Submission 21*, p. 4.

2.19 During the public hearing in Canberra, Mr Tim Lyons, Assistant Secretary of the ACTU, explained that 21 days provided people with sufficient time to seek appropriate advice before making the decision lodge an unfair dismissal claim:

We support the increase in the lodgement time for unfair dismissals because this is a really practical thing. I used to do a lot of unfair dismissals as an organiser, and giving people three weeks to seek proper advice and have a discussion with the employer before they decide whether or not to lodge a claim gives people more time to deal with the matters, get the proper advice and ensure that, if a claim is made, it is a claim that has merit and a claim that has been properly considered.²²

2.20 Other submitters supported, or did not object to, the increase to 21 days, but argued the lodgement period should be longer. For example, the Employment Law Council of Western Australia considered that the increase was positive but should extend to 90 days and the Redfern Legal Centre considered the deadline should be 60 days.²³ The Kingsford Legal Centre agreed, arguing that, even at 21 days, people are likely to file claims with little or no prospects of success because they have not had adequate time to seek legal advice. This would result in a higher workload and costs for FWA and employers.²⁴

2.21 On the other hand, the increase was opposed by organisations such as the Australian Federation of Employers and Industries and the AMMA.²⁵ Submitters such as HIA supported alignment of the claim period with the general protections claim period (discussed in the following paragraphs), but considered that both should be reduced to 14 days.²⁶

2.22 Having regard to the proposal in the bill to decrease from 60 to 21 days the allowable claim period for dismissal-related general protection claims, submitters were again divided. Support for this measure was received from a number of submitters, including ACCI and Ai Group.²⁷

2.23 Other submitters considered that the time limit should be maintained at its current level²⁸ or increased. Submitters arguing for the latter camp included the Employment Law Centre of Western Australia and the MUA. The MUA submitted that:

22 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 21 November 2012, p. 17.

23 Employment Law Centre of WA, *Submission 1*, p. 1; Redfern Legal Centre, *Submission 22*, p. 4.

24 Kingsford Legal Centre, *Submission 17*, p. 2.

25 Australian Federation Employers and Industries, *Submission 23*, p. 2; Australian Mines and Metals Association, *Submission 30*, pp 3, 11.

26 Housing Industry Association, *Submission 14*, p. 9.

27 Australian Chamber of Commerce and Industry, *Submission 25*, p. 30; Ai Group, *Submission 26*, p. 10.

28 See, for example, Queensland Nurses' Union, *Submission 10*, p. 3.

Unlike an unfair dismissal application, where failed conciliation may ultimately result in arbitration before the Tribunal, failed conciliation of a general protections dispute is a precursor to court action. The considerations informing the decision to bring a general protections dispute application are therefore more complex, involving considerations of greater costs, lengthier and more formal proceedings and additional commitment and concomitant stress.²⁹

2.24 Similarly, the NTEU called for the limit to be set at 28 days, to reflect the extra time needed to prepare for a General Protection claim, as opposed to the time required to lodge an application. The same position was taken by Kingsford Legal Centre, although they sought a 90 day limit, or at least the retention of the existing 60 days.³⁰

2.25 JobWatch argued against alignment of the time periods on the basis that telephone conciliation of unfair dismissal claims often resolved matters. However, if it did not, employees could discontinue the unfair dismissal claim and file a general protection application where that was a more appropriate course of action. This would not be possible if both unfair dismissal and general protection claims were subject to 21 day time limits.³¹

2.26 The committee notes DEEWR's submission that aligning the timeframes will ensure that:

- dismissed employees make the right claim in the right jurisdiction;
- employees have an appropriate timeframe to seek advice about a dismissal so they can make this choice in an informed way; and
- employers will respond to one claim in respect of a dismissal, not an unfair dismissal claim and later a general protections claim.³²

2.27 DEEWR also submitted that the 21 day time limit was arrived at as a compromise between the various groups who took part in the consultation process, and that it is an equitable approach which provides adequate time for employees to seek advice while also providing certainty to employees.³³

Broadening FWA power to issue costs orders

2.28 The bill would give FWA the power to order costs where a party has unreasonably failed to discontinue, unreasonably failed to agree to settlement or has unreasonably caused the other party to incur costs.

29 Maritime Union of Australia, *Submission 21*, p. 4.

30 National Tertiary Education Union, *Submission 6*, p. 5; Kingsford Legal Centre, *Submission 17*, p. 5.

31 JobWatch, *Submission 12*, pp 4– 5.

32 Department of Education, Employment and Workplace Relations, *Submission 28*, p. 5.

33 Department of Education, Employment and Workplace Relations, *Submission 28*, p. 6.

2.29 This amendment received qualified support from the ACTU, ACCI, and the HIA (ACCI and HIA supported the measure provided it extended to union officials).³⁴

2.30 However, a number of other submitters did not support the amendment. The Employment Law Centre of Western Australia and JobWatch were among them, the latter arguing that FWA can already refuse to grant a lawyer permission to appear, and there are existing procedures for security of costs in unfair dismissal applications. JobWatch considered that existing measures are adequate to achieve the policy outcomes sought by the amendment.³⁵

Departmental Response

2.31 The Department submitted that the amendment responded to Panel recommendation 45 and reflected the Panel's concern that unscrupulous lawyers or agents were encouraging dismissed employees to pursue unfair dismissal claims without merit on a no-win no-fee basis. The amendment would facilitate costs orders to be made against a person or their legal representative when they have unreasonably pursued or defended a claim but, according to the Department, would not stop a party from robustly pursuing a genuine claim.³⁶

FWA power to dismiss unfair dismissal applications

2.32 The bill would also give Fair Work Australia the power to dismiss unfair dismissal applications where the applicant unreasonably fails to attend or comply with orders/directions or discontinue a matter after a settlement agreement has been concluded. The amendment responds to a recommendation of the Expert Panel, and was broadly supported.³⁷

Power to appoint two full-time Vice Presidents.

2.33 The Act currently provides for the appointment of a President, Deputy Presidents and Commissioners to FWA.³⁸ Currently FWA has two Members who were originally appointed as Vice Presidents and a number of Members who were originally appointed as Senior Deputy Presidents, under the previous legislative

34 Australian Council of Trade Unions, *Submission 8*, p. 5; Australian Chamber of Commerce and Industry, *Submission 25*, p. 31; Housing Industry Association, *Submission 14*, p. 5.

35 JobWatch, *Submission 12*, p. 7.

36 Department of Education, Employment and Workplace Relations, *Submission 28*, p. 6.

37 See, for example, Australian Council of Trade Unions, *Submission 8*, p. 5; Housing Industry Association, *Submission 14*, p. 10; Chamber of Commerce and Industry of Western Australia, *Submission 15*, p. 1; Ai Group, *Submission 26*, p. 10.

38 *Fair Work Act 2009*, section 575.

scheme.³⁹ The committee was informed that during consultations Justice Iain Ross, President of FWA, proposed that two Vice President positions be created in order to attract senior legal specialists with high level expertise and to assist him in the administration and management of the tribunal, a proposal subsequently included in the bill.⁴⁰

2.34 Submitter opinion on the amendment varied widely. For example, the Business Council of Australia, Chamber of Commerce and Industry of WA, AMMA and ACCI were opposed, taking the view that a need for the new positions had not been established.⁴¹ On the other hand, Ai Group was not opposed, provided the appointments were made on merit.⁴²

2.35 The Law Council of Australia raised a matter of judicial independence, arguing that unless the existing Deputy Presidents were appointed to the new Vice President positions, the effect of new vice presidents being appointed would be to 'reduce the status' of the current Deputy Presidents and that:

Henceforth responsibilities that would have been capable of being delegated or given to them by nature of their senior status would instead be given to the new statutory Vice Presidents. This would have the tendency to reduce the independence of the Tribunal in that it will reduce the role and privileges associated with particular individuals.⁴³

2.36 The Law Council further argued that:

As a general principle, once a person has been appointed to sit on a Court or independent Tribunal with designated powers and privileges, any change that would have the effect of removing or reducing that particular person's powers or privileges while not affecting the powers and privileges of other Members of that Tribunal, has a tendency to undermine the independence of the Court or Tribunal. That is so because such action can be portrayed as

39 When the Australian Industrial Relations Commission transitioned to Fair Work Australia (as provided for by the Fair Work Act 2009), transitional provisions provided that the existing Vice Presidents, Senior Deputy Presidents and Deputy Presidents of that body were all appointed as Deputy Presidents of Fair Work Australia. However, each retained their title, status and remuneration (in particular the two former Vice Presidents): *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, schedule 19, items 1, 2 and 4. See also, Law Council of Australia, *Submission 29*, p. 3.

40 Department of Education, Employment and Workplace Relations, *Submission 28*, p. 10. See also Mr John Kovacic, Deputy Secretary, Department of Education, Employment and Workplace Relations, *Proof Committee Hansard*, 21 November 2012, p. 20.

41 Australian Chamber of Commerce and Industry, *Submission 25*, p. 34; Australian Mines and Metals Association, *Submission 30*, p. 4.

42 Ai Group, *Submission 26*, p. 12.

43 Law Council of Australia, *Submission 29*, p. 3.

being done because the individual Member is not in favour with the Parliament or the Executive.⁴⁴

2.37 During the public hearing Mr John Kovacic, Deputy Secretary, DEEWR, emphasised that the positions had been created on the basis of a recommendation made by the President of Fair Work Australia, and that 'the positions will be publically advertised and will be subject to a merit based selection process consistent with government policy'.⁴⁵

President's power to decide a matter personally

2.38 The bill provides that the President of FWA would have the power to decide a matter personally, even after it has been allocated to a single member of the full bench for decision. The most substantive submission in respect of this proposal came from the Law Council of Australia, which criticised the move in the following terms:

Proposed s 615C provides that after the President has allocated a matter to a single Member or a Full Bench the President can decide "to perform the function or exercise a power" himself or herself. Upon that occurring, the earlier direction that the single Member or Full Bench determine the matter is revoked. There are no preconditions to that decision and it can occur at any time, even during a proceeding. The President does not need to have considered submissions, nor be satisfied that it is in the public interest to do so. The [Law Council's Industrial Law] Committee considers it inappropriate that the Fair Work Act should include a provision that empowers the President to take over a matter allocated to a Full Bench and deal with it. Should such a power be exercised it would have the potential to reduce the standing of the Tribunal, given the potential for such an action to be characterised or perceived as an attack on the independence and/or competence of the Full Bench. That it might occur as a consequence of, or following submissions made by, a party would tend to emphasise the potential for the action to be portrayed as one intended to achieve a result or procedure different from that which the Full Bench might have expected to determine or adopt.⁴⁶

2.39 However, the Department submitted that the provision was advantageous as it would allow matters before the FWC to be escalated in significant cases and potentially save the parties time and further expense on later appeals. The committee notes the Department's contention that the inclusion of such a measure received broad support from stakeholders during the consultation phase.⁴⁷

44 Law Council of Australia, *Submission 29*, p. 3. This criticism was endorsed by ACCI during the public hearing in Canberra: Mr Daniel Mammone, Director of Workplace Policy and Legal Affairs, Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 21 November 2012, p. 3. See also, Mr Steve Knott, Chief Executive, Australian Mines and Metals Association, *Proof Committee Hansard*, 21 November 2012, pp 10–11.

45 Mr John Kovacic, Deputy Secretary, Department of Education, Employment and Workplace Relations, *Proof Committee Hansard*, 21 November 2012, p. 20.

46 Law Council of Australia, *Submission 29*, p. 2.

47 Department of Education, Employment and Workplace Relations, *Submission 28*, p. 11.

Fair Work Australia to be renamed the “Fair Work Commission”.

2.40 The bill would rename FWA as the Fair Work Commission. This proposal elicited relatively little comment from submitters. A number of submitters saw merit in resurrecting the title 'Australian Industrial Relations Commission', on the basis that the name is well known and accepted in the community.⁴⁸

Amendments arising from the Productivity Commission's report into default superannuation funds

2.41 The bill contains amendments that arise from the Productivity Commission's report on default superannuation funds. Many submissions provided general support for the contention that default superannuation schemes are required. The Australian Institute of Superannuation Trustees advised that:

Default superannuation arrangements have existed in the industrial relations system since prior to the advent of the Superannuation Guarantee. They have operated to ensure universality, fairness and balance, in a way that is supported by the representatives of employers and employees, and by the industrial tribunal itself.⁴⁹

2.42 However, these reforms also attracted a significant amount of criticism. The submission from Russell Investments summed up the tone of many:

The Bill partly adopts the recommendations of the Productivity Commission. Importantly, key recommendations from the Productivity Commission are not included in the Bill. We are concerned that the apparently hurried nature of this response and the failure to adopt the Productivity Commission recommendations as a coherent package will lead to the potential for significant adverse outcomes for ordinary superannuation fund members.⁵⁰

Exclusion of Corporate and Tailored MySuper products from nomination as default funds

2.43 The bill would amend the Act to provide that a superannuation fund is eligible to be included on the Default Superannuation List in a modern award if it is a 'generic MySuper product'. Corporate MySuper products are expressly excluded from eligibility. This would remove the ability of employers to contribute to a corporate fund as the default fund (even though it is a MySuper product) in respect of

48 See, for example, Chamber of Commerce and Industry (WA), *Submission 15*, p. 3; Maritime Union of Australia, *Submission 21*, p. 7; Australian Chamber of Commerce and Industry, *Submission 25*, p. 39; AiGroup, *Submission 26*, p. 13; Australian Mines and Metals Association, *Submission 30*, p. 4

49 Australian Institute of Superannuation Trustees, *Submission 9*, p. 3. A notable exception to this general sentiment was the Financial Services Council, *Submission 31*, p. 9.

50 Russell Investments, *Submission 16*, p. 1.

employees covered by a modern award.⁵¹ This was the cause of considerable criticism from a number of submitters.⁵²

2.44 Those who opposed the change argued that the retention of corporate funds as default funds in awards has been the result of careful bargaining and negotiation, and that removal of these funds from eligibility to be a default fund, and the consequent inability of employers to contribute for Superannuation Guarantee purposes, would disrupt agreed arrangements and operate to the detriment of employees.

2.45 It was argued that in many cases the types of funds which stand to become ineligible offer terms and conditions which are substantially more favourable for members than some or all of the funds typically listed in Modern Awards. It was submitted that the proposed legislative changes would mean members of many of these funds are likely to be significantly disadvantaged, for example through higher fees and/or inferior insurance arrangements.⁵³ A few examples follow.

2.46 Corporate Super Association did not support the exclusion of corporate MySuper products, describing the proposed amendment as:

...unjust, unexplained and is not based on any reasonable policy grounds....to exclude a fund that has qualified for MySuper status simply because it is not a public offer fund is not justifiable. It results in the exclusion of funds that have a long-standing recognition in awards and which provide generous and reliable benefits that have been agreed with large groups of employees subject to awards'.⁵⁴

2.47 Corporate Super Specialist Alliance specifically criticised the rationale provided by the Productivity Commission, arguing that:

The suggestion in the Productivity Commission Report that employers choose default funds for ease of administration, and not in the best interest of its employees, is without substantiation and is intuitively incorrect. Employers are usually members of the default fund also, so why would they not select the fund most suitable to members?⁵⁵

2.48 Opponents of the change commonly argued that certain corporate superannuation arrangements should be able to be used as a default fund by a specific employer even though not listed in a relevant award. Such funds should include standalone corporate funds offering MySuper or tailored MySuper arrangement and other funds offering a MySuper facility.⁵⁶

51 Except in the case of defined benefit members.

52 See, for example, Qantas Group, *Submission 5*, pp 1–5; Australian Mines and Metals Association, *Submission 30*, p. 3; Rio Tinto, *Submission 32*, p. 7.

53 See, for example, Mercer Australia, *Submission 13*, p. 2; Russell Investments, *Submission 16*, pp 3–4; Financial Services Council, *Submission 31*, pp 10–11.

54 Corporate Super Association, *Submission 2*, p. 2.

55 Corporate Super Specialist Alliance, *Submission 4*, p. 2.

56 See, for example, Mercer Australia, *Submission 13*, p. 3.

2.49 Opponents also addressed the 'grandfathering' provision currently in the Modern Awards. This provision enabled employers to retain their existing default super fund if it was the default at 12 September 2008. Some submitters argued that if the proposed amendments were passed, then the grandfathering provisions should be retained to bring about certainty.⁵⁷

2.50 Ai Group, while expressing support for the bill's other provisions in respect of superannuation, was critical of the removal of 'grandfathering' provisions which would preclude employers to from continuing to contribute to corporate MySuper products.⁵⁸ AiGroup called for the bill to be amended to include a grandfathering arrangement in each modern award for corporate funds with MySuper products.⁵⁹

2.51 During the public hearing in Canberra, Mr Dick Grozier, Director, ACCI, suggested that alternatively the proposed bill could be amended to provide that modern awards would permit contributions into tailored or corporate MySuper products.⁶⁰

Consultation

2.52 Some submitters also expressed concern that they were not 'warned' of the impending change to the superannuation arrangements. A number of submitters argued that the amendment flew in the face of legislation tabled as late as September 2012 (the Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012), the Explanatory Memorandum for which provided in part:

A term of a modern award will still have effect if it requires or permits superannuation contributions to a class of fund but does not specify a particular fund. For example, most modern awards include a grandfather clause that permits an employer to make contributions to a fund that the employer was contributing to before 12 September 2008, provided the fund is an eligible choice fund.⁶¹

2.53 These submitters considered that the reassurance they had taken from the MySuper Core Provisions Bill Explanatory Memorandum had been misleading. In

57 See, for example, Russell Investments, *Submission 16*, p. 5.

58 Ai Group, *Submission 26*, p. 5.

59 Ai Group, *Submission 26*, p. 5. Ai Group suggested a clause such as the following: 'any superannuation fund that offers a MySuper product to which the employee was making superannuation contributions for the benefit of its employees before 12 September 2008, providing that the superannuation fund is an eligible choice fund'.

60 This 'would provide for these companies specific funds which are authorised to offer MySuper products the same status as contributions that go into public sector schemes or defined benefit schemes': Mr Dick Grozier, Director Industrial Relations, NSW Business Chamber, Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 21 November 2012, p. 5.

61 Explanatory Memorandum, Superannuation Legislation Amendment (Further MySuper and Transparency Measures) Bill 2012, paragraph 4.20.

addition, some submitters argued that the money they had spent on attaining MySuper status would now be wasted.⁶²

2.54 However, the Department told the committee that in addition to consultations it had conducted, the Fair Work Review Panel had also engaged in lengthy consultations as part of its review process.⁶³

Time and cost implications

2.55 Other concerns were associated with the time and cost of implementing the proposed changes. The Corporate Super Specialist Alliance submitted that the Productivity Commission Report significantly underestimated the time and effort required by an employer in switching funds, based on the need to go through a selection process, the cost of professional assistance and the time needed to undertake a communication programme to employees.⁶⁴

2.56 The amendment would bring about the need to make specific purpose agreements to deal with super. Some submitters argued that this would be both expensive and disruptive. Associated with this is an argument that it would bring multiple layers of bureaucracy into play – an application to APRA to become a MySuper fund, approval by the Default Selection Panel, and then vetting by FWA.⁶⁵

2.57 It was also submitted that, even once switching of funds has been achieved, many large employers have different groups of employees covered by a number of different awards. That potentially increases cost and complexity for that employer as they have to direct default contributions to a number of different funds.⁶⁶

2.58 Instead, some submitters called for any MySuper fund to be eligible to be a default fund.⁶⁷ As an alternative, there was a consistent call for the retention of 'grandfathering' provisions.⁶⁸

Support for superannuation reforms

2.59 However, criticism of the move was not unanimous. Mr Tim Lyons, Assistant Secretary, ACTU, reminded the committee that proposed changes gave effect to 'what the Productivity Commission wanted, which is for somebody who is not the employer

62 See, for example, Corporate Super Association, *Submission 2*, p. 3; Corporate Super Specialist Alliance, *Submission 4*, p. 4.

63 Mr John Kovacic, Deputy Secretary, Workplace Relations and Economic Strategy, Department of Education, Employment and Workplace Relations, *Proof Committee Hansard*, 21 November 2012, p. 23.

64 Corporate Super Specialist Alliance, *Submission 4*, p. 4. See also Russell Investments, *Submission 16*, p. 4.

65 See, for example, Corporate Super Specialist Alliance, *Submission 4*, p. 2; Financial Services Council, *Submission 31*, p. 6.

66 Russell Investments, *Submission 16*, p. 4.

67 See, for example, Financial Services Council, *Submission 31*, p. 4;

68 See, for example, Ai Group, *Submission 26*, p. 5.

to look at the question of what an appropriate default super product is and to make that decision for disengaged workers'.⁶⁹

2.60 Dr Alison Morehead, Group Manager, DEEWR, advised the committee that any workplace that has an enterprise agreement may choose to list superannuation funds in that agreement:

If the parties to the agreement have chosen to list superannuation funds in them, they do not need to go through the process that default funds in awards will go through under the bill. Anyone who has MySuper product that is in an enterprise agreement is able to continue doing that and is not part of the process. The process that is suggested is about awards and about employees who rely on the default funds which are listed in awards.⁷⁰

2.61 In its submission, the ACTU argued that:

This approach recognises that because of the highly imperfect nature of the 'market' for default funds, and because the new MySuper regulations will allow product tailoring and differential pricing, MySuper-compliance is a necessary but insufficient condition for a fund that wishes to be named as a default in an award. It is therefore appropriate to develop a selection process that builds on MySuper-compliance by combining input from those with expertise in superannuation or related fields with input from industrial stakeholders. This provision secures that objective.⁷¹

2.62 The ACTU went on to argue that the transition arrangements contained in the bill were appropriate to the circumstances:

This provision recognises that there may be circumstances where it is in the interests of members for a newly excluded fund to be allowed to continue to receive default contributions for a transitional period. For some employers it may take time to identify a new fund appropriate to their circumstances and to put new administrative arrangements in place. It is therefore appropriate for the Commission to have discretion in this area.⁷²

2.63 The Australian Institute of Superannuation Trustees (AIST) also expressed strong approval for the measures, submitting that:

AIST fully supports the Bill in relation to the selection of super funds in awards. AIST has made submissions to the issues paper issued by the Productivity Commission in April 2012, its report in August 2012, and was involved in meetings with the Productivity Commission and the public hearings. Throughout this process, and the subsequent response of the

69 Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 21 November 2012, p. 18.

70 Dr Alison Morehead, Group Manager, Workplace Relations Policy, Department of Education, Employment and Workplace Relations, *Proof Committee Hansard*, 21 November 2012, p. 24.

71 Australian Council of Trade Unions, *Submission 8*, p. 6. See also, Mr Tim Lyons, Assistant Secretary, Australian Council of Trade Unions, *Proof Committee Hansard*, 21 November 2012, pp 18–19.

72 Australian Council of Trade Unions, *Submission 8*, p. 6.

Government, AIST has seen a progressive strengthening of consumer protections, and increased transparency, contestability, accountability and practicality in the emerging proposals.⁷³

2.64 The AIST also considered the transitional arrangements to be satisfactory:

The transitional authorisation provided to the regulator...ensures that employers can be given a reasonable amount of time to transition across to new default arrangements, should this be necessitated by changes to a default fund term in an award.⁷⁴

2.65 Industry Super Network (ISN) were also in support, submitting that:

ISN welcomes the Bill which increases transparency in the process by which default superannuation funds are named in modern awards and ensures the process has as its overarching consideration the best interests of employees. The Bill implements the key recommendations of the final report of the Productivity Commission and successfully incorporates those key recommendations into a functional system that recognises that Superannuation Guarantee payments are a form of deferred wages.⁷⁵

Power to appoint Expert Panel Members to conduct four yearly reviews

2.66 The bill proposes to provide members of the new Fair Work Commission with the power to appoint three expert panel members to sit with the FWC members during the four yearly reviews of default fund terms in modern awards.

2.67 The measure was criticised by some. For example, HIA was concerned that these new provisions introduce another layer of governmental intervention allowing the “conflicted” parties of FWC to continue to select default superannuation funds. Whilst HIA does not have a preference over industry or retail funds it expressed concern that

[T]he proposed provisions favour industry funds and would enable the removal of a default fund as part of the 4 yearly review. Such a function is anti-competitive and will reduce flexibility.⁷⁶

2.68 In contrast, the ACTU, the MUA, and the Ai Group, among others, support this measure.⁷⁷ The AIST also expressed strong support, arguing that the proposal:

It is most efficient for all stakeholders, including employers, and society generally for the existing industrial regulator, Fair Work Australia (“FWA”), to be directly responsible for the selection of default funds...An expert panel within FWA provides appropriate alignment between expert

73 Australian Institute of Superannuation Trustees, *Submission 9*, p. 1.

74 Australian Institute of Superannuation Trustees, *Submission 9*, p. 6.

75 Industry Super Network, *Submission 19*, p. ii.

76 Housing Industry Association, *Submission 14*, p. 6.

77 See for example, Australian Council of Trade Unions, *Submission 8*; MUA, *Submission 21*, p. 2; Ai Group, *Submission 26*, p. 6.

superannuation knowledge and the overall regulation of workplace relations.⁷⁸

2.69 The Financial Services Council expressed concerns that four-yearly reviews may lead to a short-term focus, to the detriment of members' long term interests.⁷⁹

2.70 However, AIST supported the requirement for default funds to be reviewed 4-yearly:

AIST supports efforts to ensure that the relevance and appropriateness of default funds is reviewed frequently, and we believe that the creation of default superannuation fund lists as proposed in [the bill] is suitable for this. We also believe that this process achieves the Productivity Commission's principles... of best interests, contestability and competition, transparency, procedural fairness, minimum regulatory burden, market stability, consistency with other policies and regular assessment.⁸⁰

2.71 During the public hearing in Canberra, Mr Kovacic, Deputy Secretary, DEEWR, explained to the committee the rationale behind four yearly reviews:

The Productivity Commission recommended a major review every eight years with an interim review at a four yearly term. The government's view was that that was probably too long a period of time. Conversely, having an ongoing opportunity to vary modern awards would go contrary to the concept of a stable and secure safety net, so it probably goes to the other end of the spectrum. In the government's view, the four-yearly time frame is an appropriate time frame which will ensure that those sorts of developments in the marketplace in terms of products and whatever will certainly be adequate to provide the opportunity to be reflected in modern awards.⁸¹

Conclusion

2.72 The evidence before this committee indicates broad overall support for the bill. It is clear to the committee that this first stage of amendments to the Act are the product of lengthy consultations and reflect an appropriate balance of the needs of both employer and employee groups.

2.73 Consistent with its undertaking when the Act came into force, the government conducted a review of the Act within two years of its implementation. The Review Panel consulted widely and received more than 250 submissions. The Review Panel concluded that the Act was working well and the economic outcomes achieved under the Act were consistent with Australia's productivity and prosperity.

78 Australian Institute of Superannuation Trustees, *Submission 9*, p. 2.

79 Financial Services Council, *Submission 31*, p. 12.

80 Australian Institute of Superannuation Trustees, *Submission 9*, p. 6.

81 Mr John Kovacic, Deputy Secretary, Workplace Relations and Economic Strategy, Department of Education, Employment and Workplace Relations, *Proof Committee Hansard*, 21 November 2012, p. 25.

2.74 The amendments contained in this bill reflect the government's implementation of around a third of the recommendations made by the Review Panel – those amendments that attracted broad support from the majority of employer and employee groups.

2.75 Nevertheless, submitters and witnesses hold divergent views on some amendments to the bill arising from the Review Panel. Some submitters have welcomed the bill because of its timely and necessary reforms, where others have expressed concerns about the amendments.

2.76 The committee is mindful of the detailed and lengthy consultations that both the Review Panel and DEEWR have conducted, and that this bill represents the first of a number of bills in the Fair Work reform package. Added to this, the committee notes the overall support for passing of the bill – even among those submitters who have expressed criticisms about particular provisions.

2.77 In relation to the amendments pertaining to superannuation, it is important to remember that the amendments only operate in cases where a person has not otherwise indicated their choice of super fund. Furthermore, enterprise agreements may continue to specify corporate MySuper funds as the default fund.

2.78 It is also of fundamental importance that member funds be protected through a thorough and independent assessment of default funds specified in awards, which is precisely what the FWA review process is designed to achieve.

Recommendation 1

2.79 The committee recommends that the Senate pass the bill.

Senator Gavin Marshall

Chair