

Submission to the Senate Education, Employment and Workplace Relations Legislation Committee Inquiry into the Fair Work Amendment Bill 2012

13 November 2012

* * * *

About ASFA

ASFA is the peak policy, research and advocacy body for Australia's superannuation industry. It is a not-for-profit, sector-neutral, and non-party political national organisation whose aim is to advance effective retirement outcomes for members of funds through research, advocacy and the development of policy and industry best practice.

ASFA's focus is on whole of system issues and its core strategies are aimed at encouraging industry best practice, advocating for a system that plays a productive role in the Australian economy, and ensuring the industry delivers on its primary purpose of delivering decent retirement incomes.

Our membership - which includes superannuation funds from the corporate, industry, retail and public sectors, and, through its service provider membership, self-managed and small APRA funds - represents over 90 per cent of Australians with superannuation.

This submission responds to the provisions relating to default superannuation in Schedules 1 and 2 of the Bill. ASFA does not wish to make any comments in regard to any other provisions within the Bill given that they are outside the scope of the activities and interests of ASFA.

In considering the legislation ASFA has based comments around specific principles that the selection process for inclusion of a MySuper product in an Award as a default fund should be:

- Open in that the provider of any generic MySuper product should be able to apply for inclusion.
- Transparent in that all the criteria for selection should be explicitly made available to all applicants.
- Fair in that the process used to determine which funds are included as a default in an award proceeds without any bias or potential bias and also allows applicants a right to be heard.

Separately ASFA believes that the legislation must avoid ambiguity that can lead to gaming behaviour in the overall process. Legislative changes should be sustainable to avoid future legislative uncertainty.

More specifically, ASFA considers that assessment should be based on:

- ability of the provider to meet a net investment performance benchmark;
- the use of after tax reporting,
- reasonable administration; advice and investment fees;
- appropriate insurance offering; and
- ability of the provider to service and engage with members and employers.

ASFA notes that whilst the legislation covers processes for selection for employees that do not actively choose their own superannuation fund, this is in the context of overall choice of fund rules that apply to all employees who are covered by award provisions relating to superannuation. ASFA considers that choice of fund should also be available to employees covered by Enterprise Bargaining Agreements.

ASFA would recommend that the application of the legislation be reviewed within 2 years to assess the impact that it is having on contestability of default superannuation industrial arrangements. Whilst all efforts should be made to ensure that technical issues are addressed in the legislation in the first instance a review will assist in determining whether the legislation is indeed meeting its stated policy objectives.

Specific comments on the provisions in Schedule 1 of the Bill

Clause 23A Terms relating to superannuation

Clause 23A(3) definition of corporate MySuper product does not seem to accommodate the large employer exemption that has been a part of recent Stronger Super legislation. There is concern that a corporate superannuation MySuper nor a large employer MySuper will not be able to be listed in an award.

Clause 156A: 4 yearly reviews of default fund terms

ASFA is supportive of a four year review process on the basis that superannuation is a long term investment. A shorter time review process would encourage a greater focus on short term performance criteria such as one year investment returns.

Clause 156B: Default Superannuation List

ASFA is supportive of the establishment of a Default Superannuation List that is open to all superannuation funds with MySuper offerings to apply to on the basis that the ability of superannuation funds to make application will increase the contestability of superannuation and competition amongst superannuation funds.

Clause 156C(4): Applications to list a MySuper product

Clause 156C(4)(b) provides that any fee payable in respect of an application to be listed as a default fund be accompanied by any fees that are prescribed by the regulations.

ASFA believe that fees should be based on cost recovery and should not be set at a level which discourages applications. If fees are set at a level that discourages applications this will impact on the ability of smaller funds to apply and will in reality result in reduced contestability of Default Superannuation List.

Clause 156D(3): Submissions on applications to list a MySuper product

ASFA is supportive of submissions being made publicly available. Whilst we acknowledge there will be some times where confidentiality may be required we believe that an open and transparent process will be best served by the publication of applications.

Clause 156E(2): Determining applications to list a MySuper product

Clause 156E(2) provides that the FWC must not determine that the product is to be included on the Default Superannuation List unless the FWC is satisfied that including the product on the list would be in the best interest of default fund employees to whom modern awards apply or a particular class of those employees. ASFA supports an explicit statement on best interest in the legislation. It is important to avoid ambiguity that in determining what is in the best interest of a class of employees as opposed to an individual that regulations provide the FWC with clear guidance on the interpretation of the term.

Clause 156F – First Stage Criteria

The bill provides nine explicit criteria for the appropriateness of a MySuper product.

ASFA considers that in order to enhance review and accountability, Key Performance Indicators (KPIs) should be considered by the Fair Work Commission (FWC) through the Expert Panel in assessing applications. Examples of possible KPIs include: an investment performance benchmark (after tax and after all fees), service levels to members, and the quality of advice and information provided to members. Applicants should be required to demonstrate their capacity to deliver outcomes that equal or exceed the KPIs and also that achieving such outcomes justifies inclusion as a default fund in an Award or Awards.

ASFA notes that some of the criteria will enable direct comparison through KPIs such as net investment returns. Other criteria will be more difficult for comparison due to their qualitative nature.

Wherever possible ASFA believes that KPIs should be standardised to ensure that comparison across MySuper products is possible. ASFA acknowledges that due to differences in fund design, fees and member characteristics standardised KPIs will not be possible for all criteria.

ASFA has made comments in respect to each criteria. We would note that there are some criteria which, whilst we support inclusion, there is the potential for ambiguity in

interpretation. Examples of this would include the 'appropriateness of insurance' or 'quality of advice'. For the avoidance of disputation ASFA would encourage regulations to be established that address areas of ambiguity.

In particular ASFA believes that criteria must relate to existing legislation in SIS, Corporations Act, APRA standards and ASIC guides. Where there is ambiguity in relation to any of the criteria reliance must be placed on existing and developing regulatory standards.

(a) the appropriateness of the MySuper product's long term investment return target and risk profile

ASFA supports the criteria. Superannuation is a long term investment. The performance of a superannuation fund over the long term has a significant impact on the retirement outcome for individual superannuation fund members. ASFA is currently working on the impediments that exist that impact on the ability of superannuation funds to investment for the long term.

(b) the superannuation fund's expected ability to deliver on the MySuper product's long term investment return target, given its risk profile;

ASFA supports the criteria.

(c) the appropriateness of the fees and costs associated with the MySuper product, given:

(i) its stated long term investment return target and risk profile; and

(ii) the quality and timeliness of services provided;

ASFA supports the criteria.

(d) the net returns on contributions invested in the MySuper product

ASFA acknowledges the importance of net returns as a criteria. Past performance is relevant but should not necessarily be a deciding factor in assessing the ability to meet a specified net investment performance benchmark. Some or even many MySuper products will in effect be new products and will not have an investment return history as they will have different investment allocations and fees compared to previous products offer by the fund concerned. Further work is being undertaken by the superannuation sector on the appropriate framework for setting a net investment performance benchmark and this work should be concluded by the time the first assessment process commences.

(e) whether the superannuation fund's governance practices are consistent with meeting the best interests of members of the fund, including whether there are mechanisms in place to deal with conflict of interest;

A minimum requirement should be that Trustee Directors (no matter through what process they are able to put themselves forward for a Trustee position) must have been assessed on criteria set by the Trustee Board, including meeting minimum skills and experience as well as any specialist or particular skills and experience that the Trustee Board considers are needed at the relevant time.

(f) the appropriateness of any insurance offered in relation to the MySuper product;

ASFA supports the criteria.

(g) the quality of advice given to a member of the superannuation fund relating to the member's existing interest in the fund and products offered by the fund;

ASFA supports the criteria.

(h) the administrative efficiency of the superannuation fund;

ASFA supports the criteria.

(i) any other matters the FWC considers relevant.

ASFA understands that providing FWC with flexibility to consider new criteria that have not been specifically identified is important in a changing and dynamic superannuation product environment. However this clause should not be used to outweigh the other listed criteria.

Clause 156G: Review of the default fund term of modern awards

In addition to employees, outworkers, and employee and employer industrial organisations, every fund that is on the “Default Superannuation List” for the relevant award should be given the opportunity to provide their reasons for inclusion in the award in writing. Such an opportunity to be heard is important in terms of providing openness and transparency in regard to the process for selecting default funds. Holding hearings at which funds could be represented should be at the discretion of the FWC, taking into account the number of applications that are made.

Clause 156K: Transitional authorisation for certain superannuation funds

ASFA notes that the Bill proposes that the “grandfathering” of certain default fund arrangements used by employers be discontinued. When a fund used by an employer is no longer a permitted default fund, basically all contributions in the future will go to a new approved default fund unless the member uses choice of fund provisions to continue contributions to the old fund. The member can thus end up with two funds. However, the proposed auto-consolidation of certain accounts and member initiated consolidation would reduce the number of such duplicate accounts.

The transitional provision allows the FWC to authorise employers to use the old defaults for a specified time period so that the employer has time to choose a new default, notify employees and allow employees the opportunity to exercise choice of fund. Employers will need to hand out a choice of fund form when they select a new default fund (even though this need for a new default fund is imposed on them).

In these circumstances, ASFA supports the FWC having the power to provide transitional authorisation for a fund or funds to be regarded as a default in cases where it has not been included in the reviewed award as a default.

The period of transition should reflect the fact that it may take some time for an employer to select an alternative default and/or for employees to exercise choice of fund, including possible selection of the fund to which contributions were made prior to the setting of new defaults in the award and the ending of the grandfathering provisions.

A major focus of policy is on avoiding the creation of unnecessary multiple accounts for employees and the exercise of the power to provide transitional authorisation should reflect that public policy.

Schedule 2—Expert Panel

Subsection 620 (1A)(b) provides that 3 Expert Panel Members will be appointed that have knowledge of, or experience in finance, investment management and superannuation. ASFA is supportive of the appointment of experts from the superannuation industry. We note that as Section 633(3) provides that an Expert Panel Member must not engage in any paid work

that in the conflicts or may conflict with the proper performance of his or her duties that this may in practice preclude the appointment of officers that are currently practising in the superannuation industry. An issue that needs to be considered is the mechanism by which an Expert Panel Member is able to keep their knowledge current in a dynamic and changing industry. ASFA would recommend that Expert Panel Members be required to undergo ongoing continuous professional development training in the field of investment and superannuation in order to ensure that knowledge remains current.