

Award modernisation

April 2011

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Introduction

As ASFA members would be aware, industrial award provisions relating to default superannuation fund have important implications for both employers and superannuation funds. Award modernisation brought substantial changes to default arrangements.

In addition, the Government's response to the Cooper Review indicates that it proposes changes to how default superannuation funds are nominated in awards, enterprise agreements and more generally by employers. The Government proposes that default funds be largely restricted to MySuper products.

The purpose of this paper is to bring ASFA members up-to-date on the outcomes of the award modernisation process to date and to provide information on the scheduled process for review of modernised award provisions, including in regard to superannuation.

Overview

The paper examines the rules that apply to the setting of default funds in modernised awards. Unfortunately it is not necessarily easy for any given employer to know which of their employees are subject to an award provision regarding default fund. A number of employers have devoted considerable resources to working out how award modernisation has impacted on wages and conditions for their employees.

In this context, around 20 per cent of the workforce are on award wages only. An additional 10 per cent of the workforce are subject to the provisions in an award even though they are on above-award wages. Once an employee is on a wage of \$100,000 or more a year they are not subject to the award. Most (but not all) awards specify a default fund or funds.

Award coverage also is determined by the type of work done so an employer might have to consider different awards which apply to different employees depending on, say, whether the employee is a clerk or in retail sales. Persons on different awards can actually work side by side.

However, if there is an enterprise agreement this over-rides any awards and can cover a variety of workers.

The other practical issue considered in this paper relates to the consequences for an employer of using the wrong default fund. Generally, employees and unions are more worried about superannuation being paid, than the fund it is going to, As well, with choice of fund, an employee who is unhappy with the default can specify their preferred fund. However, with the attention that has been given to award modernisation and default funds there are indications that employers are wary of breaching legal requirements. If they have a default in place they may only consider changing it if they are confident that this would not breach any award provision applying.

The paper also works through the implications of the Government's response to the Cooper Report. It highlights a number of issues which might have substantial implications for employers, employees and superannuation funds.

The process so far

Award modernisation is the process of reviewing and rationalising awards in the national workplace relations system to create a system of "modern awards".

The then Australian Industrial Relations Commission (AIRC) began the process in March 2008 following a formal request from the Australian Government under Part 10A of the *Workplace Relations Act 1996*.

By the end of 2009 the AIRC had reviewed more than 1,500 awards and created 122 industry and occupation awards. These awards commenced on 1 January 2010.

They apply a national system to employees in a particular industry or occupation. In general, the employees of constitutional corporations are covered by the national workplace relations system. In addition, those covered include:

- in Victoria, the Australian Capital Territory and the Northern Territory—all other employment

- in New South Wales, Queensland and South Australia—all other private sector employment (from 1 January 2010), and
- in Tasmania—all other private sector and local government employment (from 1 January 2010).

The award modernisation process is continuing under the AIRC's successor Fair Work Australia. The work includes:

- modernisation of enterprise awards—applications to be lodged by 31 December 2013; and
- termination of instruments—award-based transitional instruments and pay scales are to be terminated as soon as practicable after they have been completely replaced by a modern award.

Fair Work Australia is currently dealing with applications for the modernisation of pre-reform awards and notional agreements preserving State awards (NAPSAs) applying to a single enterprise where the employer is a constitutional corporation.

In addition there are enterprise agreements which continue in force until they expire. Future agreements will need to comply with the requirements in place when they are negotiated.

The modernised awards generally contain superannuation clauses which are drafted in near identical terms. However, there are differences between awards in the superannuation funds that are named as default funds, that is, funds that an employer can nominate as a default fund if the employee does not exercise choice of fund.

The funds nominated generally are drawn from funds that were default funds in Commonwealth and State awards that were superseded by each modernised award. However, not all funds that were previously listed in superseded awards are included in the relevant modernised awards. The number of nominated default funds also varies between modernised awards. The modernised awards were considered in five successive tranches with the later tranches tending to nominate more funds as default funds than earlier tranches.

In the period since modernised awards were first determined by Fair Work Australia there have been a number of applications to include additional funds in specific awards as default funds. Where the respondents to the award (employer organisations and unions) agree these applications appear to have a high chance of success.

The “grandfathering” of past arrangements

Basically an employer in existence as at 12 September 2008 is permitted to use its existing default arrangements for both existing and new employees. The primary effect of this provision is to allow employers to continue to use as default funds those superannuation funds which were included in the awards that were replaced by the modernised awards.

The insertion of a “grandfathering” clause was strongly supported by a number of parties, including ASFA, in the hearings on the draft first tranche awards. In the absence of such a provision many employers would have been required to use a different fund as a default for contributions made from January 2010 onwards. This would have had significant implications for both employers and for funds previously named in awards as a default fund but not specifically named in the equivalent modernised award.

It also was relatively common for awards which were in place at 12 September 2008 to make provision for employers to continue to make use of funds, including corporate funds, to which contributions were made prior to the introduction of award superannuation. These existing “grandfathered” provisions are in effect “great-grandfathered” in the modernised awards.

The “grandfathering” provision is drafted in broad terms. A literal reading of the provision indicates that an employer could use the grandfathering clause to support selecting as a new default fund one which one or more of its employees had selected as a chosen fund (under the choice of fund legislative arrangements rather than any award provision) prior to September 2008. There is nothing in any of the Fair Work Australia decisions or documents that indicates that this wide interpretation does not apply.

There are some legal uncertainties relating to how the grandfathering provisions would work in the case of a fund which was in existence at September 2008 but which later is subsumed by another fund as the result of a successor fund transfer.

On a literal reading of the provisions of the standard superannuation provisions in first tranche awards the successor fund

would not qualify as a default. As a result a number of modern awards settled in the later tranches made specific provision for successor funds to benefit from the grandfathering provision.

Even where there is not a specific successor fund provision the legal position is likely to be relatively straightforward in the case of a fund which continues to remain in existence as a legal entity even though a new trustee and administrative arrangements may have been put into effect. This might also include the case of a corporate fund which although closed in effect becomes a sub-plan in another fund.

The impact of default provisions in awards

Currently between 20 per cent and 30 per cent of employees are subject to award provisions relating to superannuation. (Around 20 per cent of employees receive no more than award wages but a higher percentage than that have at least some employment conditions governed by an award).

Around 45 per cent of employees have their employment conditions determined by collective or individual agreements which have validity under industrial relations legislation. These collective and individual agreements can be structured independently of the award provided certain minimum employment standards are met or rely on the award for certain conditions. Award modernisation does not change default provisions in industrial agreements that are independent of the award.

Employees on wages or salary greater than \$100,000 a year are not subject to the modernised awards.

The 10 National Employment Standards apply to all employees—whether they are covered by an award or not. However, these Standards do not include any reference to superannuation.

Becoming a fund named under a modernised award

It is open to any superannuation fund that considers it has been inappropriately excluded from the process to approach the industrial parties (trade unions and employer associations) involved in specific awards to consider including them in the award as one of the defaults.

If a fund has attractions for employers and employees its merits can be put forward to the relevant employer organisations and unions involved in the negotiations on specific awards. Support by employer organisations and unions is important in the process for determining default funds specified in the modernised awards. In a number of cases awards have been altered to include additional funds.

The review of modernised awards

Fair Work Australia is to review modern awards every four years to maintain a relevant and fair minimum safety net and to make sure it continues to meet the needs of the community.

The first regular review will take place in 2014, four years after modern awards commenced on 1 January 2010. Fair Work Australia may vary, make or revoke modern awards during this process. Each award must be reviewed (Section 156).

An additional review of modern awards will take place in 2012, two years after modern awards commence. This review will examine whether modern awards:

- achieve the modern awards objective, and
- are operating effectively, without anomalies or technical problems arising from the award modernisation process.

The Government response to the Cooper Report

A number of the Cooper Report recommendations addressed issues relating to default funds, both in regard to industrial relations arrangements and more generally in regard to the treatment of default funds in the Superannuation Guarantee legislation.

In Recommendation 1.2 the Cooper Report recommended that the SG Act should be amended so only a MySuper product is eligible to be a 'default' fund nominated by an employer.

ASFA understands that the essence of the MySuper concept is that it is an offering. On this basis it will be able to be a fund with no investment choice, a product or an investment option within a fund.

The Government in its response indicated that MySuper products will replace existing default funds after an appropriate transitional period and that the Government will consult with relevant stakeholders on the transitional period and other transitional issues. The Superannuation Guarantee arrangements apply to all employees, including those covered by enterprise agreements, the few remaining awards outside of the modernised award system, and also those not covered by awards.

As a result, the changes to default arrangements for employers after MySuper products are introduced will apply both in modernised awards and to default arrangements in the choice of fund legislation more generally.

That said, there are some specific recommendations that relate to default funds in modernised awards. In response to the Cooper recommendations (1.3 and 1.4), the Government has indicated that it will request Fair Work Australia to review the default superannuation funds named in modern awards so that only those funds offering a MySuper product continue to be included in modern awards as default funds following consultation with relevant stakeholders on the appropriate transitional period.

The Government also indicated that it will ask the Productivity Commission to design a process, by 1 July 2013, for the selection and ongoing assessment of superannuation funds that are nominated as default funds in modern awards and enterprise agreements.

Another Cooper recommendation (1.5) was that any fund that is a 'successor fund' (as defined in the SIS Act) to a fund currently nominated as a default fund under an award should, where the successor fund is a MySuper product, be accepted automatically as a default fund under the award, so that there is no impediment to consolidation for those funds that wish to do so. The Government in its response indicated that this recommendation will be considered by Fair Work Australia's reviews of current modern awards.

Implications of the Government response

ASFA supports fair and open competition and transparency in the setting of default fund arrangements.

At this stage it is difficult to precisely assess what might be the implications of the Government's response in regard to Cooper recommendations relating to default funds in awards and in enterprise agreements. The impact will be conditional on:

- the Productivity Commission designing a process for the selection and ongoing assessment of default funds in both modern awards and enterprise agreements. There may be different considerations which apply between the two types of arrangements.
- Fair Work Australia adopting the proposed process.
- The parties to enterprise agreements agreeing to, or being required to use, the process designed by the Productivity Commission.

However, it seems likely that at some point after 2014 default funds offered by employers to employees generally will be those that offer a MySuper product. For those employers who are bound by an award or enterprise agreement the intent of the Government's response is that the MySuper product used as a default must meet additional criteria (yet to be determined) in regard to selection and ongoing assessment. It is envisaged that one (or more) MySuper products can be offered as the default fund in an award or enterprise agreement. However, not all MySuper products will necessarily qualify. The Productivity Commission and Fair Work Australia processes are envisaged as providing objective criteria for the selection of particular MySuper product or products in specific awards or enterprise agreements.

Employers who are not bound by an award or enterprise agreement will generally be able to choose a default MySuper product from the range of such products available to them given that no specific selection process for such employers is proposed.

Issues that will need to be resolved

Similar to when the choice of fund legislation was introduced, the implementation of the Government's response will require decisions on matters such as:

- Whether existing employees (including those who have already personally exercised choice) as well as new employees will be subject to MySuper default arrangements.
- The treatment of current defined benefit fund members (employers should not be required to offer a new default fund to employees who may have reached maximum benefits in a defined benefit fund).
- The treatment of employers who are bound by legislative arrangements regarding the superannuation fund they must use or by the residual industrial relations arrangements applying in some States.
- How compliance with the new arrangements by parties to an enterprise agreement will be demonstrated.