

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

13 November 2012

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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.

General comments on the selection of default funds for inclusion in awards

While the Explanatory Memorandum provides a detailed explanation of each Clause in the Bill, it may be of assistance to the Committee to be provided with the following brief description of the overall process as proposed in the Bill:

1. For a fund to be eligible to be nominated in any award (or enterprise agreement) it has to have a MySuper product to receive employer default contributions. Only generic MySuper products (rather than those customised for a specific employer) are proposed in the Bill to be eligible for nomination to be included in an award.

2. The proposed new Expert Panel (chaired by the President of the FWC or an appointed Deputy President or Member of the Fair Work Commission and including experts from finance, investment or superannuation fields) then reviews applications by funds in order to put together a Default Superannuation List of eligible funds. This is the stage when funds need to make their submissions and address the additional criteria over and above being MySuper that are set out in the Bill. Being included on this list is necessary but not sufficient to be listed in an Award.

3. The Fair Work Commission (FWC) then has to review every Award and list at least two and normally no more than ten funds per Award that can be used as a default fund by an employer covered by the award. Employers, unions, and employees can make submissions at this stage but funds do not have standing as the Bill is drafted. A fund has to be listed in the list put together by the Expert Panel to be considered. A fund can be included in many or all funds, or none. It all depends on the decision of the FWC after submissions by the industrial parties. However, the fund would only do participate in the assessment process once – when the application to the expert panel is made.

ASFA considers 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.

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

- ability of the provider to meet a net investment performance benchmark which amongst other things should make 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.

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.

ASFA notes that choice of superannuation fund is allowed 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.

These general principles set the framework for the comments that follow.

Specific comments on the provisions in Schedule 1 of the Bill

Clause 156C(4)(b): Any fee payable in respect of an application to be listed as a default fund should be limited to a reasonable amount. The application fee should not be set at a level which discourages applications, particularly given that the provisions in the Bill would not provide successful applicants under this clause with a right to be listed, only a right to be considered by the Full Bench in later proceedings.

Clause 156F – First Stage Criteria

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.

It should be up to each fund to describe the specific KPIs that it will be using and the specific performance outcomes that are being sought. Differences in fund design, fees and member characteristics may mean that there are consequent differences in applicable KPIs for the fund. The importance is having KPIs against which a fund can be assessed.

Each MySuper nominated default fund could then be assessed against these KPIs every four years when default funds are reviewed. If the MySuper product is not substantially meeting the KPIs then it should be removed from the list of default funds in the award.

Clause 156G

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

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.