

Committee Secretary
Senate Education, Employment and Workplace Relations Committees
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

13 November 2012

Subject: Fair Work Amendment Bill 2012

Dear Sir/Madam

Thank you for inviting Mercer to comment on this Bill. Our comments and major concerns relate to the proposed amendments to the Fair Work Act 2009 to give effect to the Government's response to the Productivity Commission's Report into Default Superannuation Funds in Modern Awards.

Executive Summary

The Productivity Commission conducted a thorough and detailed examination of the issue of default funds in Modern Awards. Its report included a well considered and comprehensive set of recommendations and conclusions aimed at increasing competition while providing protection for members and minimising potential adverse implications to employers, employees and superannuation funds.

While the Bill implements a number of the Productivity Commission's recommendations, its failure to implement other key recommendations will, if the Bill is passed, result in:

- considerable disruption to many employers due to the need to change the default superannuation fund used for their employees – even where the existing default fund may be more suitable for their employees than the new fund which will need to be chosen
- considerable disruption and additional superannuation fees for many members of superannuation funds due to the creation of a new superannuation account in another fund in addition to their existing superannuation account
- considerable disruption for superannuation funds and additional cost for their members, particularly those unable to obtain listing (or lose listing) in Modern Awards.

In addition, the Bill will result in further complexity and inefficiencies for those employers operating under multiple Modern Awards with the potential they will have to select different default funds for

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different groups of employees whereas this can generally be avoided under the current grandfathering arrangements.

Although the Bill provides greater ability for funds to apply for listing in Modern Awards, many superannuation arrangements will either be ineligible for listing or will face significant barriers to become listed. This is despite the fact such facilities may offer better outcomes for members than those offered by some or all of the listed funds.

Our concerns particularly relate to:

- stand alone corporate funds (such funds are generally restricted to employees and former employees of the sponsoring employer and hence are specifically excluded from being listed in a Modern Award by virtue of being an employer-specific product which is not offered by a public offer fund)
- tailored MySuper products (the Bill also specifically excludes these from being listed)
- generic MySuper products which offer reduced administration fees to large employer groups (it appears such reduced fees cannot be taken into account when the Expert Panel determines the funds eligible for inclusion in Modern Awards).

In many case the types of funds listed above offer terms and conditions which are substantially more favourable for members than some or all of the funds typically listed in Modern Awards. The proposed legislative changes will mean members of many of these funds are likely to be significantly disadvantaged, for example through higher fees and/or inferior insurance arrangements.

We are also concerned with:

- the adverse implications for those funds (and their members) which lose their status of being listed in a Modern Award, not because the fund has performed poorly or is too expensive but because it does not fit into a list of limited size
- significant transitional issues resulting from the removal of the current grandfathering provisions for funds being used by an employer before 8 September 2008.

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Recommendations

The Bill should be amended to:

1. ***Allow certain corporate superannuation arrangements to be used as a default fund by a specific employer even though not listed in a relevant award. Such funds should include stand alone corporate funds offering a MySuper, Tailored MySuper arrangements and other funds offering a MySuper facility particularly those where an administration fee discount is in place for employees of the employer.*** It is worth noting that each of these funds would have been approved by APRA under the MySuper requirements. In addition, such funds would need to be ratified by the Expert Panel in respect of the particular employer group after the Panel is satisfied the arrangements, taking into account any relevant fee discounts, meet the criteria used by the Panel for determining whether a fund should be included on the list of funds eligible for inclusion in Modern Awards (i.e. the criteria used in Stage 1 of the selection process). This will minimise the disruption and cost to employers and members of such arrangements which are unlikely or unable to be listed while providing comfort the arrangement is still in the best interests of the affected members.
2. ***Remove the proposed limit of 10 funds to be listed in each Modern Award.*** This would avoid potential adverse impacts on members of funds who no longer fit into the limited list but are still well performing funds and provide greater competition. It would also minimise the risk employers will need to have different default funds for different groups of employees. The Productivity Commission's suggestion to also include a smaller "preferred list" of approved funds in each Modern Award could also be adopted to assist employers who are unwilling or unable to perform a detailed analysis of the appropriateness of each listed fund.
3. ***Employers should be given the ability to choose one default fund for all employees.*** For example, it should be able to satisfy the Modern Award superannuation requirements by adopting a default fund acceptable under any Modern Award which applies to employees covered by the group. This is particularly important if our first two recommendations are not adopted.

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4. ***Ensure employers can continue to use funds currently allowed under the grandfathering provisions for at least a transitional period after Modern Awards are modified.*** This would provide employers time to choose new default arrangements and provide the required notifications to employees where necessary. While the Bill appears to provide the Fair Work Commission with the power to provide such transitional arrangements, the Bill needs to provide greater certainty for employers.

Mercer's recommendations above are consistent with those made by the Productivity Commission.

We have set out more detail on these issues in Appendix 1 to this letter. Appendix 2 provides some background on Mercer.

Yours sincerely,

David Anderson
Managing Director & Market Leader,
Australia/New Zealand

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APPENDIX 1: Further detail on concerns

A. Corporate arrangements

Some large employers utilise a corporate superannuation fund as their default fund. This may either be:

- a stand-alone fund only available to the organisation's employees; or
- a plan in a corporate master trust which provides discounted fees based on the efficiencies of scale resulting from dealing with the large employer for a large number of employee members.

In many cases these default funds are not currently listed in a Modern Award. However they can be used under the grandfathering provisions included in Modern Awards which allow employers to use a fund which was being used prior to 12 September 2008 as a default fund. We note a significant majority of employers advised by Mercer who use a master trust as their default fund are currently only able to do this because of the grandfathering provisions in Modern Awards. These employers have gone through a rigorous market review and selection process before selecting the master trust.

The Bill proposes to remove these grandfathering provisions.

Under the provisions of the Bill, a stand-alone corporate fund which is not a public offer fund cannot be listed in a Modern Award even if it satisfies the criteria determined by the Expert Panel. Further the Bill does not allow Tailored MySuper products to be listed and does not appear to allow the Expert Panel to take fee discounts into account in relation to other MySuper arrangements for employer groups.

Therefore, it is likely that all employers currently utilising such arrangements will no longer be able to maintain their existing arrangements. This will cause major disruption for these employers, their employees and the funds involved. It may also have implications for the ongoing viability of these funds and hence the provision of superannuation benefits to the fund's other members.

In order to remain compliant with the Award, they will need to:

- select a new default fund
- issue a new Choice of Fund form to each employee in the current default fund
- ensure they appropriately implement the individual choices of their employees

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- consider whether a bulk successor fund transfer is appropriate (or possible) noting that this can take a considerable period of time to implement (a successor fund transfer may result in a higher consolidation of account balances and less likelihood of significant adverse changes to insurance cover and multiple insurance premiums as a result of the change in default fund. However, it is a process which is only likely to be attempted by large employers and, in any case, may be impossible under the current provisions of the Superannuation Legislation Amendment (MySuper Core Provisions) Bill).

Each employee in the current default funds will need to:

- consider whether they wish to remain in the current fund (and complete the Choice of Fund form appropriately)
- consider whether the insurance levels in their new fund will be adequate (and how they compare with their existing cover)
- ascertain whether they may be unable to obtain insurance cover in the new default fund (perhaps due to a recently acquired pre-existing condition)
- consider whether they want to consolidate their existing account balance by rolling over to the new default fund and incur the relevant withdrawal fee.

All of the above will be necessary even though the existing default fund may provide better performance, cheaper fees and better services than any new default fund chosen. This will be the case for a large proportion of the affected members, particularly after the introduction of MySuper.

This is neither in the interests of employers or employees.

Further, as different Modern Awards will specify different funds, it may not be possible for an employer to select a default fund which satisfies each Modern Award which the employer operates under. Even if it can choose a fund which is listed in all relevant Modern Awards, this fund may not be the most suitable for all employees.

Where multiple default funds are chosen, the employer will face further difficulties as employees change roles and potentially move from one Modern Award to another which requires a different default fund to be chosen.

This will not only create greater inefficiencies for employers but will potentially result in additional costs in members changing default funds. Currently these problems are avoided because of the

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current grandfathering provisions which allow employers to use any fund they were using before 12 September 2008.

We are aware of one corporate superannuation fund for employees of a major international employer which, in association with the employer, is so concerned about this Bill it is now seriously considering whether it is more appropriate for the fund to not establish a MySuper offering and save considerable cost. Employees would be able to choose to join or remain in the corporate fund – otherwise they would default into a default fund from the various Modern Award lists. We note the corporate fund is likely to provide better conditions than any default fund chosen.

The Bill needs to be amended to address these issues, with one way of achieving this is to retain the grandfathering provisions in Modern Awards. Whilst this was not supported by the Productivity Commission, the Commission's recommendations included other aspects (not picked up by the Bill) which would avoid these problems. These included:

- No limit on the number of funds listed in a Modern award
- A mechanism enabling employers to choose a default fund which, although not listed in a Modern Award, has been ratified by the Expert Panel.

If the grandfathering provisions are not retained, we strongly recommend the adoption of these other Productivity Commission recommendations.

The ratification process would need to be relatively straightforward – for example, the fund could apply to the Expert Panel for ratification in a similar manner to applying for inclusion on the Stage 1 list. We note this recommended approach also adds protection for members by ensuring the MySuper used is appropriate for the relevant employees.

The Bill would also be improved by allowing an employer to choose a single default fund for all of its employees – for example it should be able to satisfy Modern Award requirements by contributing to a fund listed in any Modern Award.

We acknowledge employers in this position can establish an enterprise agreement which nominates a non-listed default fund. However small and medium employers may not be prepared to take this path due to the costs involved. Negotiating an agreement may also be inappropriate for large employers e.g. those who employ staff under individual contracts or where staff are

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employed in diverse sectors. In other words, the Bill needs to provide a solution which does not rely on enterprise agreements.

B. Major disruptions if a fund is removed from Modern Award list

Where only a small number of funds (up to ten) are listed in a Modern Award, it is likely that many thousands of employers could be contributing to a fund which, at some stage may be removed from a list.

Each one of those employers will face considerable disruption if a fund is removed. In order to remain compliant with the Award, they will need to:

- be informed in some manner that a new default fund will need to be chosen. We note it is not clear how employers will be advised of such changes in the list and who will provide such advice
- undertake the various tasks outlined in the preceding section.

Each employee of those thousands of employers in the current default fund will need to go through the process outlined in the previous section.

At the same time, the current default fund is likely to be put under considerable strain and potentially could run into liquidity problems. This may result in an application to APRA to defer any requested transfers to a new default fund. This will also lead to members having multiple accounts and paying multiple fees for a period.

Transferring members may also be adversely impacted as it may not be feasible for their transfer value to include full allowance for any deferred tax credits (if full allowance was given, remaining members would be placed at greater risk as, with a reduced membership, the fund may not be able to obtain full value for such credits).

Remaining members of the fund may also be adversely impacted, particularly if the loss of membership is such that the ongoing viability or scale of the fund is threatened. These remaining members could include former employees, retirees receiving pensions and other non-employees.

Removal from a list is potentially a very serious matter and we believe the Government has not taken sufficient account of these problems. We would be very concerned if a fund was removed

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from a list in a Modern Award if it was now considered to be the “eleventh best” fund (out of hundreds of funds which could have been chosen) based on the views of the Full Bench. Removal from a list should therefore only be considered in extreme circumstances e.g. where the fund no longer satisfies the criteria determined by the Expert Panel, no longer exists or no longer offers a MySuper.

However such an approach creates a further problem if there is a strict limit on the number of funds on the list – the most appropriate funds may continue to be excluded from the list in the award – even though their adoption may be in the best interests of employees. Existing default funds will therefore become entrenched and competition and contestability diminished.

The Productivity Commission recognised these problems and recommended there be no limit on the number of funds listed in a Modern Award. This was an appropriate recommendation and should be incorporated in the Bill.

C. Transitional issues

The Bill provides scope for the Full Bench to allow transitional provisions. We understand these are designed to cater for situations under which a fund can no longer be used as a default fund because it has been removed from a Modern award list or due to the removal of the grandfathering provisions. However it is very unclear how these provisions will be applied and whether individual employers will need to apply to the Full Bench to initiate such provisions. The Bill needs to provide greater certainty for employers.

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APPENDIX 2: WHO IS MERCER?

Mercer is a leading global consulting leader in talent, health, retirement and investments. Mercer helps clients around the world advance the health, wealth and performance of their most vital asset – their people.

Mercer also provides customised administration, technology and total benefits outsourcing solutions to a large number of employer clients and superannuation funds (including industry funds, master trusts and employer sponsored superannuation funds). In Australia we have \$55 billion in funds under administration locally and provide services to over 1.3 million super members and 15,000 private clients. Our own master trust, the Mercer Super Trust, has approximately 260 participating employers, 240,000 members and more than \$15 billion in assets under management.