



SENATE ESTIMATES COMMITTEE - 2 June 2014

2014 REVIEW OF DEFAULT FUND TERMS - POTENTIAL CONFLICT ISSUES

DOCUMENT	DATE (2014)
1. Transcript of proceedings	13 February
2. FSC correspondence to the President	19 February
3. President's reply to FSC correspondence	21 February
4. FSC correspondence to the President	21 February
5. FSC correspondence to the President	21 February
6. Statement re: potential conflicts	7 March
7. FSC correspondence to the President	10 March
8. President's reply to FSC correspondence	11 March
9. FSC correspondence to the President	24 March
10. President's reply to FSC correspondence	27 March
11. Correspondence from ASFA	16 April
12. Statements by the President	17 and 22 April
13. Correspondence from FSC	23 April
14. Decision [2014] FWCFB 2728	28 April
15. Letter from Minister Abetz	7 May
16. President's reply	9 and 28 May



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TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

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SENIOR DEPUTY PRESIDENT ACTON
MS ALLEN
MR APTED
MR GIBBS

AM2014/6

s.156A - 4 yearly review of default fund terms

Four yearly review of default fund terms
(AM2014/6)

Melbourne

10.16AM, THURSDAY, 13 FEBRUARY 2014

PN1

THE SENIOR DEPUTY PRESIDENT: Good morning. Can we have the appearances, please? Perhaps we'll start in Melbourne?

PN2

MR WATTS: If the commission pleases, Watts, R, on behalf of Industry Super Australia and the funds listed in our application.

PN3

THE SENIOR DEPUTY PRESIDENT: Thank you, Mr Watts.

PN4

MR B. BRIGGS: If the commission pleases, Blake Briggs of Financial Services Council.

PN5

MR R. WEBB: If the commission pleases, your Honour, Richard Webb on behalf of the Australian Institute of Superannuation Trustees on behalf of our member funds.

PN6

THE SENIOR DEPUTY PRESIDENT: Thank you, Mr Webb.

PN7

MS J. DOLEN: If the commission pleases, Ms Dolen, initial J, for the ACTU.

PN8

THE SENIOR DEPUTY PRESIDENT: Thank you. Anybody else in Melbourne want to enter an appearance? No. Right, Sydney. Can we have the appearances in Sydney, please?

PN9

MR S. MAXWELL: If the commission pleases, my name is Maxwell, initial S. I appear on behalf of the Construction, Forestry, Mining and Energy Union. I apologise, your Honour, I think I came in after your associate had taken the names of those appearing in Sydney.

PN10

THE SENIOR DEPUTY PRESIDENT: Yes, you did. Thank you.

PN11

MR T. NEMEC: If the commission pleases, Tony Nemeč of Mercer Legal Consulting appearing for Mercer Australia.

PN12

THE SENIOR DEPUTY PRESIDENT: Thank you, Mr Nemeč. Anybody else?

PN13

MR E. SABBAAH: If the commission pleases, Elliott Sabbah appearing for REST Industry Super.

PN14

THE SENIOR DEPUTY PRESIDENT: Thank you, Mr Sabbah. Anybody else in Sydney?

PN15

MS B. MILLS: If the commission pleases, Brenda Mills from REST Industry Super.

PN16

THE SENIOR DEPUTY PRESIDENT: Thank you, Ms Mills.

PN17

MR D. HOULIHAN: Houlihan, initial D, for Legal Employees Super Fund and the Transport Industry Super Fund, your Honour.

PN18

THE SENIOR DEPUTY PRESIDENT: Thank you, Mr Houlihan.

PN19

MS J. LIGHT: If the commission pleases, Light, initial J, for the Australian Federation of Employers and Industries.

PN20

THE SENIOR DEPUTY PRESIDENT: Thank you, Ms Light.

PN21

MR S. SMITH: If the commission pleases, Smith, initial S, of the Australian Industry Group.

PN22

THE SENIOR DEPUTY PRESIDENT: Thank you, Mr Smith. Anybody else in Sydney?

PN23

MR SMITH: No.

PN24

MS LIGHT: No, your Honour.

PN25

THE SENIOR DEPUTY PRESIDENT: Thank you. Adelaide. Anybody in Adelaide?

PN26

No appearances in Adelaide, your Honour.

PN27

THE SENIOR DEPUTY PRESIDENT: Thank you. Brisbane. Anybody in Brisbane?

PN28

No appearances in Brisbane, your Honour.

PN29

THE SENIOR DEPUTY PRESIDENT: Thank you. Canberra. Any appearances in Canberra?

PN30

No appearances in Canberra, your Honour.

PN31

THE SENIOR DEPUTY PRESIDENT: Perth. Any appearances in Perth - and

my apologies for the earliness of the day in Perth.

PN32

MR P. DAVIES: Thank you, Senior Deputy President. Davies, initial P, for Rio Tinto Ltd and the Rio Tinto Staff Superannuation Fund.

PN33

THE SENIOR DEPUTY PRESIDENT: Thank you, Mr Davies. Is that it for Perth? Thank you. Are there any other appearances that I've missed? No, okay. You will have observed from the statement that there are three other members of the bench who are dual Fair Work Commission appointees - well, appointees in the sense of being full-time members of the Fair Work Commission, being Senior Deputy President Drake, Commissioner Bull and Commissioner Johns. Those members are unavailable for this morning's proceedings, however this matter is being transcribed and they will follow the proceedings on the transcript.

PN34

I can indicate to those here today that we have read all the submissions that have been filed so there is no need today for a repetition of your submissions. What the main purpose of today is is to give parties the opportunity to comment on the submissions of others if they wish to do so and for us to ask any questions we might have of those who are here today. Who would like to go first? Mr Watts?

PN35

MR WATTS: It looks like I'm being volunteered, your Honour.

PN36

THE SENIOR DEPUTY PRESIDENT: Excellent.

PN37

MR WATTS: Everyone else took a step backwards. Your Honour, I won't recount our submissions other than to very quickly say that we concur with some of those submissions that you've received in regard to the desirability of funds who are applicants to indicate which award or awards or demographic or particular class of employees to which their applications would be best suited. However, we note that there's no requirement to do so, and that would be in the - we just believe the applicants would be well advised to do so and that the commission would take into consideration in its determination matters that they may wish to raise in that context.

PN38

We believe the commission would be best served if that sort of detail was provided, in particular given its obligation to consider the best interests of employees covered by awards, a particular award, we would suggest, and that is a particular class of employees covered by the relevant award. We suggest that there needs to be no more, and there can be no more, in the circumstances, than guidance, and we believe that guidance would be appropriate in that circumstance.

PN39

In regards to forms, we've made certain comments in relation to the forms. In particular we have made comments in relation to form FC. We believe the commission would be best served and could only appropriately make its determinations in relation to a particular class of employee where further information is to be provided in relation to the schedule of improved employer

MySuper products. Where information is provided in relation to those if they are to apply to a particular class of employee, including employees that might be of associated entities, that that sort of information should be provided, we suggest that the form could be altered to allow applicants to provide additional information regards their tailored MySuper product or specific corporate MySuper product that might apply to a particular class of employees and that the determination can only properly be made if the information regarding that particular class of employees is provided to the expert panel.

PN40

In relation to timing, we've suggested that four plus four weeks would be appropriate; that is, four weeks from the time that the applications are called for and then submissions in response a further four weeks later. We note that there are varying timetables suggested in relation to that process ranging from our four weeks to probably never. We would suggest that four weeks would be appropriate, however we have no strong objection to the six weeks plus six weeks that was put forward by ACCI, as an example. We think that something of that order would be appropriate. Anything longer than that is obviously going to delay the process, cause undue pressure on both the commission, applicants and the entire award modernisation process, in particular the stage 2 process.

PN41

In relation to those applicants that have asked for additional time to prepare their submissions, in particular the information that's relevant to section 156F, the criteria that must be addressed in making an application, we'd suggest that that information, or the need to supply that information, has been known for well over a year by applicants. Many of the applicants that are seeking delays in this process have been well and truly aware of the need to address that particular information and one would suggest that that information is readily available to them in any event. If it's not readily available to them that says something about the state of their affairs.

PN42

There has been a number of calls for these proceedings to be held over until such time as the government comes to a policy position in relation to these matters. It is a matter of consideration as part of a government - there's been a government discussion paper and consideration is obviously going to take place from the government in relation to the future processes for the determination of the naming of default funds within modern awards. We say to that that the current legislation is the current legislation. The government coming to a different view is certainly a very different proposition to the government - or to the parliament changing its legislation, the appropriate legislation.

PN43

The government has indicated that it's looking at change. There's no guarantee by any means that there's going to be any legislative change whatsoever. We think that if and when legislation is changed, that's a matter that needs to be addressed then. At this current point in time we'd say there's an obligation on the commission to operate under the existing legislation. That general comment I think flows through to a number of points that have been made in various submissions in relation to what criteria should be addressed, what matters the expert panel should consider at stage 1. The matters that should be considered are

spelt out quite clearly in the legislation, section 156F.

PN44

Those comments also apply to the numerous calls, and not unexpected calls, for grandfathering arrangements to be extended either indefinitely or for a set period of time. The legislative regime is one where grandfathering ceases. It is an intentional decision following the Productivity Commission's decision that grandfathering should cease and it was enacted by legislation. The process is such that there has, however, been a process where applicants can seek relief through section 156K, the transitional arrangements. That is done by application on a case by case basis rather than an across the board process. It suggests that it's not open - it's not a matter for these proceedings, we suggest, in the first instance, but it's also not open to the commission to change the legislative regime in relation to those transitional arrangements. They're there, they're in place and they're quite clear.

PN45

There will be and has been both from the Financial Services Council claims of bias and that there are material conflicts of interest amongst the panel members that are here today. All we'd suggest in relation to that is that if the FSC or others have claims in relation to that, that they pursue those claims and they pursue them quickly so as to not delay these or subsequent proceedings. If in fact there are claims made of bias and the commission considers that they are relevant, there are processes within the commission to deal with that. If the FSC wishes to pursue those matters any further, then they have options open to them. We suggest they take those options and take them quickly.

PN46

We're happy to help the FSC and other parties, and I'm sure that there are a number of other parties who would assist the FSC, when they've indicated that the demographic of modern awards is not known. We'd suggest the demographics of modern awards is indeed known. The FSC suggested the commission delay these proceedings so that it better understands the demographics of the modern awards that it has coverage over. We'd suggest that demographics of modern awards and for the numbers and types of employees that are covered by - employees and employers that are covered by modern awards, is well known to the commission and others. We're happy to assist the FSC and provide information if they believe that that information is lacking.

PN47

Mercer, their applications have made a surprising statement that the APRA authorisation process for modern awards is more rigorous than the processes that will be adopted through the first stage criteria. Further, they go on to say that as a result the commission should take the position that any applicant that has MySuper authorisation from APRA should be automatically recognised and placed on the default fund list. That's not the intention of the legislation. The intention of the legislation was to instil a quality filter on MySuper products above and beyond the APRA authorisation process, that quality filter term coined by the Productivity Commission in its final report. That quality filter is the section 156F criteria, which is above and beyond the criteria which is in the APRA authorisation process. We suggest that that's why we're here today, to ensure that only high quality MySuper products are applied to those employees

who are subject to the terms of modern awards.

PN48

There are a couple of other minor issues. One is that we make as a general observation - we see no reason why applicants can't include in their submissions any material they believe to be relevant. A number of the submissions fast-forward changes to the forms or processes to allow certain information to be provided. We believe there's nothing to stop them putting that type of information in their particular applications. They go to things like return history and how you compare a new product with how you deal with questions as they apply to return histories for products that do not have a return history. There's been a number of suggestions that comparable data, data that relates to products that have been provided by the RSE licensee, for instance, that have a similar investment profile, that they be used, et cetera. All those things are a matter for the applicants to put in their relevant applications as they see it. The processes will differ in relation to that. Some applicants will put forward material, others will not, in relation to return history. That's a matter for the applicants, we'd suggest.

PN49

In relation to the confidentiality claims, we have suggested that it's appropriate that the commission indicate or request that if there is a claim of confidentiality that the applicants be precise as to what they are claiming confidentiality over. That confidentiality is not automatic. It can be tested. It can be rejected. Claims of confidentiality can be rejected. There are important issues in relation to confidentiality. For instance, if a fund seeks to claim that its fee structure is confidential information one would think that it makes a nonsense of this entire process. So it is a matter where we believe that the onus should be on applicants, and whether it's in guidance or changes to the forms we're not particularly fussed, but we believe that it's probably appropriate that the commission indicate that if there are going to be claims of confidentiality, that the applicants indicate what specifically they're claiming confidentiality over rather than blanket confidentiality, and why they're claiming confidentiality, or else we could be going down through a process where there's blanket claims of confidentiality, and that could cause significant delay and confusion. If the commission pleases.

PN50

THE SENIOR DEPUTY PRESIDENT: Mr Watts, one of the submissions that you've made concerns form FA.

PN51

MR WATTS: Yes.

PN52

THE SENIOR DEPUTY PRESIDENT: There's this issue about information versus submissions and evidence. I got the impression from your submission that you're envisaging a process whereby applicants would provide information and then their submissions would form part of a separate submissions process along the same time as others were making submissions, whereas the form has been designed in a way that information and submissions and evidence on which an applicant intended to rely would be provided up front so that others would have the opportunity to make submissions on the basis of all the material on which an

applicant intended to rely. Are you able to expand upon that notion?

PN53

MR WATTS: Look, I think it's probably just the weight of the word evidence as opposed to information. We believe it would just simply be more appropriate. We don't disagree with the processes. We envisage processes as you describe it. We just believe that the evidence - it's not evidence, of course, which is subsequently sworn, or evidence which is tested in the normal course, so we suggest that in that - if the commission is more comfortable with the term "evidence" we have no fundamental difficulty with that. We believe, however, that many of the applicants will see the term "evidence" in a different light to "information". They understand that the information should be information which should be provided which cannot be misleading. It's provided under various legislative requirements that the information must be - or needs to be as accurate as possible and cannot be false. Whether that makes it evidence in a technical sense is a matter, I think, for some debate, but we're not fussed as to whether the term is - overly fussed. We believe that there might be some confusion if the term "evidence" is used, but we don't dwell on that particular part of our application.

PN54

THE SENIOR DEPUTY PRESIDENT: There might be room for debate further down the track, but I think the words were used to avoid a situation, for example, in respect of the net returns on contributions factor.

PN55

MR WATTS: Yes.

PN56

THE SENIOR DEPUTY PRESIDENT: Where there was an assertion about what the net returns had been, and that was subject to challenge later when it wouldn't have been the subject of challenge if evidence of the net returns in some form of documentation had been provided.

PN57

MR WATTS: Yes. I can understand the reasoning behind that and I think that the other option to the commission in relation to the forms is a reminder in terms of those who are filling out the forms, their obligations, their legal obligations, and the possible penalties of providing false information. That's another option. Whether evidence, the term "evidence" actually produces that result is a matter of the eye of the beholder, I guess. If it was up to us, we would prefer - it's only a preference - that there be a reminder of the legal obligations on the submitters of that information and the term "evidence" be deleted, but we are, as I said, not dwelling on the point.

PN58

THE SENIOR DEPUTY PRESIDENT: But in any instance your position is that the applicants would put up all their information - - -

PN59

MR WATTS: Absolutely.

PN60

THE SENIOR DEPUTY PRESIDENT: - - - in inverted commas, up front, so that others have the opportunity to make submissions on all the material on which

the applicant intends to rely.

PN61

MR WATTS: Absolutely.

PN62

THE SENIOR DEPUTY PRESIDENT: Thank you.

PN63

MR WATTS: If the commission pleases.

PN64

THE SENIOR DEPUTY PRESIDENT: Who's next? Does the ACTU want to go next?

PN65

MS DOLEN: Thank you, your Honour.

PN66

THE SENIOR DEPUTY PRESIDENT: Ms Dolen?

PN67

MS DOLEN: If the commission pleases, we propose to make a very brief submission today. This is just in relation to the timing of the filing of responses to applications to have a MySuper product included on the default list or the schedule of employer MySuper products. We respectfully ask that between six to eight weeks be permitted to respond to applications, and the reason for this is due to the large workload currently being undertaken by the ACTU and its affiliates. Much of this workload is outlined in Ross J's statement dated 6 February this year, if the commission pleases.

PN68

THE SENIOR DEPUTY PRESIDENT: Thank you, Ms Dolen. Who's next? Mr Webb?

PN69

MR WEBB: If the commission pleases. Your Honour, I'd just like to add only a very short clarifying statement with regards to our submission. We've got no comments to make with regards to any of the other submissions. It has come up that we may need to clarify our recommended expected due dates for the return of forms. In our submission we outlined that we would prefer the submissions to come back by say mid March and mid April in terms of stages 1 and 2. Obviously, of course, that's not going to be possible if the forms were only made available in their final format in mid March or mid April. So certainly we would obviously recommend that a reasonable amount of time for funds who are applying to join the process be given to complete those forms. However, I do want to further make the point that it is AIST's position that this particular process be wrapped up as soon as possible so that funds themselves and, more importantly, the employees who fall under awards, have some certainty about the default funds that are going to apply to them. Thank you.

PN70

THE SENIOR DEPUTY PRESIDENT: Thank you, Mr Webb. Mr Briggs?

PN71

MR BRIGGS: Thank you, Senior Deputy President. I appreciate that this is a fairly contested public policy space and so I'm mindful that in these proceedings. I also appreciate this is a new process for both the bench and participants in it, and on those grounds I ask the bench's indulgence for mistakes and as people feel their way through this process. I would also seek to caution the bench as to take a cautious approach itself as we try to unravel what is clearly a fairly complicated and at times vague process laid down in the legislation.

PN72

To start, and to put that into context, I would like to withdraw the submission the FSC made in relation to it not being clear who applies to the Fair Work Commission. I had simply overlooked section 23A(4) of the Fair Work Act which defines superannuation fund, which as I pointed out in the submission, is a defined term in the SIS Act, but there is a connecting definition separate from the definitions in the Act.

PN73

Secondly, and without seeking to repeat the FSC's submissions in too much detail, I'd like to make clear a recommendation to the Fair Work Commission which I would hope would be somewhat uncontentious. I would like to favour the commission early in these proceedings because I'm aware the Financial Services Council may not have the opportunity to appear again should proceedings from here only allow superannuation funds themselves to make applications and then for registered organisations to respond to those applications in the future, so I think it's important that this matter be raised at this stage.

PN74

The Fair Work Act requires that a determination changing default funds in the modern awards cannot have effect before 1 January 2015, however it doesn't stipulate an end date by which a determination must have effect. Considering the practical nature that this review by the bench is taking place concurrently with the government's review of the process, and the government is considering a range of options, including amending this process or abolishing it entirely, there would be the potential for severe dislocation for employees, employers and superannuation funds should determinations amending modern awards have effect from the 1 January 2015 deadline only for that process to be determined by parliament to be abolished or amended, making the process voluntary and the impact of it redundant.

PN75

The recommendation I would like to make for the consideration of the bench as well as the other parties here today is the consideration that any determination the bench makes to amend modern awards doesn't have effect until 1 July 2015. That doesn't necessarily have to disturb the timetables that are being considered today. Should the bench decide to proceed on whatever timetable it chooses, the date on which determinations have effect don't necessarily have to be served up. What this would allow is for the government and the parliament to consider policy positions and the resulting legislation and in due course make changes or not, without the risk of employers, employees and funds facing significant costs, disturbance and effectively bad public policy outcomes.

PN76

I will address a range of points raised by the other organisations so far. ISN has made submissions that the application forms should allow superannuation funds to specify which modern awards they will seek to be listed in, or they would like the bench to consider to be listed in. The FSC supports that submission. We think it would be entirely appropriate for superannuation funds to be able to specify which ones they believe they would be most suited towards. I would also note that some very large super funds are listed in a large number of awards currently, and what's more is that some very large super funds are listed in almost no awards currently and may seek to be listed in up to the maximum 122 modern awards.

PN77

It would be appropriate for the forms to be adapted to accommodate the circumstances of both individual funds that are fairly narrow in their coverage as well as superannuation funds that will seek to be listed in potentially every modern award. The context of this, which I feel is quite appropriate, is that some of the very large superannuation funds are public offer funds and have large numbers of members from every sector in the Australian economy. They may be able to derive benefits from either their scale or tailoring of insurance or fee arrangements from members which will allow them to sufficiently be included on the default superannuation list relative to their peers as well as potentially be considered on any number of awards within the system. So we would be mindful that the form needs to be adapted to accommodate those changes.

PN78

THE SENIOR DEPUTY PRESIDENT: I'm unclear about why you think us being informed at this stage about which modern awards they might be administering is relevant?

PN79

MR BRIGGS: Whilst it is - to the extent that ISN is seeking amendment to the forms to allow funds to specify which awards and to address why those superannuation funds are suitable to the classes of employees covered by those awards, where a superannuation fund is likely to apply in relation to a large number of awards, that the form be adapted to accommodate that vast (indistinct) function.

PN80

THE SENIOR DEPUTY PRESIDENT: I understand what you're seeking but I'm questioning why you think it's relevant to a listing for being included on the - - -

PN81

MR BRIGGS: I appreciate that this - - -

PN82

THE SENIOR DEPUTY PRESIDENT: Well, really - - -

PN83

MR BRIGGS: For the superannuation funds this forms the only opportunity to present information that is relevant to both the expert panel's consideration of whether or not they should make the list and the Full Bench's consideration of whether or not they should be listed in the individual modern award. So if information is to be provided in relation to the individual modern awards, this is

the only opportunity to do so.

PN84

THE SENIOR DEPUTY PRESIDENT: I see.

PN85

MR BRIGGS: I also note that ISN has sought to allow funds through the forms to provide information in relation to the demographic traits of the employees covered by a modern award in response to a point raised by the FSC. This does suppose that both the - this is an understanding that both the fund needs to provide information in relation to the class of employees to show how it would suit them and they would need to provide evidence or information about that class, but it also is contingent upon the expert panel and the Full Bench to be able to test the validity of that claim and not simply relying - particularly where a different - or by a different summary of what the characteristics of that class of employees are. They may be diametrically opposed or they may be consistent. We don't know at this stage.

PN86

It is important that as both the - it is important that both the expert panel and the Full Bench are properly equipped to make an assessment of whether or not the fund's application is correct or will actually serve the best interests of the employees to which the award applies. The FSC propose a solution to this, in that the Fair Work Commission can gather its own information about the class of employees. As Mr Watts suggested, the industry association for a particular subset of market could provide information, however it's difficult to see how that would be a particularly robust response to this situation. We think it would be important to have academically based, politically neutral information about the demographic characteristics against which the veracity of applications can be tested.

PN87

I'll turn to timetable briefly. There is some recognition here, it seems, that there is some variance in the timetable sought by different organisations. I think it's everywhere from four weeks for first-stage applications to three months. The FSC as a primary principle would suggest that the commission should err on the side of caution because of the complicated nature of these things that we're considering. I think there's also a degree of recognition now amongst the parties that there is a large amount of information that needs to be collected by superannuation funds to lodge these applications and then likely also from registered organisations to respond to the applications in both stages of the process.

PN88

It would be necessary - considering it's also necessary for the submission being made that it's necessary to amend their forms, the FSC would broadly support Mercer's submission in this regard, that three months be afforded to funds to gather the necessary information in relation to the first-stage applications. We feel that is an appropriate time-frame. That's including for those funds that seek to be listed in a very large number of modern awards, as is the case, I believe, across the industry.

PN89

The ISN also propose that this information - the criteria against which funds will be assessed has been public knowledge for a year, and that therefore funds should be in a position to lodge their applications. I would only go so far as to say that vague and unclear criteria are no less vague and unclear just because they're common knowledge. The FSC in its submissions has sought guidance from the Full Bench as to how, or the grounds on which it will interpret some of the provisions in the first-stage test, and that guidance is critical to funds being able to provide accurate and useful information to the expert panel as well as being able to simplify and make proceedings as efficient as possible.

PN90

THE SENIOR DEPUTY PRESIDENT: Mr Briggs, just in that regard, there have been some submissions, and to pick up from what you've said, that the tribunal should somehow interpret the criteria and tell people what information to provide. I'm not sure that that is open to us, or whether the tribunal is really required to operate on the basis of submissions that are put to it in respect of matters. If I might make an analogy with which I think you will be familiar, anyway, in termination of employment matters there's a range of criteria that the tribunal is required to consider in determining whether a termination is harsh, unjust or unreasonable, one of which is a valid reason. We don't tell parties what might constitute a valid reason. It's up to them to establish that what has happened is or is not a valid reason. So I just raise that to ask you whether you've got any more to say on that sort of concept.

PN91

MR BRIGGS: Yes, Senior Deputy President, I appreciate the point. I mean, the practical implications of the legislation as it is currently drafted is that because of the vagueness of the criteria superannuation funds will, for want of a better term, seek to cover the field in the information they've provided, and that as many of us are aware, the criteria being taken into account is very technical, specialised information, particularly in relation to calculating returns or insurance coverage, and that for the considerations that need to be made a significant amount of information will need to be provided. If it isn't clear which aspects of those criteria, or the grounds on which they will be tested - and it may be the case that the commission isn't in a position or could choose not to provide further advice on how it's interpreted, but funds would need to provide a significant volume of information to address those criteria and all that information is relevant and crucial to understanding complex technical issues such as ones in the material.

PN92

THE SENIOR DEPUTY PRESIDENT: But is it possible that one fund may argue that a certain return over a certain period is particularly relevant to their fund but another level of return over a different period might be more relevant to another fund because of the circumstances of who they seek to cover? Therefore, in those circumstances, what is the use of the tribunal saying you have to provide information on X return over a specific period? Wouldn't that curtail the ability of people to make submissions on why the information inevitably for - is most relevant in respect of the criteria the tribunal is required to consider?

PN93

MR BRIGGS: Yes, Commissioner, I - sorry, Senior Deputy President. I am

aware that the review only is in relation to which funds will be listing modern awards for a four-year period until the next review takes place, so the extent that funds are addressing returns within the particular period, I think that is why it would be largely consistent. However, I do acknowledge the commission's point in relation to it is contingent upon the funds to provide the information they think is relevant to the consideration and I propose to leave that there. Thank you.

PN94

THE SENIOR DEPUTY PRESIDENT: Yes, Mr Briggs.

PN95

MR BRIGGS: If I may turn to the confidentiality issues raised by ISN. Several submissions made the point that the Fair Work Commission should take a bias towards releasing information that may or may not be commercial in confidence. I would suggest that the commission should take a more conservative approach. What is commercially sensitive in a business context is sometimes difficult to discern and the implications of making that information public once it has been made - sorry, making it private again once it's been made public is - it can't be done, sorry, is what I'm trying to say.

PN96

In particular, I would recommend that the commission be careful to funds using this process as a means of extracting information in relation to their competitors, particularly in relation to the tailored MySuper product stream. That is a very competitive space within the industry that has regard to the movement of billions of dollars within the superannuation sector, and to the extent that information in that area is made public it could prejudice future tender arrangements for both employers, employees and funds and it may also allow funds to mimic or be - products that their competitors currently put out. So we suggest a cautious approach in that regard.

PN97

I would draw the commission's attention to other information collecting organisations like the ABS. That does not make public information relating to commercial arrangements as to specific companies full stop unless there is a very, very clear public policy reason to do so. It aggregates up that information at a sector or industry level, and we feel that an organisation such as ABS that has been doing that for a very long time would be an appropriate model for this commission to follow.

PN98

The final point I will make is that the FSC has raised concerns about conflicts of interest within the expert panel. I appreciate that the legislation has - the Fair Work Act has means for dealing with conflicts of interest where they arise, and that is in some regards at the discretion of the President, however we're seeking further advice from the commission as to whether or not conflicts of interest have been made public to the parties. I believe the legislation requires those Fair Work Commission members to disclose a conflict of interest to both parties involved in proceedings, as well as the President, and that the President can take action if they believe there is a material conflict of interest that interferes with the justice of proceedings. They are my submissions, Senior Deputy President.

PN99

THE SENIOR DEPUTY PRESIDENT: Thank you, Mr Briggs. That's Melbourne. Let's go to Sydney. Who would like to go first in Sydney?

PN100

MR MAXWELL: Your Honour, perhaps if I go first. Mr Maxwell from the CFMEU. Our submissions are very brief. Our main concern is in regard to the timetabling. Our concern was that some parties have suggested four weeks for the applications to be made and four weeks for responses. We believe that timetable is too short, particularly in regard to any response submissions. We would seek a timetable of approximately six to eight weeks for any submissions in response to any applications made. If the commission pleases.

PN101

THE SENIOR DEPUTY PRESIDENT: Thank you, Mr Maxwell. Who's next?

PN102

MR NEMEC: If the commission pleases, Tony Nemeč representing Mercer. Our appearance is really just to clarify any matters in our submission that would be helpful to the commission in terms of assisting it in its due process and considerations. Perhaps the one point I would make is that it would certainly assist the participants in the industry to have some clarity or certainty around their position to make submissions for the stage 2 process if they are approved on the default fund list. There seems to be a legislative mechanism for the commission to take submissions from basically a wider group than the specified parties who must be accorded a reasonable opportunity to submit in the stage 2 process, and through that I think it provides a mechanism for the Fair Work Commission to indicate that those funds to achieve the stage 1 listing would have the opportunity to submit on relevant awards.

PN103

The other aspect of clarification related to that is that it would assist if funds were given an indication that it is relevant for them to provide whatever information that would assist the commission in its stage 1 process regarding relevant awards for their fund. If the commission pleases.

PN104

THE SENIOR DEPUTY PRESIDENT: Mr Nemeč, just on the first point that you raised, am I to understand that you're saying that the Act requires the tribunal, the commission, to give the opportunity for submissions to certain persons and bodies but doesn't preclude the tribunal from taking submissions from others?

PN105

MR NEMEC: That's right. From our reading of the Act initially we thought it was the case that there would be no automatic standing for superannuation funds to apply in the second stage listing process. However, on a closer examination of section 156G(2) and (3), by implication section (3) which deals with declaration of conflicts of interest in terms of submissions expressly extends to those persons who are not given a reasonable opportunity - or require to be given a reasonable opportunity in both conditions to make submissions in relation to stage 2. So by implication that means other parties can make submissions in relation to the stage 2 process.

PN106

Why might that be the case? Looking back at the explanatory memorandum in relation to this legislation, it was commentary recognising that the commission of course still had its general powers whenever it conducts hearings under - I think it's section 590, to hear from anyone in relation to matters which it considers are relevant to its proceedings. I think in the context - looking at the context of all of these proceedings, it seems manifestly obvious that when the commission comes to actually determine which funds should be on which awards, that it has the opportunity to hear from funds directly in relation to matters that may be relevant to that consideration. Related to that is otherwise there's the sense that funds better make sure in their stage 1 process that they put all relevant matters in that part of the process if they will be excluded at the stage 2 point.

PN107

THE SENIOR DEPUTY PRESIDENT: So I assume then that you would be making that submission at the stage 2 point as to why we should accept submissions beyond those from prescribed persons.

PN108

MR NEMEC: Well, certainly in terms of any funds that we were to represent we would seek to do that, for sure. Otherwise there is, of course, a mechanism for those funds through relevant employer associations, employee associations, employers, to have submissions made, in effect, on their behalf as to what funds are relevant for what awards, but as I suggest, I think it might assist even at this point if the Fair Work Commission was to contemplate that that may occur. I think it would make the process a bit more straightforward and transparent for the parties involved when they're framing their stage 1 applications.

PN109

THE SENIOR DEPUTY PRESIDENT: Yes, thank you. Anything else you want to say, Mr Nemece?

PN110

MR NEMEC: No, Your Honour.

PN111

THE SENIOR DEPUTY PRESIDENT: Who is next in Sydney?

PN112

MS MILLS: Ms Mills, REST Industry Super, your Honour.

PN113

THE SENIOR DEPUTY PRESIDENT: Yes, Ms Mills?

PN114

MS MILLS: We just wanted to agree with the previous speaker in relation to the funds given the opportunity to identify the awards for which they're applying to be made stage 1 criteria. I think we've already discussed the points in relation to that. It would certainly perhaps assist the commission in relation to actually sorting out in terms of the level of detail that may come out of it, because every fund has a one stop shop in relation to the first submission that, naturally enough, put everything in there they possibly could. So it probably might help in terms of setting out whether or not there's a word limit or some sort of clarity around how much detail should be given in there and the sort of awards that they are applying

for. That would perhaps identify some of the chief criteria in relation to what those funds are actually trying to do in relation to that particular award.

PN115

I think the other points have been dealt with, particularly in relation to where we're seeking guidance from the commission, but there may be rather less point in relation to - the commission takes the point that you don't tell the parties what a valid reason is in relation to how much detail they can provide there. I suppose just trying to provide some sort of guidance would perhaps be in relation to marshalling the amount of detail that funds would be tempted to actually put up, because naturally you want to sell the case as much as possible in relation to that first round. So it's a difficult position in terms of trying to filter it, perhaps, but also noting that there's a natural tendency for the funds to put up as much information as possible, and then you'd have to deal with large quantities of advice.

PN116

There's also a point about the form B process in relation to persons making a comment on those form As. We would also request clarification as to whether or not a fund has a right of reply, probably in the interests of procedural fairness in relation to that, because we know that they're up on the website for all to see and we notice that the commission also publishes any submission under section 156D subsection (3). So just querying whether or not you would have some sort of filtering process to perhaps clear out any vexatious submissions. If the court pleases.

PN117

THE SENIOR DEPUTY PRESIDENT: You don't think there will be any vexatious submissions, do you?

PN118

MS MILLS: No.

PN119

THE SENIOR DEPUTY PRESIDENT: You will note, I think, in the notice, the draft notice, there was something about future proceedings would be considered in light of what comes in, in essence. I assume there would be no need for a right of reply if there was no criticism of any of the applications, all the submissions were in support.

PN120

MS MILLS: Yes. It's just a comment, your Honour.

PN121

THE SENIOR DEPUTY PRESIDENT: Yes. Thank you, Ms Mills. Who's next?

PN122

MR HOULIHAN: Your Honour, Houlihan, D, for the Transport Industry Super Fund and Legal Employees Super Fund. Your Honour, we have some brief submissions to make in relation - comments in relation to some of the submissions filed in respect of the proposed timetable. Your Honour, obviously most of the submissions dealing with the timetable are looking at a one to three-month window after the application notice is published. We believe that somewhere

around the two-month window would probably be appropriate, around the eight-week window, and then eight weeks for the parties to - for any party to reply to those submissions. We note the comments of the CFMEU and the ACTU in relation to that, but that's simply a comment, your Honour. Three months in terms of applications and then eight weeks after that would probably see this process, the state-run process, consume too much of the year.

PN123

We note and accept the submissions of my friend at the FSC about the requirement that it not occur prior to 1 January of 2015 and that the publication of the changes to the modern awards can occur after that date. To provide certainty to both employers, employees and superannuation funds we would prefer that this matter, you know, obviously proceed as quickly as it can.

PN124

With respect to the application of the first stage criteria, we are generally supportive of the Mercer submission, particularly in regards to the commission and the expert panel having regard to the fact that MySuper products have already been through a filtering process through the appropriate regulatory body through APRA, and that where first stage criteria for a new product, for example, 156F subsection (d), the net returns of contributions for a new product, that's obviously going to be a difficult issue for them to establish, and that the Full Bench and the expert panel should have regard to the relatively new nature of these processes. Your Honour, for those reasons we feel that the first stage criteria, a number of them can be satisfied simply by the fact that the MySuper products have been approved and that that should effectively limit some of the detail that the superannuation funds may be required to provide.

PN125

With respect to the comments about whether or not this evidence is simply information, we note that it's going to be up to the applicants' superannuation funds to provide all the information that they believe will be necessary to satisfy the commission that they should be included on the default superannuation list. In that case it's similar to most award review processes where you have an opportunity to put the information and (indistinct) so they're our comments in relation to that.

PN126

With respect to the second-stage process and the standing of superannuation funds to make additional submissions as to which awards they should be party to, or which awards should be nominated to default funding, we support again the submissions of Mercer, that we're looking for some guidance from the commission with respect to that to ensure that superannuation funds do actually have the opportunity during that second-stage process to make appropriate submissions in support of that. They're our submissions, if please the commission.

PN127

THE SENIOR DEPUTY PRESIDENT: Thank you, Mr Houlihan. Ms Light?

PN128

MS LIGHT: Light, initial J, for AFEL. Your Honour, today the purpose of our appearance is to endorse the preliminary submissions of Industry Super Australia

and we don't seek to make any comment as to timetabling in this matter.

PN129

THE SENIOR DEPUTY PRESIDENT: Thank you, Ms Light. Mr Smith?

PN130

MR SMITH: Yes, thank you, your Honour. Ai Group would like to just make a few brief comments about a few of the propositions put forward by other parties. Firstly on the issue of whether an applicant should be required or encouraged to identify the awards that they have an interest in when they make their application, that to us is a sensible proposal and we'd support it. With regard to the issue of whether or not this whole review should be delayed pending the government determining what it intends to do in relation to the discussion paper that Senator Sinodinos released, we don't believe that it's open to the commission to delay the review given that section 156A of the Act requires that the review be conducted and that the review start as soon as practicable after 1 January. So we don't support the idea of the review being delayed given the massive amount of work that the expert panel has to do in relation to this review.

PN131

On the issue of timing, the Ai Group has put forward a proposition of six weeks for the applications and six weeks for submissions. We've noted what's been said today and also read the submissions of the other parties and nothing has convinced us that that six-week plus six-week timeframe is not appropriate. We note that there's a degree of support for that from Mr Watts, for example, Mr Maxwell, et cetera. So we still believe that that is an appropriate time-frame, if the panel pleases.

PN132

THE SENIOR DEPUTY PRESIDENT: Thank you, Mr Smith. Does that complete Sydney?

PN133

MR SMITH: Yes.

PN134

THE SENIOR DEPUTY PRESIDENT: Perth?

PN135

MR DAVIES: Thank you, your Honour. Davies, P, for Rio Tinto. Our interest in this matter is limited to the task the commission has under section 156L to establish a schedule of approved MySuper products. Rio Tinto is an employer that will be seeking to have the Rio Tinto Staff Superannuation Fund included on that schedule. I make the submission that under section 156M the application can be made by the fund or by the employer. It is our current intention to be joint applicants in this process. We say that because neither the company nor the fund have the total control of information that will be required for the commission to assess whether or not a fund should be included on the schedule.

PN136

By way of a very brief example, whilst we would be quite open and will intend to include in our application details of the number of employees that Rio Tinto has, the modern awards that would apply to their employment, none of that information is in the control of the superannuation fund. They deal with members

of the fund who have elected to join that fund and they have that information only. So we think it will help the commission in the task that it has in front of it in this matter to enable joint applications, particularly in relation to the schedule of approved MySuper products.

PN137

I don't intend to be lengthy in any way this morning, your Honour. What I would say in terms of timing, though, is that it's not a case, as was suggested to you, that funds have had over 12 months to prepare for this event. While that is true for the industry funds that are appearing before you, the employer superannuation funds were only enabled to make an application in this matter by an amendment to the Act that was made in May or June of last year. From that time our entire focus has been on meeting the obligations that we have to achieve APRA approval of the Rio Tinto fund as an approved MySuper product provider. That took us until December of last year to achieve, and so we are effectively - whilst we've done some work to satisfy the APRA obligations, the way in which that material is prepared compared to the requirements we have under the first-stage criteria are different and we will need to spend time to achieve both of those issues.

PN138

In terms of the range of particular suggestions which have been made to the commission in submissions and in comment this morning, I fall in the category of those groups that believe that 90 days is an appropriate time for an application to be made in the circumstances that I've outlined. I would be comfortable with six weeks as a timetable for submissions to be placed about the application that would be made. I would suggest to the commission that perhaps there needs to be a further stage, which is in fact an ability for an applicant to reply to a submission that is made. I think that would facilitate the process and potentially a form similar to form C could be used for that purpose.

PN139

The only other issue that I would raise would be that it would appear to me that whilst the process the commission must follow to establish the schedule and the broader task it has with the determination of approval for funds are related, they are in fact different, and the focus of the consideration that the expert panel will need to provide to whether or not it includes an employer fund onto the schedule is different to the consideration it would give to whether or not it was included in one of the approved funds for default awards. On that basis we believe that the expert panel's tasks should be done separately, particularly as it relates to the second stage criteria, because of that difference in focus. Beyond that, your Honour, the only other thing I would say is that I think that the process suggestions that have been made in the Mercer submission make sense to us and would help facilitate the process.

PN140

THE SENIOR DEPUTY PRESIDENT: Mr Davies, in terms of the joint application notion that you've spoken of, do you perceive there's some difficulty with form FC in enabling that?

PN141

MR DAVIES: I don't think so, your Honour, but clearly I wouldn't like to make a joint application to find that we then have that application disallowed because of

that point, I have to say. I think if the commission or the expert panel makes a clear statement that an application could be made either singly or as a joint application, then the process should run quite happily. It may well be that other funds have a different view to Rio Tinto, so I think there - - -

PN142

THE SENIOR DEPUTY PRESIDENT: It's just the first question is "Name of superannuation fund and/or employer". I must say, I perceived that the application form permitted both, but if you perceive there's some difficulty in that regard it would be helpful if you'd indicate it.

PN143

MR DAVIES: I'm comfortable with your view, although perhaps let me say it's put in there out of making sure that we have covered the base.

PN144

THE SENIOR DEPUTY PRESIDENT: Okay, thank you. Does that complete the submissions? Very well. We'll take on board everything that's been said and you'll hear further from us in respect of where the matter is going. We'll now adjourn.

<ADJOURNED INDEFINITELY

[11.24AM]

19 February 2014

The Honorable Justice Iain Ross
President
Fair Work Commission
GPO Box 1994
Melbourne VIC 3001

Dear Mr President

Conflicts of interest in relation to matter AM2014/6 - 2014 review of default fund terms

The Financial Services Council (FSC) wishes to raise concerns in relation to potential conflicts or the perception of conflicts that may interfere or be perceived to interfere with the proper performance of the Expert Panel responsible for making the Default Superannuation List.

Section 12 of the *Fair Work Act 2009* (FW Act) provides that Expert Panel members are Fair Work Commission (FWC) members. Expert Panel members are therefore subject to the same rules governing potential conflicts as other FWC members.

Subsection 633(3) of the FW Act provides in relation to Expert Panel members:

Expert Panel Members

- (3) An Expert Panel Member must not engage in any paid work that, in the President's opinion, conflicts or may conflict with the proper performance of his or her duties.

The FSC submits that, on the basis of the potential conflicts relating to Ms Vicki Allen and Mr Stephen Gibbs detailed below, it may be necessary for you to act to ensure that they do not engage in either the paid work (including any employment) giving rise to the potential conflict or continue their role on the Expert Panel.

The FSC also submits that a decision must be made in relation to this issue prior to the FWC accepting applications from superannuation funds that wish to be considered for the Default Superannuation List.

In the absence of Ms Allen and Mr Gibbs voluntarily resigning from the paid work (including any employment) giving rise to the conflicts, in our view it may be appropriate for you to consider whether or not, to manage the conflicts, it may be necessary for you to give a direction to these Expert Panel members (under s640(4) of the FW Act) that they not deal with the matter (being matters relating to the Default Superannuation List, including matter AM2014/6) and any other matter giving rise to the conflicts.

The FSC also notes that s644 of the FW Act provides:

Termination of appointment for outside work

Expert Panel Members

- (2) The Governor-General must terminate the appointment of an Expert Panel Member if the Expert Panel Member engages in paid work that, in the President's opinion, conflicts or may conflict with the proper performance of his or her duties (see subsection 633(3)).

The FSC raised these concerns in our written submission of 7 February 2014 and oral submissions on 13 February 2014 with the Full Bench as constituted. In raising these concerns, this afforded the opportunity to the Panel members to disclose their potential conflicts in that forum or recuse themselves.

Section 640 of the FW Act provides in this regard:

Disclosure of interests by FWC Members other than the President

- (1) This section applies if:
- (a) an FWC Member (other than the President) is dealing, or will deal, with a matter; and
 - (b) the FWC Member has or acquires any interest (the *potential conflict*), pecuniary or otherwise, that conflicts or could conflict with the proper performance of the FWC Member's functions in relation to the matter.
- (2) The FWC member must disclose the potential conflict to:
- (a) a person who has made, or will make, a submission for consideration in the matter; and
 - (b) a person who the FWC member considers is likely to make a submission for consideration in the matter; and
 - (c) the President.

The Expert Panel presided over this matter at the hearing on 13 February 2014. The Expert Panel members did not disclose any potential conflicts at that hearing.

As a result, the FSC submits that it is appropriate for you to consider this matter and take action in accordance with s640(4) of the FW Act which provides:

- (4) The President must give a direction to the FWC Member not to deal, or to no longer deal, with the matter if:
- (a) the President becomes aware that an FWC Member has a potential conflict in relation to a matter (whether or not because of a disclosure under subsection (2)); and
 - (b) the President considers that the FWC Member should not deal, or should no longer deal, with the matter.

In raising our concerns, we make no suggestion that any persons mentioned herein would not perform their roles and duties as required by law. Nonetheless the conflicts we mention in this

letter are such that we consider the matter ought to be brought to your attention for the consideration and response of the FWC as to how such conflicts will be managed.

Further details of the paid work and potential conflicts

The FSC's concerns relate to the ongoing role of Ms Vicki Allen and Mr Stephen Gibbs on the Expert Panel.

Ms Vicki Allen

Ms Vicki Allen is an Independent Director of the MTAA Board. The MTAA directly competes with other superannuation funds through the default fund market, the choice market and the tailored employer plan market. Specifically, MTAA Super will be a competitor in this default fund market which is to be overseen by the Expert Panel. We should disclose that some members of the FSC may provide investment management and other services to MTAA or any fund operated by MTAA. Further, some FSC members may benefit if appointed as an investment manager or appointed to provide other services to MTAA or any fund it operates. Any FSC member providing investment management or other services to MTAA or any related fund could benefit if MTAA is on the Default Superannuation List.

The FSC submits that there is a potential conflict should Ms Vicki Allen remain on the Expert Panel. The conflicts arising in relation to Ms Allen's participation on the Expert Panel are threefold:

- the conflict arising from her role assessing the MTAA's own application for listing in the Default Superannuation List;
- the commercial advantage that could be gained by the MTAA if Ms Allen determined that the applications of direct competitors to the MTAA should not succeed; and
- the commercial advantage that could be gained from Ms Allen's receipt of commercially sensitive information provided by competitors in relation to their MySuper products.

The Expert Panel is also required to apply both the first and second stage tests when determining the Schedule of Approved Employer MySuper Products (the Schedule). Two potential conflicts arise from this role:

- Those products named in the Schedule will ultimately seek to compete for members and contributions from those 'Standard MySuper Products' named in modern awards, including the MTAA; and
- the commercial advantage that could be gained from Ms Allen's access to commercially sensitive information in relation to Employer MySuper Products that will compete with the MTAA.

The FSC submits that superannuation funds are required to provide commercially sensitive information as a result of s156F (a), (b), (c), (d) and (f) of the FW Act which provides:

The *first stage criteria* are as follows:

- (a) the appropriateness of the MySuper product's long term investment return target and risk profile;
- (b) the superannuation fund's expected ability to deliver on the MySuper product's long term investment return target, given its risk profile;
- (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;
- (d) the net returns on contributions invested in the MySuper product;
- ...
- (f) the appropriateness of any insurance offered in relation to the MySuper product;
- ...

These subsections relate to:

- The commercial arrangements between the superannuation funds and their service providers, particularly in relation to fees and service agreements; and/or
- The intellectual property of fund managers, life insurers and the trustee that underpins the investment strategy.

This information is central to the competitive dynamics of the superannuation industry. Costs, returns and insurance offerings, and the capacity to negotiate with service providers for fund specific arrangements, are critical in determining the relative performance of one superannuation fund relative to another.

Mr Stephen Gibbs

Mr Stephen Gibbs is Director of Hastings Funds Management (Hastings) and is a Non-Executive Director and Chair of Australian Ethical Investment (AEI). We should disclose that AEI is a member of the FSC. These two funds managers would invest on behalf of a large number of superannuation funds, including some that receive default contributions as a result of listings in modern awards or pre-modern award instruments.

The FSC submits that there is a potential conflict should Mr Gibbs remain on the Expert Panel. The conflicts arising in relation to his participation on the Expert Panel are also threefold:

- The commercial advantage that could be gained by giving a favourable assessment of applications from superannuation funds to which Hastings or AEI provides services and receives remuneration;
- The commercial advantage that could be gained by giving a negative assessment of applications from superannuation funds that compete with those superannuation funds to which Hastings or AEI provides services; and
- The commercial advantage that could be gained for Hastings or AEI from Ms Gibb's receipt of commercially sensitive information provided by competitors in relation to their MySuper products and Employer MySuper Products.

Hastings and AEI may commercially benefit from access to information provided to Mr Gibbs within applications to be listed in the Default Superannuation List under s156F (a), (b), (c) and (d) of the FW Act which provides:

The *first stage criteria* are as follows:

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

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

...

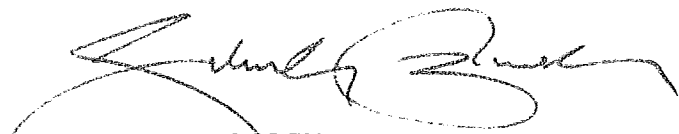
These sections require superannuation funds to provide commercially sensitive information to the Expert Panel relating to:

- The investment strategies of competing fund managers;
- The cost basis of competing investment strategies;
- The fee arrangements of competing fund managers; and
- The intellectual property of competing fund managers and trustees.

This information may provide Mr Gibbs, Hastings and AEI a competitive advantage in relation to negotiations with superannuation funds due to his knowledge of otherwise confidential information relating to the cost, fees and performance of other fund managers and the financial positions of superannuation funds.

I appreciate your consideration of these matters.

Yours sincerely



JOHN BROGDEN
Chief Executive Officer

Copy: Senator the Hon Eric Abetz
Leader of the Government in the Senate
Minister for Employment



*Australia's National Workplace
Relations Tribunal*

21 February 2014

Mr John Brogden
Chief Executive Officer
Financial Services Council Ltd
Level 24, 44 Market Street
SYDNEY, NSW 2000

The Honourable
Justice Iain Ross AO
President

Dear Mr Brogden,

Conflicts of interest in relation to matter AM2014/6- 2014 review of default fund terms

I refer to your letter of 19 February 2014.

A hearing in relation to the 4 yearly review of default fund terms in modern awards took place on Thursday 13 February 2014. Senior Deputy President Acton provided me with a copy of the transcript of that proceeding and directed my attention to those parts of the transcript dealing with allegations that a number of the expert panel members had a conflict of interest in relation to the proceedings. It appears that only two parties raised this issue during the course of the proceedings and I have set out below what they said:

Richard Watts (Industry Super Australia Pty Ltd and others) PN45. There will be and has been both from the Financial Services Council claims of bias and that there are material conflicts of interest amongst the panel members that are here today. All we'd suggest in relation to that is that if the FSC or others have claims in relation to that, that they pursue those claims and they pursue them quickly so as to not delay these or subsequent proceedings. If in fact there are claims made of bias and the commission considers that they are relevant, there are processes within the commission to deal with that. If the FSC wishes to pursue those matters any further, then they have options open to them. We suggest they take those options and take them quickly.

Blake Briggs (Financial Services Council Ltd) PN98. The final point I will make is that the FSC has raised concerns about conflicts of interest within the expert panel. I appreciate that the legislation has - the Fair Work Act has means for dealing with conflicts of interest where they arise, and that is in some regards at the discretion of the President, however we're seeking further advice from the commission as to whether or not conflicts of interest have

been made public to the parties. I believe the legislation requires those Fair Work Commission members to disclose a conflict of interest to both parties involved in proceedings, as well as the President, and that the President can take action if they believe there is a material conflict of interest that interferes with the justice of proceedings. They are my submissions, Senior Deputy President.

I understand that your organisation also raised this issue in its written submission to the Expert Panel.

On Tuesday 18 February 2014 I issued a direction to the three expert panel members who are members of the Panel in this proceeding (Ms Allen and Messrs Apted and Gibbs). The direction concerned the disclosure to me of potential conflicts in relation to these proceedings. Each of the expert panel members have provided information in response to my direction. I am presently seeking further clarification in relation to aspects of the disclosures provided. Once I have received that clarification I will make a decision on whether I should exercise my powers under s.640(4) of the *Fair Work Act 2009* (Cth).

As will be apparent from the sequence of events I was already taking steps to deal with these issues prior to your correspondence. I do not intend to have regard to your correspondence in deciding whether to exercise my powers under s.640(4). In my view the exercise of these powers is not a matter for submissions by interested parties. This is so because the Act clearly contemplates disclosures by a member of any potential conflict directly to the parties (s.640(2)(a)). Further, whether or not I exercise the power in s.640(4) any interested person in a proceeding may make an application that any member not hear a matter on the basis of apprehended bias. Fairness and transparency should require that such applications be made in public, in the proceedings so that any other interested person may make submissions in relation to any issue raised.

I expect to be in a position to finalise my consideration of this matter by Friday 7 March 2014. At that time I intend to make my directions, and the responses of the expert panel members, publically available.

My consideration of these issues should not unduly delay the review of default fund terms.

In the interests of transparency I will have your correspondence and this reply placed on the part of the Commission's website relating to these proceedings.

Yours sincerely,

JUSTICE IAIN ROSS AO
President

21 February 2014

The Honorable Justice Iain Ross
President
Fair Work Commission
GPO Box 1994
MELBOURNE VIC 3001

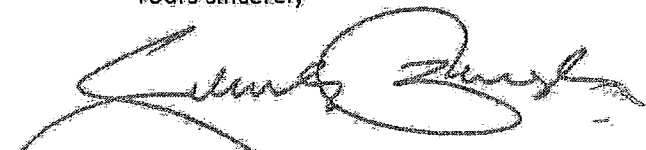
Dear Mr President

**Conflicts of interest in relation to matter AM2014/6 - 2014 review of default fund terms –
Correction of factual error re Mr Gibbs**

We refer to our letter dated 19 February 2014. Our letter stated Mr Stephen Gibbs is a director of Hastings Funds Management. We note that Mr Gibbs resigned from Hastings in September 2013. We sincerely apologise for our error. We will be bringing to the attention of Mr Gibbs our incorrect statement and noting to him that we have informed the Fair Work Commission of our factual error in our 19 February letter.

As stated in our 19 February letter, Mr Gibbs is a Non-Executive Director and Chair of Australian Ethical Investment. Our concerns relating to conflicts raised in our 19 February letter otherwise remain. Please see attached a revised letter to the FWC which removes our factual error and which supersedes our 19 February letter.

Yours sincerely



JOHN BROGDEN
Chief Executive Officer

Copy: Senator the Hon Eric Abetz
Leader of the Government in the Senate
Minister for Employment

21 February 2014

The Honorable Justice Iain Ross
President
Fair Work Commission
GPO Box 1994
MELBOURNE VIC 3001

Dear Mr President

Conflicts of interest in relation to matter AM2014/6 - 2014 review of default fund terms

The Financial Services Council (FSC) wishes to raise concerns in relation to potential conflicts or the perception of conflicts that may interfere or be perceived to interfere with the proper performance of the Expert Panel responsible for making the Default Superannuation List.

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Subsection 633(3) of the FW Act provides in relation to Expert Panel members:

Expert Panel Members

- (3) An Expert Panel Member must not engage in any paid work that, in the President's opinion, conflicts or may conflict with the proper performance of his or her duties.

The FSC submits that, on the basis of the potential conflicts relating to Ms Vicki Allen and Mr Stephen Gibbs detailed below, it may be necessary for you to act to ensure that they do not engage in either the paid work (including any employment) giving rise to the potential conflict or continue their role on the Expert Panel.

The FSC also submits that a decision must be made in relation to this issue prior to the FWC accepting applications from superannuation funds that wish to be considered for the Default Superannuation List.

In the absence of Ms Allen and Mr Gibbs voluntarily resigning from the paid work (including any employment) giving rise to the conflicts, in our view it may be appropriate for you to consider whether or not, to manage the conflicts, it may be necessary for you to give a direction to these Expert Panel members (under s640(4) of the FW Act) that they not deal with the matter (being matters relating to the Default Superannuation List, including matter AM2014/6) and any other matter giving rise to the conflicts.

The FSC also notes that s644 of the FW Act provides:

Termination of appointment for outside work

Expert Panel Members

- (2) The Governor-General must terminate the appointment of an Expert Panel Member if the Expert Panel Member engages in paid work that, in the President's opinion, conflicts or may conflict with the proper performance of his or her duties (see subsection 633(3)).

The FSC raised these concerns in our written submission of 7 February 2014 and oral submissions on 13 February 2014 with the Full Bench as constituted. In raising these concerns, this afforded the opportunity to the Panel members to disclose their potential conflicts in that forum or recuse themselves.

Section 640 of the FW Act provides in this regard:

Disclosure of interests by FWC Members other than the President

- (1) This section applies if:
- (a) an FWC Member (other than the President) is dealing, or will deal, with a matter; and
 - (b) the FWC Member has or acquires any interest (the *potential conflict*), pecuniary or otherwise, that conflicts or could conflict with the proper performance of the FWC Member's functions in relation to the matter.
- (2) The FWC member must disclose the potential conflict to:
- (a) a person who has made, or will make, a submission for consideration in the matter; and
 - (b) a person who the FWC member considers is likely to make a submission for consideration in the matter; and
 - (c) the President.

The Expert Panel presided over this matter at the hearing on 13 February 2014. The Expert Panel members did not disclose any potential conflicts at that hearing.

As a result, the FSC submits that it is appropriate for you to consider this matter and take action in accordance with s640(4) of the FW Act which provides:

- (4) The President must give a direction to the FWC Member not to deal, or to no longer deal, with the matter if:
- (a) the President becomes aware that an FWC Member has a potential conflict in relation to a matter (whether or not because of a disclosure under subsection (2)); and
 - (b) the President considers that the FWC Member should not deal, or should no longer deal, with the matter.

In raising our concerns, we make no suggestion that any persons mentioned herein would not perform their roles and duties as required by law. Nonetheless the conflicts we mention in this

letter are such that we consider the matter ought to be brought to your attention for the consideration and response of the FWC as to how such conflicts will be managed.

Further details of the paid work and potential conflicts

The FSC's concerns relate to the ongoing rôle of Ms Vicki Allen and Mr Stephen Gibbs on the Expert Panel.

Ms Vicki Allen

Ms Vicki Allen is an Independent Director of the MTAA Board. The MTAA directly competes with other superannuation funds through the default fund market, the choice market and the tailored employer plan market. Specifically, MTAA Super will be a competitor in this default fund market which is to be overseen by the Expert Panel. We should disclose that some members of the FSC may provide investment management and other services to MTAA or any fund operated by MTAA. Further, some FSC members may benefit if appointed as an investment manager or appointed to provide other services to MTAA or any fund it operates. Any FSC member providing investment management or other services to MTAA or any related fund could benefit if MTAA is on the Default Superannuation List.

The FSC submits that there is a potential conflict should Ms Vicki Allen remain on the Expert Panel. The conflicts arising in relation to Ms Allen's participation on the Expert Panel are threefold:

- the conflict arising from her role assessing the MTAA's own application for listing in the Default Superannuation List;
- the commercial advantage that could be gained by the MTAA if Ms Allen determined that the applications of direct competitors to the MTAA should not succeed; and
- the commercial advantage that could be gained from Ms Allen's receipt of commercially sensitive information provided by competitors in relation to their MySuper products.

The Expert Panel is also required to apply both the first and second stage tests when determining the Schedule of Approved Employer MySuper Products (the Schedule). Two potential conflicts arise from this rôle:

- Those products named in the Schedule will ultimately seek to compete for members and contributions from those "Standard MySuper Products" named in modern awards, including the MTAA; and
- the commercial advantage that could be gained from Ms Allen's access to commercially sensitive information in relation to Employer MySuper Products that will compete with the MTAA.

The FSC submits that superannuation funds are required to provide commercially sensitive information as a result of s156F (a), (b), (c), (d) and (f) of the FW Act which provides:

The *first stage criteria* are as follows:

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

- (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;
- (d) the net returns on contributions invested in the MySuper product;
- (f) the appropriateness of any insurance offered in relation to the MySuper product;

These subsections relate to:

- The commercial arrangements between the superannuation funds and their service providers, particularly in relation to fees and service agreements; and/or
- The intellectual property of fund managers, life insurers and the trustee that underpins the investment strategy.

This information is central to the competitive dynamics of the superannuation industry. Costs, returns and insurance offerings, and the capacity to negotiate with service providers for fund specific arrangements, are critical in determining the relative performance of one superannuation fund relative to another.

Mr Stephen Gibbs

Mr Stephen Gibbs is a Non-Executive Director and Chair of Australian Ethical Investment (AEI). We should disclose that AEI is a member of the FSC. AEI may invest on behalf of superannuation funds, including some that receive default contributions as a result of listings in modern awards or pre-modern award instruments.

The FSC submits that there is a potential conflict should Mr Gibbs remain on the Expert Panel. The conflicts arising in relation to his participation on the Expert Panel are also threefold:

- The commercial advantage that could be gained by giving a favourable assessment of applications from superannuation funds to which AEI provides services and receives remuneration;
- The commercial advantage that could be gained by giving a negative assessment of applications from superannuation funds that compete with those superannuation funds to which AEI provides services; and
- The commercial advantage that could be gained by AEI from Ms Gibbs's receipt of commercially sensitive information provided by competitors in relation to their MySuper products and Employer MySuper Products.

AEI may commercially benefit from access to information provided to Mr Gibbs within applications to be listed in the Default Superannuation List under s156F (a), (b), (c) and (d) of the FW Act which provides:

The *first stage criteria* are as follows:

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

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

...

These sections require superannuation funds to provide commercially sensitive information to the Expert Panel relating to:

- The investment strategies of competing fund managers;
- The cost basis of competing investment strategies;
- The fee arrangements of competing fund managers; and
- The intellectual property of competing fund managers and trustees.

This information may provide Mr Gibbs and AEI a competitive advantage in relation to negotiations with superannuation funds due to his knowledge of otherwise confidential information relating to the cost, fees and performance of other fund managers and the financial positions of superannuation funds.

I appreciate your consideration of these matters.

Yours sincerely



JOHN BROGDEN
Chief Executive Officer

Copy: Senator the Hon Eric Abetz
Leader of the Government in the Senate
Minister for Employment



STATEMENT

Fair Work Act 2009
s.156A - 4 yearly review of default fund terms

2014 Review of Default Fund Terms (AM2014/6)

POTENTIAL CONFLICTS

JUSTICE ROSS, PRESIDENT

MELBOURNE, 7 MARCH 2014

Background

[1] On 6 January 2014 I constituted an Expert Panel in matter AM2014/6 for the purposes of the 4 yearly review of default fund terms of modern awards. The Panel comprises Senior Deputy President Acton, Senior Deputy President Drake, Commissioner Bull, Commissioner Johns and Expert Panel Members Allen, Apted and Gibbs.

[2] Section 640 of the *Fair Work Act 2009* (Cth) (the FW Act) applies if:

(a) a Member of the Fair Work Commission (other than the President) is dealing, or will deal, with a matter; and

(b) the Member of the Commission has or acquires any interest (the *potential conflict*), pecuniary or otherwise, that conflicts or could conflict with the proper performance of the Member's functions in relation to the matter (see s 640(1)).

[3] Members of the Commission are required by s.640(2) of the FW Act to disclose any potential conflict in relation to a matter to any person who has made or is likely to make a submission for consideration in the matter and to the President of the Commission.

[4] The President of the Commission is required by s.640(4) of the FW Act to give a direction to a Member not to deal, or no longer to deal, with a matter if:

(a) the President becomes aware that the Member has a potential conflict in relation to the matter; and

(b) the President considers that the Member should not deal, or should no longer deal, with the matter.

[5] Pursuant to my direction to Expert Panel Members Allen, Apted and Gibbs of 18 February 2014, they have made written disclosures to me of any interests that could conflict with the proper performance of their functions in relation to matter AM2014/6. These disclosures will be published on the Commission's website.

Expert Panel Member Allen

[6] As a result of the disclosure made by Expert Panel Member Allen, I have become aware that she is a director of Motor Trades Association of Australia Superannuation Fund Pty Ltd. That entity is the trustee of the MTAA Superannuation Fund, which has an authorised MySuper product.

[7] In my view, there would be or could be a conflict between Expert Panel Member Allen's duties as a director and the proper performance of her functions in relation to matter AM2014/6 if she were to deal with applications in this matter from the MTAA Superannuation Fund or the trustee of that fund.

[8] Further, in my view Expert Panel Member Allen's duties as a director of the trustee of the MTAA Superannuation Fund would or could conflict with the proper performance of her functions in relation to matter AM2014/6 if she were to deal with applications in this matter from funds or entities that are actual or potential competitors of the MTAA Superannuation Fund or the trustee of that fund.

[9] In this regard, I also note the nature of the "first stage criteria" specified in s.156F of the FW Act that are to be considered by the Expert Panel in determining applications and that ss.156C(6) and 156N(5) of the FW Act recognise that applications may include confidential or commercially sensitive information that ought not be published by the Commission. In my view it is likely that if Expert Panel Member Allen continues to deal with matter AM2014/6, she will receive confidential or commercially sensitive information about funds or entities that are actual or potential competitors of the MTAA Superannuation Fund or the trustee of that fund, and this would or could give rise to a conflict between her duties as a director and the proper performance of her functions in relation to matter AM2014/6.

Expert Panel Member Apted

[10] The disclosure made by Expert Panel Member Apted does not identify any interest that in my view would or could give rise to a conflict with the proper performance of his functions in relation to matter AM2014/6. In particular, Expert Panel Member Apted is not a director of a trustee of a superannuation fund.

Expert Panel Member Gibbs

[11] As a result of the disclosure made by Expert Panel Member Gibbs, I have become aware that he is a director of Australian Ethical Superannuation Pty Ltd (that entity is the trustee of the Australian Ethical Retail Superannuation Fund, which has an authorised MySuper product) and is also Chairman of Australian Ethical Investment Limited (a service provider to Australian Ethical Superannuation Pty Ltd).

[12] In my view there would be or could be a conflict between Expert Panel Member Gibbs' duties as a director and the proper performance of his functions in relation to matter

AM2014/6 if he were to deal with applications in this matter from the Australian Ethical Retail Superannuation Fund or the trustee of that fund.

[13] Further, in my view Expert Panel Member Gibbs' duties as a director would or could conflict with the proper performance of his functions in relation to matter AM2014/6 if he were to deal with applications in this matter from funds or entities that are actual or potential competitors of the Australian Ethical Retail Superannuation Fund or the trustee of that fund.

[14] Again I have regard to the "first stage criteria" in s.156F and to ss.156C(6) and 156N(5) of the FW Act. In my view it is likely that if Expert Panel Member Gibbs continues to deal with matter AM2014/6, he will receive confidential or commercially sensitive information about funds or entities that are actual or potential competitors of the Australian Ethical Retail Superannuation Fund or the trustee of that fund, and this would or could give rise to a conflict between his duties as a director and the proper performance of his functions in relation to matter AM2014/6.

[15] I consider that:

- (a) by reason of the circumstances identified above, Expert Panel Members Allen and Gibbs have a 'potential conflict' within the meaning of s.640 of the FW Act in relation to matter AM2014/6; and
- (b) Expert Panel Members Allen and Gibbs should no longer deal with the matter.

[16] Directions will issue to give effect to this conclusion and to reconstitute the Expert Panel accordingly.



PRESIDENT

10 March 2014

The Honourable Justice Iain Ross
President
Fair Work Commission
GPO Box 1994
MELBOURNE VIC 3001

By email:

Subject: AM2014/6 review of default fund terms

Dear Mr President

The Financial Services Council (FSC) makes these supplementary submissions in relation to the 2014 review of default fund terms in modern awards.

In view of Friday's decision to exclude Expert Panel members Allen and Gibbs due to a 'possible conflict', we believe the process should now cease and that no further appointments be made by the Fair Work Commission (FWC).

We do not believe the requisite skills exist within the FWC for the Expert Panel to be reconstituted.

Please feel free to contact me on 02 9299 3022 if you have any further questions in relation to this submission.

Yours sincerely



JOHN BROGDEN
Chief Executive Officer

SUPPLEMENTARY SUBMISSION

The President of the Fair Work Commission (FWC) provided a Statement on Friday, 7 March 2014 in which he determined that Expert Panel Members Allen and Gibbs have a 'potential conflict' within the meaning of Section 640 of the *Fair Work Act 2009* (FW Act) in relation to matter AM2014/6. As a result the President decided that Expert Panel Members Allen and Gibbs should no longer deal with the matter.

The Financial Services Council (FSC) submits that this decision has a significant impact on the deliberations of the Full Bench in relation to the process for AM2014/6. Section 620 of the FW Act requires an Expert Panel for the four yearly review of default fund terms to comprise of three individuals with knowledge of, or experience in, fields particular to the subject matter being considered. Section 620 provides:

Section 620 Constitution and decision-making of an Expert Panel

Constitution of an Expert Panel for 4 yearly reviews of default fund terms etc.

(1A) *An Expert Panel constituted under this section for a purpose referred to in subsection 617(4) or (5) consists of 7 FWC Members (except as provided by section 622), and must include:*

(a) the President, or a Vice President or Deputy President appointed by the President to be the Chair of the Panel; and

(b) 3 Expert Panel Members who have knowledge of, or experience in, one or more of the following fields:

- (i) finance;*
- (ii) investment management;*
- (iii) superannuation.*

In the 7 March 2014 Statement it was stated that "Directions will issue to give effect to this conclusion and to reconstitute the Expert Panel accordingly".

The FSC notes that Section 622 of the FW Act provides for the process of reconstitution of the Expert Panel when an Expert Panel member becomes unavailable. Section 622 of the FW Act provides:

Section 622 Reconstitution of the FWC when FWC Member of a Full Bench or an Expert Panel becomes unavailable

(1) This section applies if:

*(a) an FWC Member (the **unavailable member**) forms part of a Full Bench or an Expert Panel in relation to a matter; and*

(b) the FWC Member becomes unavailable to continue dealing with the matter before the matter is completely dealt with.

(2) *The Full Bench or the Expert Panel may continue to deal with the matter without the unavailable member if the Full Bench or the Expert Panel consists of the following:*

(a) for the Expert Panel--the President and at least 2 Expert Panel Members;

...

(3) *Otherwise, the President must direct another FWC member to form part of the Full Bench or the Expert Panel. After the President does so, the Full Bench or the Expert Panel may continue to deal with the matter without the unavailable member.*

The Expert Panel is currently only constituted with one Expert Panel member. The FSC also submits that the presiding FWC member is a Senior Deputy President (as opposed to the President). As such, the current constitution of the Expert Panel does not satisfy the requirement under Section 622(2)(a) and the Expert Panel as currently constituted cannot continue to deal with the matter.

The FSC submits that the Full Bench and the Expert Panel must cease to deal with the matter until such time as the President issues directions to reconstitute the Expert Panel or the Minister issues new appointments.

The FSC also notes that Section 622 of the FW Act provides that the President may appoint a FWC member to the Expert Panel so as to reconstitute the Expert Panel. Section 12 of the FW Act defines a FWC member as follows:

"FWC member" means the President, a Vice President, a Deputy President, a Commissioner or an Expert Panel Member.

Section 626 of the FW Act provides for the appointment of FWC members. Critically, the same person must not hold, at the same time, an appointment as both an Expert Panel member and the President, a Vice President, a Deputy President or a Commissioner (section 626(4)). Section 626 provides:

Section 626 Appointment of FWC Members

(1) *An FWC Member is to be appointed by the Governor-General by written instrument.*

(2) *The instrument of appointment must specify whether the FWC Member is the President, a Vice President, a Deputy President, a Commissioner or an Expert Panel Member.*

(3) *...*

(4) *The same person must not hold, at the same time, an appointment as both:*

(a) an Expert Panel Member; and

(b) *the President, a Vice President, a Deputy President or a Commissioner.*

The FSC therefore submits that the President is only empowered to reconstitute the Expert Panel in matter AM2014/6 with a FWC member that was originally appointed by the Governor-General as an Expert Panel Member.

The FSC also submits that the capacity to reconstitute the Expert Panel with a FWC member must also adhere to the requirements of Section 620 of the FW Act, that is, that an Expert Panel member for the Default Superannuation List must have knowledge of, or experience in, one or more of the following fields:

- (a) finance;
- (b) investment management;
- (c) superannuation.

The FSC submits that it is critical to the integrity and effective functioning of the Expert Panel and the Full Bench that the Expert Panel Members undertaking the review of default fund terms satisfy the knowledge and experience requirements of section 620(1A)(b) of the FW Act. This is particularly important considering their sole purpose on the Expert Panel is to bring their technical skills to bear to assess applications and submissions in relation to their field of expertise.

This submission is supported by the original announcement by the then Minister for Workplace Relations, that categorised Expert Panel appointments as either Superannuation Expert Panel Members or Minimum Wage Review Expert Panel Members.¹ The Minister specifically provided:

"I am pleased to announce the appointment of Ms Vicki Allen, Mr Arthur Apted and Mr Stephen Gibbs as Expert Panel Members with high level experience and expertise in the financial services and superannuation fields," Minister Shorten said.

"I am also pleased to announce the appointment of Professor Sue Richardson, Mr Tim Harcourt, and Mr Anthony Cole as Expert Panel Members with expertise to participate in the conduct of the annual minimum wage review."

The FSC therefore submits that the appointees to the Superannuation Expert Panel are solely qualified for that Expert Panel and the appointees to the Minimum Wage Review Expert Panel are solely qualified for the wage review Expert Panel.

The FSC submits that the President is not empowered to reconstitute the Expert Panel in relation to AM2014/6 with Expert Panel Members who were appointed in relation to the Minimum Wages Review Expert Panel as this would in our view be in breach of the knowledge and experience requirements in Section 620(1A)(b) of the FW Act.

The FSC also recognises that as a result of these legislative requirements there may not be sufficient Expert Panel members currently appointed to the FWC by the Governor-General for the Full Bench or Superannuation Expert Panel to be reconstituted. As a result, the Full Bench and Superannuation Expert Panel cannot continue to consider AM2014/6 until such time as there are an adequate number of Expert Panel Members with the knowledge or experience

¹ <http://billshorten.com.au/fair-work-commission-expert-panel-appointments>

required by Section 620(1A) of the FW Act to allow reconstitution to occur in accordance with sections 620 or 622 of the FW Act.

The FSC submits that the FW Act contemplates this scenario. Section 626 of the FW Act empowers the Governor-General to appoint new Expert Panel members to the FWC to fulfil this role, and as such the discretion to do so rests with the Governor-General.

The FSC submits that the Full Bench cannot continue to consider matter AM2014/6 as the Expert Panel is currently only constituted by one Expert Panel member, and therefore continuing the matter would be in breach of Section 622(2)(a) of the FW Act.



Australia's National Workplace
Relations Tribunal

11 March 2014

The Honourable
Justice Iain Ross AO
President

Mr John Brogden
Chief Executive Officer
Financial Services Council Ltd
Level 24, 44 Market Street
SYDNEY, NSW 20000

Dear Mr Brogden,

AM2014/6 - review of default fund terms

I refer to your correspondence of 10 March 2014.

On Friday 7 March 2014, I appointed Mr Tim Harcourt to form part of the Expert Panel in matter AM2014/6 - review of default fund terms.

I am satisfied that Mr Harcourt meets the requirements of s.620(1A)(b).

Yours sincerely,

JUSTICE IAIN ROSS AO
President

24 March 2014

The Honourable Justice Iain Ross
President
Fair Work Commission
GPO Box 1994
MELBOURNE VIC 3001

By Email: Chambers.Ross.j@fwc.gov.au

Subject: AM2014/6 review of default fund terms

Dear Mr President

I am writing in relation to your decision of 7 March 2014 to remove Expert Panel Members Allen and Gibbs from the above matter (the Review) due to a potential conflict of interest and your subsequent decision to assign Expert Panel Member Mr Harcourt to the Review.

For ease of reference, I will refer to the reconstituted expert panel as the current Expert Panel.

The Financial Services Council (FSC) respectfully submits that the Current Expert Panel is not properly constituted because:

- the Current Panel does not include the President (which means section 622(2)(a) does not apply); and
- as there are two unavailable members, the President would need to direct two FWC members to form part of the Expert Panel under section 622(3). However, the President has directed only one – Mr Harcourt.

The FSC submits that the Act requires the President to appoint a further expert to the Expert Panel before the FWC can progress the Review. It also follows that the Statement issued on 11 March 2014 was not validly made.

Reasoning

Section 620(1A) provides that, for the purposes of the Review, the Expert Panel must consist of:

...7 FWC Members (except as required by section 622), and must include:

(a) *the President, or a Vice President or Deputy President appointed by the*

President to be the Chair of the Panel; and

- (b) 3 Expert Panel Members who have knowledge of, or experience in, one or more of the following fields:*
 - (i) finance;*
 - (ii) investment management;*
 - (iii) superannuation.'*

Putting to one side the exception for section 622 (which we discuss below), the current Expert Panel does not meet the requirements of section 620(1A) because it:

- (a) consists of six FWC Members, rather than the seven FWC Members; and*
- (b) consists of two Expert Panel Members (Mr Apted and Mr Harcourt), rather than the required three Expert Panel Members.*

As the current Expert Panel does not meet the requirements of section 620(1A), it is submitted that it is not properly constituted in accordance with that section.

Section 622 of the Act applies if:

(1) This section applies if:

(a) an FWC Member (the unavailable member) forms part of a Full Bench or an Expert Panel in relation to a matter; and

(b) the FWC Member becomes unavailable to continue dealing with the matter before the matter is completely dealt with.

(2) The Full Bench or the Expert Panel may continue to deal with the matter without the unavailable member if the Full Bench or the Expert Panel consists of the following:

(a) for the Expert Panel--the President and at least 2 Expert Panel Members;

(b) for a Full Bench--at least 3 FWC Members, including at least one FWC Member who is the President, a Vice President or a Deputy President.

(3) Otherwise, the President must direct another FWC member to form part of the Full Bench or the Expert Panel. After the President does so, the Full Bench or the Expert Panel may continue to deal with the matter without the unavailable member.

However, section 622(2) does not apply because:

- (a) the current Panel does not include the President; and*

- (b) we consider section 622(2) requires the Expert Panel to have two Expert Panel Members who were already Members of the Expert Panel *before* the Expert Panel was reconstituted, rather than any two Expert Panel Members. This is because section 622 is evidently designed to provide continuity in the Expert Panel.

The FSC further submits that the current Expert Panel was not reconstituted in accordance with section 622(3) of the Act. The FSC submits that, as there are two unavailable members, the President must direct two FWC members to form part of the Expert Panel. However, the President has directed only one FWC member to form part of the Expert Panel.

In this regard, we consider that section 622(3) of the Act is directed at replacing the members of the Expert Panel so that it is constituted in accordance with section 620(1A) of the Act.

Further, we believe that the remaining FWC Expert Panel members either do not have the requisite knowledge and experience or have a clear conflict of interest.

Accordingly we do not believe that it is possible for the Expert Panel to be reconstituted at the present time. We respectfully submit that the FWC must cease dealing with the matter until such time as the Expert Panel can be properly reconstituted (whether due to new Expert Panel appointments or changes to the Act).

Thank you for your consideration. I await your reply.

Yours sincerely



JOHN BROGDEN
Chief Executive Officer



*Australia's National Workplace
Relations Tribunal*

27 March 2014

Mr John Brogden
Chief Executive Officer
Financial Services Council
Level 24, 44 Market Street
SYDNEY NSW 2000

The Honourable
Justice Iain Ross AO
President

Dear Mr Brogden,

AM2014/6 - review of default fund terms

I refer to your correspondence of 24 March 2014 and to my previous correspondence in relation to this matter.

If the FSC considers that Expert Panel Member Apted or Harcourt has a conflict of interest, it is open to it to make an application in the proceedings that the Member not hear the matter.

I do not consider it appropriate to engage in further ex parte discussions in relation to the proceedings.

Yours sincerely,

JUSTICE IAIN ROSS AO
President



STATEMENT

Fair Work Act 2009

s.156A - 4 yearly review of default fund terms

2014 Review of Default Fund Terms (AM2014/6)

JUSTICE ROSS, PRESIDENT

MELBOURNE, 17 APRIL 2014

Background

[1] On 6 January 2014 I constituted an Expert Panel in matter AM2014/6 for the purposes of the 4 yearly review of default fund terms of modern awards. The Panel comprised Senior Deputy President Acton, Senior Deputy President Drake, Commissioner Bull, Commissioner Johns and Expert Panel Members Allen, Apted and Gibbs.

[2] Pursuant to my direction to Expert Panel Members Allen, Apted and Gibbs of 18 February 2014, they made written disclosures to me of any interests that could conflict with the proper performance of their functions in relation to matter AM2014/6.

[3] In my Statement of 7 March 2014, having regard to these disclosures, I concluded that Expert Panel Members Allen and Gibbs had a 'potential conflict' within the meaning of s.640 of the *Fair Work Act 2009* (Cth) (**FW Act**), but Expert Panel Member Apted had no such potential conflict.

[4] On 7 March 2014 I issued a direction pursuant to s.640(4) of the FW Act that Expert Panel Members Allen and Gibbs no longer deal with matter AM2014/6 and they were consequently unavailable to continue dealing with the matter for the purposes of s.622(1) of the Act.

[5] Having formed the view that Expert Panel Member Harcourt had the knowledge or experience required under s.620(1A)(b) of the FW Act and having regard to his statement that he had no potential conflict, on 7 March 2014 I also issued a direction pursuant to s.622(3) of the Act that Expert Panel Member Harcourt form part of the Expert Panel.

Further Reconstitution of the Expert Panel

[6] In order to put beyond doubt that the quorum requirement for the Expert Panel in s.622(2)(a) of the FW Act is met, I will now join the Expert Panel pursuant to s.622(3) of the Act.

[7] The quorum requirement being met, pursuant to s.622(2) of the FW Act the Expert Panel may continue to deal with matter AM2014/6 without its full complement of Expert Panel Members.

[8] In my view this resolves any uncertainty that the Expert Panel is properly constituted.



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16 April 2014

The Honourable Justice Iain Ross
President
Fair Work Commission
GPO Box 1994
MELBOURNE VIC 3001

By Email: chambers.ross.j@fwc.gov.au

Dear Mr President,

The composition of the Expert Panel reviewing default fund terms

I am writing to you regarding the recent media reports that claim the Expert Panel dealing with review of default fund terms is not properly constituted.

The application process for funds to be considered for inclusion on the Default Superannuation List requires considerable time and expense on behalf of superannuation funds. These costs are ultimately paid by fund members. Accordingly, ASFA considers it important that any uncertainty about the process, including the possibility that work completed thus far will have to be abandoned or repeated, should be addressed as soon as possible.

About ASFA

ASFA is a non-profit, non-political national organisation whose mission is to protect, promote and advance the interests of Australia's superannuation funds, their trustees and their members. We focus on the issues that affect the entire superannuation system. Our membership, which includes corporate, public sector, industry and retail superannuation funds, plus self-managed superannuation funds and small APRA funds through its service provider membership, represent over 90% of the 12 million Australians with superannuation.

Comments made by the Financial Services Council

ASFA has been provided with copies of the correspondence between the Financial Services Council (FSC) and the Fair Work Commission.

We do not wish to provide any comments on the substance of the correspondence or the requests made by the FSC. Nor are we claiming that any of the current members of the Expert Panel have an actual or potential conflict of interest.

Instead, we seek clarity from the Fair Work Commission on whether or not it believes the Expert Panel is properly constituted. In this regard, we request a public statement from the Commission indicating why it considers that the Expert Panel dealing with the review of default fund terms is properly constituted.

Issuing this statement would help provide much-needed clarification regarding the makeup of the Expert Panel and on how it complies with the requirements of the Fair Work Act. Funds could then make an informed assessment of the likelihood of any delays or changes to the process for considering applications by funds. It would also facilitate the taking of any remedial action, if a party to the review process considered that a further appointment of a Fair Work Commission member to the Expert Panel is necessary.

Given the tight timetable for the preparation and submission of applications, we would be very grateful if you were able to respond to our request as soon as it is possible to do so.

Yours sincerely

A handwritten signature in black ink that reads "Pauline B Vamos". The signature is written in a cursive style with a large initial 'P'.

Pauline Vamos
Chief Executive Officer

Media Statement

22 April 2014



Statement from Fair Work Commission President Justice Iain Ross

Fair Work Commission President Justice Iain Ross has made the following statement in response to media commentary about the Commission's superannuation fund review process:

The Commission received correspondence from the Association of Superannuation Funds of Australia on Wednesday 16 April 2014, seeking an urgent public statement providing clarity on whether the Expert Panel was properly constituted.

In response to this urgent request, after giving due consideration of the matter, I issued a statement on 17 April 2014.

The Directions issued on 11 March 2014 by the Panel determining the 2014 review of default fund terms have not changed throughout this process and are quite clear to all parties involved.

All applications to the Commission to have a standard MySuper product included on the Default Superannuation List and applications to the Commission to have an employer MySuper product included on the Schedule of Approved Employer MySuper Products must be lodged with the Commission by **Monday, 28 April 2014**.

All correspondence received, as well as Directions and Statements issued by the Commission, are publicly available on the website at www.fwc.gov.au.

- ENDS -

For further information please contact:

Di Lloyd
Manager Media and Communications
Phone: 0427 097 628
Email: communications@fwc.gov.au

Our ref: SJW\HFF\n.f
Your ref: AM2014/6
Partner: Stephen Woodbury
Direct line: +61 2 9258 6444
Email: stephen.woodbury@ashurst.com
Contact: Heidi Fairhall, Senior Associate
Direct line: +61 2 9258 6884
Email: heidi.fairhall@ashurst.com

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23 April 2014

The Associate to the Honourable Justice Iain Ross
President
Fair Work Commission
Level 4
11 Exhibition St
MELBOURNE VIC 3000

The logo for Ashurst, featuring the word "ashurst" in a lowercase, bold, sans-serif font.

Dear Associate

AM2014/6- Review of Default Fund Terms

We act for the Financial Services Council Limited (**FSC**).

We refer to the Statement issued by the President on 17 April 2014 in the above matter (see [2014] FWC 2632).

On 11 April 2014, our client wrote to the Associate to Senior Deputy President Acton to express its concerns that the Expert Panel as presently constituted in this matter does not comply with the requirements of the *Fair Work Act 2009* (Cth) (**FW Act**) including for the reason that the Expert Panel contains only two Expert Panel members rather than the three Expert Panel members required under s620(1A) of the FW Act. A copy of that correspondence is **attached**.

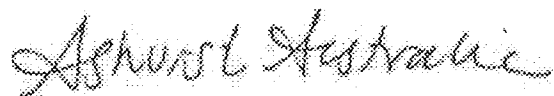
Our client considers that the step taken by the President on 17 April 2014 to appoint the President to the Expert Panel pursuant to s622(3) of the FW Act, as advised in the Statement dated 17 April 2014, is insufficient to cure this non-compliance. Accordingly, our client maintains its objection to the Expert Panel, as currently constituted, continuing to conduct this matter.

We respectfully request that the matter be listed for hearing, as soon as possible and prior to 28 April 2014, to enable our client to make submissions in a public hearing on its objection to the current constitution of the Expert Panel and to enable any interested parties to make submissions in relation to this issue. In light of the objections raised by our client, and the ramifications for the constitution of the current Expert Panel, we respectfully request that the timetable contained in the Expert Panel's Statement dated 11 March 2014 (see [2014] FWCFB 1146) be extended until seven days after the objection is heard and determined.

We would also be grateful if the Fair Work Commission could please make publically available a copy of the Direction which gives effect to the appointment of the President to the Expert Panel.

Please contact Stephen Woodbury on +61 2 9258 6444 or Heidi Fairhall on +61 2 9258 6884 if you have any questions in relation to this matter.

Yours faithfully

A handwritten signature in cursive script that reads "Ashurst Australia".

Cc Associate to Senior Deputy President Acton, Chair, Expert Panel

Cc Other parties to AM2014/6

11 April 2014



Associate to Senior Deputy President Acton
Fair Work Commission
GPO Box 1994
MELBOURNE VIC 3001

By Email: Chambers.acton.sdp@fwc.gov.au

Dear Associate

AM2014/6: Review of default fund terms

The Financial Services Council Limited (the FSC) respectfully requests that the Expert Panel convene as soon as possible to hear submissions from all parties as to the proper constitution of the Expert Panel.

The FSC wishes to contend that the Expert Panel, as presently constituted, does not comply with the requirements of the Fair Work Act (the Act). FSC's position, which we wish to put before the Expert Panel is, in summary, the following:

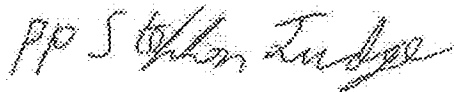
- (i) section 620(1A) of the Act provides that, for the purposes of the Review, the Expert Panel must consist of seven FWC members;
- (ii) the current Expert Panel does not meet the requirements of s.620(1A) because it:
 - a. consists of six FWC members, rather than the seven required by the section; and
 - b. consists of two expert panel members rather than the required three expert panel members provided for in s.620(1A)(b) of the Act;
- (iii) recently two members of the Panel became unavailable in the sense that they were removed from the Expert Panel because of a perceived potential conflict of interest and one new member was appointed to the Panel – see the Statement of the President of the Fair Work Commission dated 7 March 2014;
- (iv) there is limited scope pursuant to s.622 of the Act for the Expert Panel to continue dealing with the matter in the event of the unavailability of a member or members of the Expert Panel. Where the President of the Commission is not a member of the Expert Panel, as is the case in the present matter, it was necessary that two new Expert Panel members be appointed, as required by s.622(3) of the Act; and

(v) in the absence of an additional member being appointed, the present Panel cannot proceed to deal with the Review.

We will appreciate it if you could bring this correspondence to the attention of Senior Deputy President Acton, the presiding Member of the Panel, with a respectful request from the FSC that the matter be dealt with as soon as possible.

We are providing a copy of this letter to each of the other parties who has appeared before the Expert Panel.

Yours sincerely

A handwritten signature in black ink, appearing to read "John Brogden". The signature is written in a cursive style with some loops and flourishes.

JOHN BROGDEN
Chief Executive Officer



DECISION

Fair Work Act 2009

s.156A—4 yearly review of default fund terms

2014 Review of Default Fund Terms (AM2014/6)

JUSTICE ROSS
SENIOR DEPUTY PRESIDENT ACTON
SENIOR DEPUTY PRESIDENT DRAKE
COMMISSIONER BULL
COMMISSIONER JOHNS
ARTHUR APTED
TIM HARCOURT

MELBOURNE, 28 APRIL 2014

[1] This decision deals with correspondence of 17 and 23 April 2014 from Ashurst on behalf of their client, the Financial Services Council Ltd (the correspondence). The correspondence requested that the President list for hearing, as soon as possible and prior to 28 April 2014, the *2014 Review of Default Fund Terms* (AM 2014/6) for the purpose of permitting the Financial Services Council Ltd to make submissions concerning its objection to the current constitution of the Expert Panel. The correspondence also included an ancillary request that the timetable for the filing of submissions contained in the Expert Panel's Statement dated 11 March 2014 ([2014] FWCFB 1146) be extended until seven days after the objection is heard and determined.

[2] The President referred the correspondence to the Expert Panel for its consideration. The Expert Panel has decided to reject the requests set out in the correspondence, for the following reasons:

(i) It appears from the correspondence that the hearing that is sought would be one conducted by the Expert Panel, as currently constituted.

(ii) The power to constitute an Expert Panel is, under s.620(2) of the *Fair Work Act 2009* (the Act), conferred on the President. Likewise, the power to reconstitute an Expert Panel when an FWC Member becomes unavailable is, under s.622(3) of the Act, conferred on the President. In those circumstances, it is apparent that the Expert Panel, as currently constituted, would have no power to make any decision with respect to its own constitution or re-constitution. No such power is identified in the correspondence.

(iii) Any proceeding before the Expert Panel as currently constituted would include the President and accordingly would involve the President reviewing his own prior decision. It would be inappropriate for the President to consider and determine submissions concerning the lawfulness of his own prior decision to reconstitute the Expert Panel.

(iv) The Expert Panel cannot conclusively determine any objection to the current constitution of the Expert Panel. A conclusive determination of this issue can only be made by a court of competent jurisdiction.

[3] To the extent that the correspondence, contrary to the understanding identified in paragraph [1], seeks a hearing concerning the Financial Services Council Ltd's objection to the constitution of the Expert Panel before the President sitting alone, the President rejects that request. It would be inappropriate for the President to consider and determine submissions concerning the lawfulness of his own prior decision.

[4] To the extent that the Financial Services Council Ltd maintains the position that the President's decision to re-constitute the Expert Panel did not comply with, or achieve compliance with, the relevant provisions of the Act, the most appropriate course would be an application for judicial review of that decision in the Federal Court of Australia. Judicial review has been the usual way in which parties have challenged decisions of the President of the Fair Work Commission or its predecessor tribunals concerning the constitution of benches.¹

[5] We note the further request in the correspondence for a "copy of the Direction which gives effect to the appointment of the President to the Expert Panel". The President's decision to reconstitute the Expert Panel under s.622(3) by placing himself on the Panel was made in a Statement issued on 17 April 2014 ([2014] FWC 2632). A copy of that Statement is accessible on the Commission's website.

[6] The Directions issued on 11 March 2014 by the Panel determining the 2014 review of default fund terms have not changed throughout this process and are quite clear to all parties involved. All applications to the Commission to have a standard MySuper product included on the Default Superannuation List and applications to the Commission to have an employer MySuper product included on the Schedule of Approved Employer MySuper Products must be lodged with the Commission by Monday, 28 April 2014.



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¹ See *Re Australian Insurance Employees Union; Ex parte Academy Insurance Pty Ltd* (1988) 78 ALR 466; *Re Australian Liquor, Hospitality and Miscellaneous Workers Union; Ex parte Australian Hotels Association* (1993) 112 ALR 650



SENATOR THE HON. ERIC ABETZ
LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR EMPLOYMENT
MINISTER ASSISTING THE PRIME MINISTER FOR THE PUBLIC SERVICE
LIBERAL SENATOR FOR TASMANIA

7 MAY 2014

The Hon. Justice Ross
President
Fair Work Commission
GPO Box 1994
MELBOURNE VIC 3001

Dear President

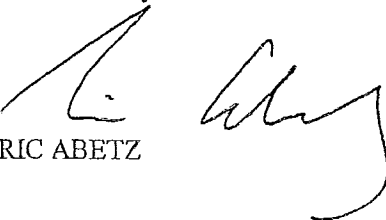
I refer to your recent decisions relating to the constitution of the Expert Panel in matter AM2014/6, specifically, your decision pursuant to s 640(4) of the *Fair Work Act 2009* that Member Allen and Member Gibbs no longer deal with that matter on the basis they each held interests that did, or could, conflict with the performance of their functions.

I seek an update from you on whether you have inquired into, and if so whether you have formed an opinion on, the issue of whether or not in light of your decision pursuant to s 640(4), Members Allen and Gibbs are engaging in paid work that conflicts with, or that may conflict with, the proper performance of their duties as Expert Panel Members (cf s 644 of the *Fair Work Act*).

I seek this information from you in my capacity as Minister responsible for administering the *Fair Work Act*.

I would appreciate an indication from you at your earliest convenience.

Yours sincerely



ERIC ABETZ



Australia's National Workplace
Relations Tribunal

Senator the Hon. Eric Abetz
Minister for Employment
MG 68, Parliament House,
CANBERRA, ACT 2600

The Honourable
Justice Iain Ross AO
President

Dear Minister

Expert Panel Member conflicts

I refer to your letter dated 7 May 2014 regarding conflicts of interest on the part of Expert Panel Members Vicki Allen and Stephen Gibbs.

The issue you have raised in relation to s.644 of the *Fair Work Act 2009* involves consideration a number of matters, including the capacity of the Expert Panel Members to participate in Commission proceedings other than the present 4 yearly review of default fund terms and ensuring that the Expert Panel Members receive procedural fairness.

I am giving consideration to these matters and will provide a substantive response to you as soon as practicable.

Yours sincerely

JUSTICE IAIN ROSS AO
President

Accordingly, I have not formed an opinion that Ms Allen is engaging in paid work that conflicts or may conflict with the proper performance of her duties as an Expert Panel Member for the purposes of s.644(2).

However, Ms Allen informed me that from the date of her application to become an Expert Panel Member, her interest has been solely in performing public service as an Expert Panel Member in 4 yearly reviews of default fund terms. Consequently, Ms Allen advised me that she intends to resign her appointment as an Expert Panel Member. I have attached a copy of Ms Allen's letter to the Governor General to that effect.

Mr Gibbs

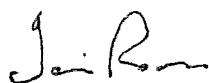
In my Statement of 7 March 2014, I concluded that Mr Gibbs also had "a 'potential conflict' within the meaning of s.640 of the FW Act in relation to matter AM2014/6", as he is a Director of Australian Ethical Superannuation Pty Ltd (AES) and Chairman of Australian Ethical Investment Limited (AEI). Further to that conclusion, in my correspondence I informed Mr Gibbs of my opinion that whilst he remains a Director of AES and Chairman of AEI, he also will be wholly disqualified from participating in any 4 yearly review of default fund terms.

On the basis of the information that Mr Gibbs provided to me, I am satisfied that he also has the knowledge or experience required under s.620(1)(b) of the FW Act to participate as an Expert Panel Member in annual wage reviews and that he could perform such duties free of conflict with his paid work as a Director of AES and Chairman of AEI.

Accordingly, I have not formed an opinion that Mr Gibbs is engaging in paid work that conflicts or may conflict with the proper performance of his duties as an Expert Panel Member for the purposes of s.644(2).

In closing, I note that Ms Allen and Mr Gibbs have behaved with complete propriety in disclosing their potential conflicts. It is regrettable that Ms Allen has found it necessary to resign her appointment. I urge you to fill this vacancy quickly in order to resolve any residual uncertainty regarding the constitution of the panel hearing matter AM2014/6. Assuming that the appointee has no potential conflicts it would be my intention to assign them to the existing panel.

Yours sincerely



JUSTICE IAIN ROSS AO
President

PO Box R859 Royal Exchange
Sydney NSW 1225

28 May 2014

His Excellency General the Honourable
Sir Peter Cosgrove AK MC (Retd)
Governor-General of the Commonwealth of Australia
Government House
Dunrossil Drive
YARRALI MLA, ACT 2600

Dear Governor-General

Resignation of appointment as Expert Panel Member

On 5 August 2013 I was appointed an Expert Panel Member of the Fair Work Commission, pursuant to section 626 of the *Fair Work Act 2009* (Cth).

In accepting this appointment it was my intention to perform public service as an Expert Panel Member in the Commission's 4 yearly reviews of default fund terms of modern awards

Unfortunately, the President of the Commission has informed me that, in his opinion, my present work in the superannuation industry conflicts or could conflict with the proper performance of my functions as an Expert Panel Member participating in 4 yearly reviews of default fund terms. Consequently, whilst I continue with that work, I will be wholly disqualified from participating in these reviews.

Accordingly, it is with regret that I hereby resign my appointment as an Expert Panel Member of the Fair Work Commission, with effect from 5pm on Wednesday 28 May 2014

Yours sincerely

Vicki Allen