

**Senate Standing Committee on Education Employment and Workplace
Relations**

**QUESTIONS ON NOTICE
Additional Estimates 2010-2011**

Agency - Fair Work Australia

DEEWR Question No.EW0757_11

Senator Fisher provided in writing.

Question

SUPERANNUATION

Please detail the process used by FWA when making and/or varying those clauses in a modern award dealing with superannuation, and in particular the nomination of a default superannuation fund, including:

- o Who or what is eligible to apply for nomination as a default superannuation fund,
- o What documentary or other supporting material must accompany any application for nomination as a default superannuation fund,
- o Within what timeframe/s does FWA assess any applications for nomination as a default superannuation fund,
- o What is the process for assessing any application/s for nomination as a default superannuation fund,
- o In respect of FWA communicating with or providing notice to any such applicant and/or any other interested parties: § on what basis and by whom is the decision made as to which other parties may be 'interested parties' § how, at what stage in the proceedings, and by what mechanism/s and/or medium does FWA communicate with any such applicant/s and any other interested parties, and § on what basis and by whom is the decision made as to whether such communication is appropriate or necessary? Noting that modern awards began in January 2010, and given that any employer with default superannuation fund arrangements in operation as at 12 September 2008, can utilise those default superannuation fund arrangements for both those of its employees ongoing from 12 September 2008, and for any employees commencing after 12 September 2008, what constitutes a 'default arrangement' or 'default superannuation fund arrangement' under this 'grandfathering' arrangement?

Answer

Fair Work Australia has provided the following response.

The following extracts from a Full Bench statement in September 2008 and Full Bench decisions in December 2008 and September 2009 dealt with superannuation in modern awards:

12 September 2008 – [2008] AIRCFB 717

“[29] We do not think it is appropriate that the Commission conduct an independent appraisal of the investment performance of particular funds. Performance will vary from time to time and even long term historical averages may not be a reliable indicator of future performance. We are

prepared to accept a fund or funds agreed by the parties, provided of course that the fund meets the relevant legislative requirements.”

19 December 2008 – [2008] AIRCFB 1000:

“[90] The terms of the exposure draft concerning the default fund provision were the cause of a number of submissions from employer and employee interests, from superannuation funds and the superannuation industry. We have decided to allow as a default fund any fund to which the employer was making contributions for the benefit of employees on 12 September 2008. This approach is likely to minimise inconvenience for employers. While funds other than those provided for will not qualify as default funds employees may still exercise their right to choose in favour of these funds.”

2 September 2009 – [2009] AIRCFB 800

“[66] In our view the nomination of default funds should be made on some readily ascertainable basis and one which does not lead to any disruption. For that reason it was decided to provide for named default funds as the primary basis. The secondary basis was any fund to which the employer was making contributions before 12 September 2008. That date was chosen because it was the date on which the exposure drafts of the priority modern awards were published.

[67] A number of funds have since made applications to be included as named default funds on the basis that the fund was nominated as a default fund in an award-based transitional instrument relevant to the coverage of the modern award or on the basis that the representatives of the main parties covered by the award consent. In our view either basis would constitute a good reason for the fund being specified as a default fund in a modern award. Where such grounds exist an appropriate application could be made. We do not intend to deal with such applications, however, in this decision.

[68] Returning now to the proposal that we should change the relevant date from 12 September 2008 to 1 January 2010, and assuming the proposal could be characterised as a transitional provision, we doubt whether such a variation would go to the heart of the matter. Most funds voicing objection to the default fund provision did so on the basis that they are fundamentally opposed to any limitation on the ability of an employer to choose the default fund. Simply substituting one date for another would not remedy that complaint. Indeed, it might create a deal of disruption in the industry between the publication of this decision and 1 January 2010.

[69] The relevant legislation provides for default funds to be included in awards. Our present view is that we should continue to provide for default funds where there is a history of award regulation of superannuation in the industry or occupation the modern award covers. It should be emphasised, however, that, self-evidently, the default fund provision only operates where the employee does not nominate a fund. The superannuation legislation enshrines the right of an employee to choose the fund into which the employer should make contributions. Consistently with the legislation the award provision does not limit an employee’s right to nominate a fund. Nor does it limit the ability of superannuation funds which are not default funds to

market their products to employees and employers. We have decided, on the basis of what has been put in the proceedings, not to alter the date of 12 September 2008.”

In relation to the questions regarding ‘interested parties’, the method of notifying parties is based on a subscription service available through the Tribunal’s website. All subscribers to relevant industries/modern awards are advised by email as material including applications to vary, submissions and directions regarding timeframes is posted to the website.

There are a number of other cases dealing with applications to vary default fund provisions in modern awards.