

19 December 2016

Mr Peter Harris AO
Chairman
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

The Honourable
Justice Iain Ross AO

by e-mail: Gwendoline.Bennett@pc.gov.au

Dear Mr Harris

Submission: Inquiry into alternative default models

I attach a submission to assist the Productivity Commission in its inquiry into alternative default models of superannuation.

The Commission's role is to administer its jurisdiction in accordance with statute. The Commission does not enter the legal policy debate other than where technical changes may make the administration of the law simpler. Accordingly, this submission does not respond to questions posed by the Productivity Commission that go to matters of legal policy.

I welcome any inquiries you may have regarding this submission and the operation of the Commission.

Yours sincerely,

JUSTICE IAIN ROSS AO
President

**SUBMISSION OF THE PRESIDENT OF THE FAIR WORK COMMISSION, JUSTICE
ROSS, TO THE PRODUCTIVITY COMMISSION INQUIRY INTO ALTERNATIVE DEFAULT
MODELS**

1. This submission is lodged in response to the Productivity Commission's Issues Paper into Alternative default models of Superannuation (the Issues Paper).
2. This submission does not address the majority of the issues raised by the Issues Paper. Rather it provides data on the existence of default superannuation in enterprise agreements and information relating to the Fair Work Commission's ("the Commission") inability to finalise the process established by section 159A of the Fair Work Act.

Background information on default superannuation terms in enterprise agreements

3. The Commission obtained data on clauses relating to default superannuation in collective agreements from the Department of Employment's Workplace Agreements Database (WAD).
4. The WAD data show that for agreements approved in 2015–16, 96.8% of agreements contained a superannuation provision. These agreements covered 98.8% of employees who were covered by a collective agreement in 2015-16.
5. Further, between 2010–11 and 2015–16, the proportion of agreements with clauses relating to superannuation has remained broadly the same.
6. For agreements approved in 2015–16, the following data are relevant:
 - 73.6% of agreements, covering 79.4% of employees, list one or more fund(s) which may be a default fund(s) or a mandated fund(s). In some cases the fund which is specified is listed as an example of the type of fund that the employer super contribution may go into.
 - Agreements that provide employees with an unrestricted choice of fund also often have a default fund which is specified and these agreements are included in the 73.6% figure.
 - There were, on average, 1.4 funds listed per agreement.
 - By industry, the percentage of agreements listing a fund(s) varied, ranging from 55.2 per cent (Mining) to 83.6 per cent (Health care and social assistance).
 - The proportion of agreements which have clauses specifying a default fund increases as the number of employees covered by the agreement increases. For example, 84.5 per cent of agreements covering more than 500 employees had superannuation funds specified as the default fund, compared with 70.7 of agreements covering between one and nineteen employees.

7. Between 2010–11 and 2015–16, the proportion of agreements with a fund listed has fluctuated, ranging from a low of 70.5% to a high of 77.5%, perhaps due to the mix of industries from which the agreements approved came in those years.

The role of the Commission in managing default funds in modern awards

8. Following the 2012 Productivity Commission review of default superannuation funds in modern awards, the Commonwealth Parliament passed legislation requiring that the Commission conduct a 4 yearly review of default fund terms in modern awards. The provisions are principally found in Division 4A of Part 2-3 of the *Fair Work Act*. These provisions create a two stage process for the 4 yearly review of default fund terms (s156A(2)).

9. In the first stage, the Commission must make the Default Superannuation List for the purposes of the review. This task is to be performed by an Expert Panel (s.617(4)(a)). Section 620(1A) provides that the Expert Panel constituted for this purpose consists of 7 Commission members and must include:

‘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.’

10. Three Expert Panel Members with experience and expertise in the financial services and superannuation fields were appointed in 2013.
11. Subsequently, two of these appointees disclosed potential conflict of interests precluding them from participating in the first stage of review. As a consequence of the decision of the Federal Court in *Financial Services Council Ltd v Industry Super Australia Pty Ltd and anor* ([2014] FCAFC 92), it was not possible to establish the Expert Panel on Superannuation in accordance with the Act. As a consequence the Commission has been unable to conduct the review of default superannuation funds. I have attached copies of the Statements I have issued dealing with this matter.
12. I have advised the relevant Ministers of the Commission’s inability to progress this review of default superannuation and sought their advice as to the Government’s intention on how to resolve this issue. My advice was provided in writing to Minister Abetz on 28 May 2014, 20 April 2015 and 9 July 2015, while Minister Cash was separately advised on 17 August 2016. Minister Abetz indicated that the Government was actively considering the issue in April 2015, but there have not been any further appointments made to the Expert Panel.
13. The Commission remains willing to complete the 4 yearly review into default superannuation funds if and when the Government appoints a new Expert Panel Member who does not have a potential conflict of interest on the issues.