



# 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, 10 JUNE 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] 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 due to 'potential conflicts' within the meaning of s.640 of the *Fair Work Act 2009* (Cth) (FW Act). 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.

[3] On 17 April 2014 I issued a Statement indicating that I would join the Expert Panel pursuant to s.622(3) of the FW Act.

[4] On 6 June 2014 the Federal Court in *Financial Services Council Ltd v Industry Super Australia Pty Ltd and Anor* NSD447/2014 by Order declared invalid my direction of 17 April 2014 that I would form part of the Expert Panel and declared that the Panel as currently purportedly reconstituted is not reconstituted as required under Subdivision B of Division 4 of Part 5-1 of the FW Act.

### Consequences of the Federal Court Order

[5] In consequence of the Order of the Federal Court, the Expert Panel as currently purportedly reconstituted will not deal further with matter AM2014/6.



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# 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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# 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.

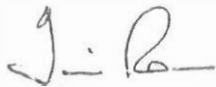
[14] Again I have regard to the "first stage criteria" in s.156F and to ss.156C(6) and 156N(5) of the FW Act. In my view it is likely that if Expert Panel Member Gibbs continues to deal with matter AM2014/6, he will receive confidential or commercially sensitive information about funds or entities that 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

[2013] FWC 8765

FAIR WORK COMMISSION

# STATEMENT

*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*

Schedule 5, item 6—Review of all modern awards (other than modern enterprise awards and State reference public sector modern awards) after first 2 years

*Fair Work Act 2009*

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

**Superannuation**

(AM2013/25)

JUSTICE ROSS

MELBOURNE, 7 NOVEMBER 2013

*Superannuation.*

[1] This statement sets out the processes the Fair Work Commission (the Commission) generally proposes to adopt in respect of its various responsibilities concerning the superannuation clauses in modern awards. The processes cover the:

- Transitional Review of modern awards (Item 6 of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*).
- Mandatory term for a defined benefit member (s.149A, *Fair Work Act 2009* (FW Act)).
- Funds offering a MySuper product (s.155A, FW Act).
- Four yearly reviews of default fund terms (Division 4A of Part 2-3 of the FW Act).
- Superannuation provisions in enterprise agreements (s.194(h), FW Act).

**Transitional Review of modern awards**

[2] Twelve applications have been made to vary the superannuation provisions in 22 modern awards as part of the Transitional Review of modern awards commenced in 2012. These applications seek to insert additional default superannuation funds into one or more modern awards. The applications are scheduled for hearing before a Full Bench of the Commission on 9 December 2013. The notice of listing for the hearing is on the Commission website at [www.fwc.gov.au](http://www.fwc.gov.au).

**2013 Review**

[3] There are two primary elements to the 2013 Review – including a mandatory term for a defined benefit member in modern awards and an examination of default funds to determine if they offer a MySuper product.

[4] Section 149A of the FW Act requires a modern award to include a term that permits an employer covered by the award to make superannuation contributions to a superannuation fund or scheme in relation to a default fund employee who is covered by the award and who is a defined benefit member of the fund or scheme.

[5] A “default fund employee” is an employee who has no chosen fund within the meaning of the *Superannuation Guarantee (Administration) Act 1992*.

[6] Section 155A(1) of the FW Act provides that a modern award must not include a term that has the effect of requiring or permitting superannuation contributions, for the benefit of an employee covered by the award who is a default fund employee, to be made to a superannuation fund or scheme specified in the award, unless it is a fund that offers a MySuper product or it is an exempt public sector superannuation scheme.

[7] These sections, together with Part 2 of Schedule 1 to the FW Act, require a review of all modern awards by 31 December 2013 to ensure they comply with ss.149A and 155A.

[8] As a result, during the last quarter of 2013 the Commission will:

- (a) consult with the Australian Prudential Regulation Authority (APRA) on the superannuation funds that offer a MySuper product;
- (b) publish for comment, draft determinations varying modern awards to ensure they comply with sections 149A and 155A; and
- (c) issue final determinations updating modern awards to comply with sections 149A and 155A.

#### **Four yearly reviews of default fund terms**

[9] Division 4A of Part 2-3 of the FW Act commences on 1 January 2014. The Division requires the Commission to conduct a four yearly review of the default fund terms of modern awards as soon as practicable after 1 January 2014.

[10] A “default fund term” is a term of a modern award that requires, permits or prohibits an employer covered by the award to make contributions to a superannuation fund for the benefit of an employee who is covered by the award and has no chosen fund within the meaning of the *Superannuation Guarantee (Administration) Act 1992*.

[11] The first part of the four yearly review is to be conducted by an Expert Panel of the Commission. The Expert Panel for the four yearly review comprises:

- a Chair, who is the President of the Commission, or a Presidential member appointed by the President to be Chair,
- three members who are Presidential or Commissioner members of the Commission, and
- three Expert Panel members who have knowledge of, or experience in, finance, investment management or superannuation.

[12] The second part of the four yearly review is to be conducted by a Full Bench of the Commission.



[13] The Expert Panel must make a Default Superannuation List and a Schedule of Approved Employer MySuper Products.

[14] A Full Bench then reviews the default fund term in each modern award and makes a determination varying the term to remove every specified superannuation fund, specify a number of superannuation funds in relation to standard MySuper products from the Default Superannuation List, make any transitional provisions and ensure the term complies with s.149D of the FW Act (including in relation to the Schedule of Approved Employer MySuper Products).

[15] A determination varying the default fund term of a modern award must not take effect before 1 January 2015.

[16] The four yearly review of default fund terms will be undertaken separately but in parallel with the other four yearly review of modern awards to be conducted by the Commission in 2014.

[17] Consistent with the requirements in the FW Act therefore, in early 2014 the Commission will publish notices inviting superannuation funds that offer a MySuper product, or employers to which an employer MySuper product relates, to apply to the Commission to have the product included in the Default Superannuation List or the Schedule of Approved Employer MySuper Products. Subject to confidentiality or commercial sensitivity issues, the applications made will be published by the Commission.

[18] The Commission will then invite submissions in relation to the applications and publish the submissions made. Subsequently, a determination on the MySuper products to be included on the list or schedule will be issued by the Commission and the list and schedule will be made and published.

[19] After that, submissions from prescribed persons on the default fund term of each modern award (including submissions requesting that a particular superannuation fund be specified in the term in relation to a MySuper product) will be sought and published by the Commission.

[20] Finally, the Commission will issue determinations removing the superannuation funds specified in the default fund term of each modern award, setting out the funds from the Default Superannuation List to be specified in the term and any transitional provisions, and varying the term to otherwise comply with the FW Act.

[21] A draft timetable for the four yearly review of the default fund terms in modern awards will be published shortly.

### **Superannuation provisions in enterprise agreements**

[22] From 1 January 2014, section 194(h) of the FW Act provides that a term of an enterprise agreement is an unlawful term if it is a term that has the effect of requiring or permitting contributions for a default fund employee to be made to a superannuation fund or scheme that is specified in the agreement which is not a fund that offers a MySuper Product, not a fund or scheme of which the employee and other relevant employees are defined benefit members, and not an exempt public sector superannuation scheme.

[23] Further information about the Commission's responsibilities concerning superannuation clauses in modern awards, including the requirements regarding its various reviews of such clauses and the timetable for its 2013 Review, is contained on the Commission's website at [www.fwc.gov.au](http://www.fwc.gov.au). All inquiries should be directed to [amod@fwc.gov.au](mailto:amod@fwc.gov.au).

PRESIDENT

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