Superannuation is an industrial right

Submission by the Australian Council of Trade Unions to the Productivity Commission's stage 3 inquiry into the *Competitiveness and Efficiency of Australia's Superannuation System* draft report

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Introduction

Since its formation in 1927, the Australian Council of Trade Unions (ACTU) has been the peak trade union body in Australia. There is no other national confederation representing unions. For 90 years the ACTU has played the leading role in advocating for workers for the improvement of wages, conditions and social welfare.

The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates. They have approximately 2 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

The ACTU and its affiliated unions founded industry superannuation and won the right for all workers to be entitled to super. The ACTU continues to be a leader in the superannuation sector, advocating to ensure workers retain their rights over their deferred wages, and that superannuation delivers adequate retirement outcomes for workers. The ACTU is the representative body for unions who represent workers' interests through the determination of Awards and Agreements of the Fair Work Commission.

This is relevant to the extent that the framework for establishing the current system of default funds is through this Award and Agreement system. As such the ACTU and its affiliated unions have been central players in the default system structures which have operated highly successfully within Australia for some 30 years.

The ACTU itself played a pivotal role in the establishment of superannuation through the negotiation of the Accord with the incoming Labor Government in 1983 which in turn led to superannuation being determined to be an industrial issue, the establishment of award provisions providing for payment of superannuation into prescribed funds and the establishment and stewardship of many of the new industry funds prescribed by the Award system. The ACTU subsequently played a major role, through iterations of the Accords, in the establishment of the Superannuation Guarantee Charge by the Federal Government. As such the ACTU remains one of the most significant ongoing institutions and representatives of workers to guide public policy in superannuation.

ACTU Primary Position in Relation to the Inquiry

The ACTU has consistently questioned the motivation of this inquiry, the soundness of the assumptions taken, and the approach from the Productivity Commission (the Commission). The inquiry has appeared from the outset a political tool by the Abbott-Turnbull Government to find ways in which to increase the presence of bank-owned for-profit super funds in the default sector.

At each stage of the inquiry, the ACTU has made submissions to the Commission representing workers' interests in the ongoing debate and deliberation. This submission builds upon the work already submitted.

While the evidence in the draft report *Superannuation: Assessing Efficiency and Competitiveness*[1] found that for-profit funds systemically underperform, the Commission makes no investigation as to the causes of underperformance nor the ongoing appropriateness of for-profit products in the default system. Rather it seeks to undermine the foundations of the default sector and its industrial basis which has been overwhelmingly successful for working people. As found in the draft report, the default sector has, on average, outperformed the choice sector, and the leaders in outperformance are not-for-profit industry super funds. This would not be possible without the processes of the Fair Work Commission where workers' voices are heard in the determination of their fund.

The draft report has recommended the decoupling of superannuation from the industrial space. This will cause significant harm to workers as their voice in determining defaults will be diminished by the proposed, Ministerially appointed panel. This is in stark contrast with the established and accepted principle that selection of superannuation funds is an industrial right. As argued in each of the ACTU's submissions during this review, in the Manufacturing Grocers Case (160CLR341) (1) the High Court determined superannuation to be an industrial matter. In its rule, the High Court observed:

> *"What is important for the purposes of this case is that claims made are, as we have said, no more than demands for the payment during the currency of an award or employer contributions to superannuation schemes which will take an approved form. It is because the claims are in this limited form that is, in our view, impossible to sustain the argument that they are not made with respect to industrial matters, whatever may have been the position had the claims been in a more elaborate form.*
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> *It may be observed generally that superannuation benefits are commonly regarded as being an aspect of the terms and conditions of employment … As a matter of common understanding, entitlement to participate in a superannuation scheme and the means by which that scheme is to be funded are matters which pertain to the relations between employers and employees and fall within pars. (b), (c) and (h) of the definition of industrial matters in s.4 of the Act."*

[1] Productivity Commission, 2018, *Superannuation Assessing Efficiency and Competitiveness*, Draft Report, Canberra

The High Court rightly found that it is a workers' right to claim for a particular fund as an industrial matter which could be legitimately determined as a matter for inclusion in an award. In the ACTU's view, it does not matter that the quantum of superannuation paid is the primary focus of this application; what remains a principle is that the claim by a Union for workers to have their superannuation contributions paid into appropriate (default) funds is still an issue which is in connection with employment and the general principle of matters relating to employment being able to be regulated as industrial matters still applies.

Workers have a longstanding and legitimate right to bargain for the conditions of employment that apply to them, and to do so on a collective basis. The Commission's proposal seeks to undermine this principle by separating superannuation as a condition which can be bargained for in awards.

The foundations for the Fair Work Commission's process (as legislated) were recommended by the Productivity Commission in 2012 and have yet to have an opportunity to be applied. When considering the process for producing a shortlist of funds that are suitable default funds there is little difference between what the Commission is proposing and what currently exists in law. The Commission is simply proposing that some body – any body – other than the Fair Work Commission determine default status. The Commission pays lip service to the system as legislated but ignores its previous recommendation that the system be allowed to operate for 10 years before being reviewed.

The Commission's draft report makes claims about the irrelevancy of the Fair Work Commission due to the changing nature of work, but does not make any recommendations which would extend the Superannuation Guarantee to those currently not covered. This discussion is used as an illogical premise to the conclusion that the Fair Work Commission is no longer a relevant body to determine default status. Universality of the Superannuation Guarantee is not addressed through the distribution of default funds, and if the Commission truly wished for those in non-standard work arrangements like contractors, gig-economy workers, those earning less than $450 per week, workers under the age of 18, or those with more than one job, it would recommend changes to the *Superannuation Guarantee (Administration) 1992* and the *Fair Work Act 2009*.

The national workplace relations tribunal is the only place to deal with issues about what is in workers' best interests. It does this beyond the traditional notions of pay and conditions, including dealing with issues such as flexible working arrangements to support caring, parenting and victims of domestic violence. Given the success of the Fair Work Commission in distributing defaults, any gaps which are found in its processes or gaps in the universality should be filled through improving the system – rather than throwing it out and starting again. This Commission's distaste for the Fair Work Commission is baseless and reflects the Government's antipathy to workers' rights along with the current default settings.

The inclusion of superannuation funds in awards is one of the most significant connections funds have to the cohorts of workers they cover. Industry super funds reflect these workers by having representatives of their industry and workforce as the custodians of their retirement savings. Industry super funds take great care to not only ensure the products (like insurance) are appropriate for their members as workers, but they have investment policies which reflect the values of the industry. In recommending decoupling awards from defaults, the Commission has fundamentally misunderstood both the history and philosophy of the industry fund movement.

The ACTU rejects this politically motivated inquiry clearly aimed at facilitating the entry of underperforming bank-owned super funds into Australia's default system. The system as legislated has not had any opportunity to determine default funds, and the Commission has made the recommendation to overturn the current system with no evidence. The Fair Work Commission must be allowed to do the work it is best placed to do, rather than being stalled by an ideological Government.

Improving the system

Australia's superannuation system must be improved to the benefit of members. The ACTU believes in and supports sensible reforms that will improve the universality of the Superannuation Guarantee and the adequacy of retirement incomes for all Australian workers. Systemic issues like the proliferation of multiple accounts should be solved through diligent application and facilitation by Government rather than taking a sledgehammer to the system. And the systemic underperformance of for-profit superannuation funds must force their exclusion from default status.

All workers should be entitled to receive employer-based contributions regardless of how they're engaged as a worker. Similarly, the $450 per month Ordinary Time Earnings minimum threshold for superannuation guarantee contributions should be abolished, along with any age restriction. Complementing these reforms would be the replication of the Superannuation Guarantee in the *National Employment Standards* with default funds applying to workers falling outside both awards and agreements. The default funds would be determined in the same way as legislated, through the Fair Work Commission.

Workers who change jobs or industries should have their funds follow to the next most appropriate default. With the advent of Super Stream and Single Touch Payroll, Government is able to determine when a member changes jobs to assist funds in transferring to the next most appropriate default fund. The work of Industry Super Australia through its Cross-Fund Matching programme has shown it is efficient and possible to ensure that the funds follow the worker. To

assist this, exit fees should be abolished and barriers preventing direct transfer from fund-to-fund should be eliminated.

For-profit superannuation funds should be excluded from defaults. For-profit superannuation has been a persistent, net drag on the system, and their inclusion as MySuper products have made workers poorer as a result. The Commission has found they exhibit systemic underperformance, but does not address the root causes of this. The model of for-profit superannuation funds is fundamentally inconsistent with the objective of delivering dignity in retirement for workers whose wages the system is 'entrusted' to invest.

For profit entities cannot simultaneously deliver the best results for members through the Sole Purpose Test and deliver maximum profits for shareholders. They are inherently conflicted and given their severe underperformance there can be no question that workers will continue lose if they continue to be given license to operate in the system. It should be based principle that the rights or benefits of employment should not be defaulted into a conflicted for-profit fund which charges exorbitant fees and pays dividends to large corporations. The benefits of employment should flow solely to workers.

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