March 14th 2012

Default Superannuation Funds in Modern Awards
Productivity Commission
Melbourne
VIC 3000

To whom it may concern,

The Fair Work Australia Act 2009 contains provisions enabling Fair Work Australia (FWA) to create criteria for default fund selection and delisting. However, it refuses to do so. FWA has failed to ensure governance, transparency, fund expertise, performance and, contestability are given proper consideration when determining a default superannuation fund within an award.

If FWA continues with this refusal then an independent body should evaluate the suitability of superannuation funds for default status and delisting.

1. How does an adjudicator (FWA) and advocates (employee and employer groups) without possessing an Australian Financial Services Licence (AFSL) be deemed capable of placing millions of employees and retirees into investments?

2. How can the Australian Prudential Regulatory Authority (APRA) and the Australian Securities and Investments Commission (ASIC) allow FWA to make investment decisions for employees' retirement when FWA does not have an AFSL or expertise in investment selection?

This is more disturbing when FWA has the power to establish criteria for default fund selection and delisting but refuses to do so.

3. The Fair Work Australia Act enables FWA to create such criteria.

Division 2 of the Act deals with "Establishment and functions of Fair Work Australia". Section 578 addresses matters FWA must take into account in performing functions. It states-

"In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), FWA must take into account:

> (a) the objects of this Act, and any objects of the part of this Act; and
>
> (b) equity, good conscience and the merits of the matter; and
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> (c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin"

Under S578 (b) FWA must take into account the equity, good conscience and the merits of the matter in default fund selection and delisting. This provision enables FWA to establish such criteria.

In other words FWA must take into account matters including governance, transparency, conflicts of interest, fund fees, performance and, contestability.

In 2008 the then Superannuation Minister Nick Sherry in a submission to FWA's predecessor, the Australian Industrial Relations Commission asked that a process be developed for default fund selection. FWA in 2008 decided against thus.[1]

Section 590 of FWA deals with "Powers of FWA to inform itself". This provision also enables FWA to develop criteria for default fund selection.

A federal government could compel the FWA to develop criteria. Under Section 597 there is a "Minister's entitlement to make submissions to FWA".

Recent decisions by FWA on default funds show its failure to act in accordance with the provisions of the FWA Act.

Last year FWA permitted the MTAA Superannuation Fund access to retail sector employees. The application was made by the Australian Manufacturing Workers Union (AMWU). The two AMWU officials making the application before FWA, Ian Jones and Alix Sachinidis were trustees of MTAA Superannuation Fund.[2] The applicants had a conflict of interest.

MTAA Superannuation Fund was under investigation by APRA. The MTAA balanced fund was ranked 49 out of 49 over the three (3) years to June 2010. Yet FWA approved the MTAA Superannuation Fund application.

Last year employer group, the Australian Information Industry Association backed an application before FWA for AMP's main superannuation fund to be listed as a default fund. The Australia industry Group (AIG) opposed the application. AIG claimed AMP had no standing under workplace law to make the application. FWA upheld AIG's objection rejecting AMP's application. Had AMP's application succeeded it would have been able to compete with industry funds.[3] AIG has links to industry fund Australian Super. AIG CEO at the time, Heather Ridout is also a member of the Australian Super Trustee Board.

[1] " Super fund faces blowtorch as motoring body revs up for change"- Adele Ferguson- The Age 5 July 2011

[2] "Union pushes workers into super loser"- David Crowe- Australian Financial Review 9 June 2011

[3] "AIG blocks AMP super expansion"- Business Spectator 28 June 2011 and "AMP Super out in the cold" - David Crowe – Australian Financial Review 28 June 2011

If these two examples are typical of FWA's "forensic" approach to default fund selection then it is abrogating its responsibility to the millions workers and retirees reliant on FWA to ensure their retirement savings are in funds that perform, and have best practice in governance, disclosure and transparency.

Louise Staley of the Institute of Public Affairs looked at various super funds and uncovered substantial differences of disclosure of funds.[4] According to Staley, "Some funds are clearly trying hard to properly disclose their assets, their trustees and any conflicts; others are a brick wall of non-disclosure," Staley says. "Such divergence shouldn't exist in a system where all these funds are deemed appropriate as default funds for even the most financially illiterate workers."

Staley in a report identified 12 people controlling $188 billion of industry superannuation funds and a complex web of associated entities. "With greater concentration comes greater risk that only adequate disclosure can ameliorate," she says.

Staley goes to say on the existing default fund system-"This gives the default fund massive market power and advantage over non-default funds. In many respects the default funds process creates and sanctifies anti-competitive, oligopoly-like market power in superannuation."

Australians deserve criteria for default selection and delisting. Time is overdue for FWA to perform this function under the existing provisions of the FWA Act. If FWA refuses the federal government should compel it to do so or create an independent body to assess the suitability of superannuation funds for default status and delisting.

Vincent Mahon

[4] "Spotlight on super transparency"- Adele Ferguson – The Age March 20 2010