AIST response to questions asked by the Productivity Commission in public hearings on Default Superannuation Funds in Modern Awards

August 2012

Introduction

This document responds to two questions directed to the Australian Institute of Superannuation Trustees by the Productivity Commission at the public hearing in Melbourne on 30 July 2012 concerning the Draft Report on Default Superannuation Funds in Modern Awards.

The first question was an invitation to further develop the proposal for superannuation single issue enterprise agreements previously made by AIST. It was suggested that this may be difficult to implement in practice. AIST made this proposal as an alternative to providing unilateral employer discretion to opt-out, and the "how to" details provided below supplement the "why not" reasons given by AIST in opposing employer opt-out.

The second question was to ask about the extent to which AIST supported the removal of grandfathering provisions in modern awards that allow employers to make superannuation contributions to their previously selected default fund. AIST's previous submission supported the removal of grandfathering (but not as an adjunct to employer discretion), but we took the invitation to provide a more detailed response on notice. In this document, AIST outlines a smooth and efficient process for the removal of grandfathering that does not result in significant disruption.

These proposals will also be incorporated into the "AIST Response – Productivity Commission Draft Report – Default Superannuation Funds in Modern Awards" that will shortly be submitted to the Productivity Commission, and should be read in conjunction both with that document and with AIST's previous submission to this inquiry.

An alternative to employer opt-out: superannuation single issue enterprise agreements

AIST's initial submission to the Productivity Commission proposed that single issue enterprise agreements dealing with superannuation be permitted, as an alternative to allowing unilateral employers opt-out. This section addresses how such an arrangement might work.

Section 57 of the Fair Work Act states that the provisions of modern awards do not apply where an enterprise agreement applies to an employee. Therefore, under existing legislation, the making of a single issue agreement, including one covering superannuation, would void the operation of the relevant award, not just in relation to the subject matter of the agreement but in relation to all matters.

Comprehensive enterprise agreements are able to include superannuation provisions that may nominate a default fund or a mandatory fund. If it does not (and it may not), an employer is able to choose any fund as the default fund, even if the previously applicable modern award included a prescribed list of default funds. This is a consequence of the operation of section 57.

Over 40% of enterprise agreements do not have a superannuation clause that nominates a default or mandatory fund, although numerous enterprise agreements include numerous provisions of the relevant modern award by reference.

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AIST submits that both the effective inability to make a single issue enterprise agreement concerning superannuation, and the existing capacity to opt-out from superannuation provisions using the enterprise agreement mechanism are flaws in the Fair Work system that should be addressed by legislative changes.

AIST recommends that subsection 57(1) of the Fair Work Act (Interaction between modern awards and enterprise agreements) be amended so that:

1. Where an enterprise agreement does not include provision for superannuation, the applicable superannuation provision is either that prescribed:

    a. in a single-issue enterprise agreement covering superannuation that applies at the enterprise; or

    b. in the absence of a single-issue enterprise agreement covering superannuation, in the modern award(s) that would otherwise apply at the enterprise.

2. Where an enterprise agreement is solely concerned with superannuation, the operation of the enterprise agreement does not displace the coverage of the modern award(s) applying at the enterprise.

3. An enterprise agreement concerned solely with superannuation should, as a minimum, nominate a default fund or a mandatory fund, make reference to applicable superannuation legislation, require employer contributions at the level and frequency required by superannuation legislation, and allow for voluntary employee contributions. It will also be required to fulfil the other mandatory requirements for an enterprise agreement (eg, a dispute resolution clause).

The implementation of this proposal would enable superannuation to be "carved-out" as an industrial matter at an enterprise agreement while still remaining within the auspices of the Fair Work system. It would enable an enterprise-wide solution that addressed the minimum factors for default selection (which unilateral employer out-out does not), while not otherwise requiring negotiation of a complete code of conditions in circumstances where the enterprise is otherwise satisfied with the conditions prescribed in the modern award. This may also be a cost-effective outcome for the enterprise.

It also provides a solution that accommodates corporate funds while ensuring that their selection meets minimum criteria.

Grandfathering

The Productivity Commission draft report makes numerous references to existing grandfathering provisions in modern awards that allow employers to make superannuation contributions to their previously selected default fund.

The Productivity Commission concluded that, irrespective of the reform option chosen, the reformed process would include the removal of existing grandfathering provisions from modern awards. This conclusion was, however, reached in the context of also proposing unilateral employer opt-out: a proposal with which AIST strongly disagrees.

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The draft report notes that AIST is opposed to grandfathering continuing in its present format. This section addresses a process for the removal of grandfathering, and ameliorating its consequences.

AIST proposes the following smooth and efficient process for the removal of grandfathering:

1. From the date a modern award or enterprise prescribes default or mandatory funds that meet the minimum criteria for selection, all new employees who have not chosen a super fund must have their superannuation paid into a prescribed fund.
2. Within 12 months of a modern award or enterprise prescribing default or mandatory funds that meet the minimum criteria for selection, an employer must conclude the following process in relation to their employees whose default contributions are paid into a grandfathered fund:
    a. Advise all employees of the prescribed default or mandatory funds that meet the minimum criteria for selection in relation to the employer, including material providing an explanation of the "best interest for members" basis for this.
    b. Specifically advise these employees that their superannuation contributions will not be paid into the grandfathered fund from a specified date within the 12 months, and identify the *future destination for default contributions*.
    c. Also advise these employees that they have Choice of Fund, how this choice can be exercised (using material similar to that provided to new employees) and options for account consolidation.
    d. Contributions previously made to the grandfathered fund to remain in the grandfathered fund, unless the employee elects to transfer their benefit in the grandfathered fund to the new default fund.
3. The same process to be followed in the event of a fund being removed from a list of prescribed funds in a modern award or enterprise agreement.

Once a superannuation contribution is made by an employer to a super fund, it forms part of the benefit of the super fund member. Notwithstanding the reason for a super fund losing default status, it cannot or should not be transferred without the member's knowledge or consent. However, it is also in the public interest that the member knows about the consequences of their super fund losing default status in relation to their *accrued benefit*.

Accordingly, AIST recommends that the previously grandfathered fund be required to advise employees whose default contributions were previously paid into the fund:

a. That the fund will no longer be able to accept their default contributions.
b. That another (specified) fund will be receiving their contributions from a (specified) date.
c. The reasons for this.
d. The options available to the member, being:

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i. remaining in the fund;

ii. transferring their accrued benefit into the new default fund; and

iii. transferring their accrued benefit into another fund chosen by the member.

e. A standard form to give effect to these options should be provided to the member.

This is not a perfect solution but it has to be weighed against the confusion that would result from the transfer of benefits without the member's knowledge or consent from one fund about which a member may only be vaguely aware to another fund about which a member may also likely be unaware.

This proposal should be considered in conjunction with AIST's proposal for superannuation single issue enterprise agreements. AIST suggests that it is a better public policy outcome for corporate super funds that have been chosen by an employer to be identified and regulated by means of an enterprise agreement than to be outside a transparent selection process.

About AIST

The Australian Institute of Superannuation Trustees (AIST) is an independent, not-for-profit professional body whose mission is to protect the interests of Australia's $450 billion not-for-profit superannuation sector. AIST's members are the trustee directors and staff of industry, corporate and public-sector superannuation funds, who manage the superannuation accounts of two-thirds of the Australian workforce.

AIST is a registered training organisation and has recently expanded its education program to encompass the growing and changing needs of all members of the not-for-profit superannuation sector.

AIST offers a range of services including compliance and consulting services, events - both national and international - as well as member support. AIST also advocates on behalf of its members to relevant stakeholders.

AIST's services are designed to support members in their endeavour to improve the superannuation system and build a better retirement for all Australians.

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