

22 January 2016

Mr Ian Beckett
Division Head
Retirement Income Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: superannuation@treasury.gov.au

Dear Division Head

**Exposure Draft: Superannuation Legislation Amendment (Governance) Bill 2015:
Extending superannuation choice to Enterprise Agreements and Workplace
Determinations**

This submission has been prepared by the Law Council of Australia's Superannuation Committee, which is a committee of the Legal Practice Section.

It contains brief comments on the Exposure Draft Superannuation Legislation Amendment (Governance) Bill 2015: Extending superannuation choice to enterprise agreements (**the Bill**) and the Explanatory Statement for that Bill.

The Bill amends the *Superannuation Guarantee (Administration) Act 1992 (Cth)* (**the Act**).

The objectives of the Superannuation Committee are to ensure that the law relating to superannuation in Australia is sound, equitable and clear, by providing submissions and comments on the legal aspects of proposed legislation, circulars, policy papers and other regulatory instruments which affect superannuation funds.

Paragraph 32C(6)(h) – enterprise agreements

The Act currently provides that choice of fund requirements can be met by employer contributions made under, or in accordance with ' (h) an enterprise agreement '.

The proposed amendment to paragraph 32C(6)(h) is to the effect that a contribution complies with choice of fund requirements if made under or in accordance with an enterprise agreement, only where the enterprise agreement is 'made' before 1 July 2016.

As mentioned in the Explanatory Statement, an enterprise agreement is 'made' when a majority of employees vote to approve the agreement. However an enterprise agreement does not have any operation unless there is an approval by the Fair Work Commission (**FWC**). If an enterprise agreement is made but is not approved by the FWC, the agreement never comes into operation.

The operation of the proposed amendment to paragraph 32C(6)(h) is problematic in circumstances where an enterprise agreement is approved by a majority vote of employees before 1 July 2016, but is not then approved by the FWC:

- The employer could rely on the agreement that was approved by the employees, as the agreement has been 'made', even if the agreement never comes into operation.
- The employer could not continue to rely on an existing agreement that the new agreement is proposed to replace, even if the new agreement never comes into operation and the existing agreement continues to apply.

We suggest that, to avoid uncertainty, the amendment to paragraph 32C(6)(h) should refer to an enterprise agreement 'approved by the Fair Work Commission' before 1 July 2016.

Alternatively, the amendment to paragraph 32C(6)(h) could refer to an enterprise agreement made before 1 July 2016 and approved by the Fair Work Commission.

Explanatory Statement – subsection 32C(6AA)

Further, it would be helpful if paragraph 1.14 of the Explanatory Statement includes an additional comment to the effect that where a pre-1 July 2016 enterprise agreement or workplace determination ceases to apply, this does not of itself give rise to an obligation of the employer to give a Standard Choice Form to employees who were covered by that agreement or determination.

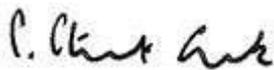
Explanatory Statement – subsection 20(3A)

For clarity, we think it would be helpful if paragraph 1.16 of the Explanatory Statement includes an additional comment to the effect that this is a technical amendment, to ensure that s 20, which sets out circumstances where an employer is deemed to comply with choice of fund requirements for the purposes of calculating whether the employer has a notional quarterly shortfall under subsection 19(2B), applies in all circumstances where under section 32NA the employer is not required to give a Standard Choice Form to an employee entitled to defined benefits (subsections 32NA(7), (8) and (9)).

Contact details

If you have any questions about this submission, please contact the Chair of the Superannuation Committee's Legislation and Policy Sub-committee, Tony Nemeč, on 02 8864 6974 or the Chair of the Superannuation Committee, Michelle Levy, on 02 9230 5170.

Yours sincerely



S Stuart Clark AM

PRESIDENT

president@lawcouncil.asn.au