



26 May 2017

Mr Adam Dansie
Senior Manager, Industrial Relations
Local Government NSW
GPO Box 7003
SYDNEY NSW 2001

Dear Mr Dansie

AM2014/234 – Local Government Industry Award 2010

On [14 June 2016](#) Local Government NSW on behalf of the combined State and Territory Local Government Associations (jointly the LGA) wrote to the Fair Work Commission (the Commission) in response to directions given in transcript at the Mention on [7 June 2016](#). These Directions were issued by the President, Justice Ross in matter [AM2014/234](#) – the 4 yearly review of the *Local Government Industry Award 2010* (the LG Award).

Correspondence from the LGA

In its correspondence, the LGA advised the Commission of changes to the trading names of two default funds listed in clause 12.4 of the [further revised exposure draft](#) of the LG Award:

1. On 1 July 2012 “Local Super” merged with “StatewideSuper” with the merged fund using the trading name “StatewideSuper” from 1 January 2013.

The reference to “Local Super” is obsolete and should be deleted and replaced with a reference to “StatewideSuper”.

2. On 30 November 2015 “Quadrant Superannuation Scheme” merged with “Tasplan”. The effect of the change is that Quadrant Superannuation Scheme ceased to exist from 1 December 2015. Tasplan continues to exist as a default superannuation fund for the Local Government industry.

The reference to “Quadrant Superannuation Scheme” is obsolete and should be deleted.

The LG Award

Clause 20.4 of the current LG Award states:

20.4 Superannuation fund

Unless, to comply with superannuation legislation, the employer is required to make the superannuation contributions provided for in clause 20.2 to another superannuation fund that is chosen by the employee, the employer must make the superannuation contributions provided for in clause 20.2 and pay the amount authorised under clauses 20.3(a) or (b) to one of the following superannuation funds or its successor:

(a) LGsuper;

(b) Local Government Superannuation Scheme (LGSS);

(c) Quadrant Superannuation Scheme;

(d) Tasplan;

(e) Vision Super;

(f) WA Local Government Superannuation Plan;

(g) City of Perth Superannuation Fund;

(h) Local Super;

(i) any superannuation fund to which the employer was making superannuation contributions for the benefit of its employees before 12 September 2008, provided the superannuation fund is an eligible choice fund and is a fund that offers a MySuper product or is an exempt public sector scheme; or

(j) a superannuation fund or scheme which the employee is a defined benefit member of.

(emphasis added)

APRA superannuation fund information

It appears from the information supplied by the LGA and material on the [APRA website](#) that members of the [Quadrant Superannuation Scheme](#) were transferred to the [Tasplan](#) fund through a 'successor fund transfer'. This means that the Tasplan fund is the successor fund to the Quadrant Superannuation Scheme within the meaning of the LG Award's default fund term.

Similarly, the modern award term permits contributions to be made to [StatewideSuper](#) as the 'successor fund' to [Local Super](#). It appears that the requested variation to the default fund term would not effectively alter the operation of the LG Award.

While it is not necessary for clause 20.4 of the LG Award to be amended to permit an employer to make contributions to Tasplan or StatewideSuper, it may be desirable to update the list of funds to remove any ambiguity or uncertainty.

The 4 yearly review of modern awards

The 4 yearly review of modern awards, of which AM2014/234 is a part, is being undertaken under s.156 of the *Fair Work Act 2009* (the FW Act). Section 156(2)(c) relevantly states:

(2) *In a 4 yearly review of modern awards, the FWC: ...*

(c) *must not review, or make a determination to vary, a default fund term of a modern award.*

(emphasis added)

Power to vary default fund terms

The Commission has limited powers to vary default superannuation fund terms under the FW Act. The Commission must review and may vary a term under s.159A—4 yearly reviews of default fund terms (see also ss.156B–156U). The review of default funds is separate to the review of modern awards.

Reviewing default superannuation fund terms

In 2013 the Commission undertook a review of default superannuation funds in accordance with ss.149A and 155A of the FW Act (these sections have since been repealed.) The superannuation clause in the LG Award was amended as part of the 2013 review, with effect from 1 January 2014, to remove funds that did not comply with the requirements of the FW Act. Accordingly clause 20.4 of the LG Award met the requirements in s.149D at that time (see [PR546113](#) and [\[2013\] FWC FB 10016](#)).

It should be noted that while the Commission is under a legislative obligation to conduct 4 yearly reviews of default fund terms under s.156A, it has not been able to do so because there are not enough Expert Panel Members available to constitute an Expert Panel (see [\[2014\] FWC 3840](#)).

Outside a 4 yearly review of default fund terms, modern award default fund terms may only be varied pursuant to s.159A – *Variation of default fund term of modern award* or under the more

general provisions of s.160 – *Variation of modern award to remove ambiguity or uncertainty or correct error.*

It is not clear whether s.159A may be applied to an award that has not previously been subject to a 4 yearly review of default fund terms. However, even if it may be applied, s.159A does not provide for variation of a default fund term to *add* an additional superannuation fund or to *replace* a specified fund with a successor fund as proposed by the LGA. The FW Act only permits the Commission to *rename* or *omit* a fund in certain circumstances.

Varying default superannuation fund terms outside a 4 yearly review

Given the uncertainty as to the application of s.159A and the inability of the Commission to vary a default superannuation fund term as part of the current 4 yearly review of modern awards, it may be more appropriate for the Commission to consider a variation to clause 20.4 of the LG Award under s.160 of the FW Act. Section 160 is set out below:

160 Variation of modern award to remove ambiguity or uncertainty or correct error

(1) The FWC may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.

(2) The FWC may make the determination:

(a) on its own initiative; or

(b) on application by an employer, employee, organisation or outworker entity that is covered by the modern award; or

(c) on application by an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award; or

(d) if the modern award includes outworker terms—on application by an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker terms relate.

(emphasis added)

The LGA may consider making an application under s.160 of the FW Act to address an ambiguity or uncertainty arising from the current term (see [Form F46](#) – Application to vary a modern award).

If such an application were made, the Commission may provide other interested parties an opportunity to make submissions on issues including:

- whether the Commission has the jurisdiction under s.160 of the FW Act to vary a default superannuation term in the manner proposed;
- whether Tasplan and StatewideSuper are successor funds to Quadrant Superannuation Scheme and Local Super respectively; and
- whether StatewideSuper is a fund that should be included in the LG Award.

Noting the above the Full Bench asks that LGA advise whether it continues to press its proposed amendments to clause 12.4 under the terms of the 4 yearly review, or whether, it now withdraws those amendments. If the LGA continues to press the amendments we invite submissions about how it is said the Commission has the power to make the amendments. Any submission must be filed by close of business on Friday, 9 June 2017.”

Please contact the Commission at amod@fwc.gov.au if you have any questions regarding this process.



Catherine Luby
MEMBER SUPPORT TEAM