

From: AMOD

Sent: Wednesday, 20 December 2017 11:27 AM

To: 'Blake.robson@lgnsw.org.au'

Subject: AM2017/38 - Application to vary the Local Government Industry Award 2010
[SEC=UNCLASSIFIED]

Dear Mr Robson,

Re: [AM2017/38](#) - Application to vary the *Local Government Industry Award 2010*

Please see the Memo attached; the research has been prepared by the Modern Awards Team for Commissioner Johns' consideration.

The Commissioner has indicated that he is inclined to accept the recommendations contained in the Memo and has requested that it be forward to you for review. The Commissioner has asked that the Local Government and Shires Association of New South Wales make further submissions in reply to the Memo by **4.00 pm on Friday 12 January 2018**. At that time, can you please confirm whether you are content for the matter to be determined on the papers or whether you would like to request an oral hearing.

Please forward your response and submissions to amod@fwc.gov.au. If we can be of any further assistance please do not hesitate to contact us by phone or return email.

Kind regards,

Elise Lima-Bosworth

Member Support Research Team

Fair Work Commission

Tel: 03 8656 4714

amod@fwc.gov.au

11 Exhibition Street, Melbourne Victoria 3000

GPO Box 1994, Melbourne Victoria 3001

www.fwc.gov.au



Memo

To: Commissioner Johns	Date: 7 December 2017
From: Modern Awards Team	
Email: amod@fwc.gov.au	Contacts: Lucy Fitzpatrick Elise Lima-Bosworth
Subject: AM2017/38 - Application to vary the <i>Local Government Industry Award 2010</i>	

Key points:

The Local Government Associations (LGA) [applied to vary](#) clause 20.4—Superannuation fund of the *Local Government Industry Award 2010* [[MA000112](#)] (LG Award) as follows:

1. To **remove** Quadrant Superannuation Scheme from the list of default super funds, because it merged with Tasplan; and
2. To **remove** Local Super from the list of default super funds, and **replace** it with Statewide Super, as the funds have merged and Statewide Super is not currently listed in the LG Award.

LGA submits these variations are necessary as the aforementioned mergers within the superannuation industry render clause 20.4 of the LG Award ambiguous and/or uncertain. LGA submits it requires remediation by the Commission pursuant to its powers under s.160 of the [Fair Work Act 2009](#) (the FW Act).

This memo addresses whether the Commission has the jurisdiction to make either of the variations sought by the LGA under s.160 or any other section of the FW Act.

Recommendations:

This matter may be determined on the papers because there has been no request for an oral hearing.

There has been no contradictor to provide a submission in reply so there are no objections to the variations being made. The lack of submissions has meant there have been no jurisdictional arguments ventilated.

- In previous matters the contradictors have been other funds listed on a modern award's default fund list who object to the inclusion of a new fund or another interested party that does not agree that the new fund has any relevance in the industry.

The following change does not appear to fall within the scope of ss.157–160 or any other jurisdiction open to the Commission:

- The Commission cannot **add** new super funds to the list of default funds outside of 4 yearly review of default funds under s.156A, which is not currently on foot. As such, Statewide Super cannot be added to clause 20.4 of the LG Award

The following change could potentially be made within the scope of s.160 of the FW Act:

- **Delete** Quadrant Superannuation Scheme from the list of default super funds in clause 20.4 of the LG Award. This variation may be possible on the basis that it may cause ambiguity or uncertainty about whether contributions can still be made to the fund, as it has now merged with Tasplan, which is also on the list in clause 20.4 of the LG Award

LGA's two claims are not interdependent, therefore it is possible to remove Quadrant Superannuation Scheme, whilst Local Super will remain on the list pending the outcome of the 4 yearly review of default super fund terms in due course.

Alternatively, the Commission may decide to make no variation to the LG Award and allow the 'successor fund' principle to resolve any queries about which fund to pay into.

- It should be noted that Statewide Super has already undergone a number of company name changes since in commenced trading in 1999. It may not be practicable for modern awards to be varied every time a fund's name changes given the frequency with which it occurs and the lack of communication between the funds and the Commission.

The Modern Awards Team can assist with drafting a decision and a determination if that would be of assistance.

Background:

On 24 February 2015, LGA sought to amend clause 20.4 of the LG Award by way of a [submission](#) to the 4 yearly review of modern awards ([AM2014/234](#)). LGA applied to remove Local Super from the list and replace it with Statewide Super. Submissions with respect to Quadrant and Tasplan were added on [14 June 2016](#).

The Commission [wrote](#) to LGA on 26 May 2017 explaining that under s.156(2)(c) of the FW Act “the Commission ‘must not review, or make a determination to vary, a default fund term of a modern award’ as part of the 4 yearly review of modern awards”.¹

- In that correspondence, the Commission suggested that LGA could consider making an application under s.160. The resulting application is the subject of this memo.

Local Super, Quadrant Superannuation Scheme & Tasplan were listed in clause 20.4 of the LG Award when the modern award was [made](#) on 4 December 2009.

Part 2 of Schedule 5 to the [Fair Work \(Transitional Provisions and Consequential Amendments\) Act 2009](#) required the Commission to review all modern awards to consider if they were achieving the modern awards objective, and operating effectively after the second anniversary of the Fair Work (safety net provisions) commencement day (1 January 2012). The Review concluded on 31 December 2013.

- Local Super was removed from clause 20.4 of the LG Award under the Transitional Review pursuant to the now repealed provisions of the FW Act.²
- Under the Review, default super funds were removed from modern awards if they did not offer a MySuper product. Local Super was deleted from the LG Award under the Transitional Review, even though it offered a MySuper product ([\[2014\] FWCFB 3206](#)).

Statewide Super submitted s.160 should be used to give effect to expired transitional provisions of the FW Act (see [\[2014\] FWCFB 3206](#)), specifically to include Statewide Super within the LG Award because it is the successor fund to Local Super (see [deed](#) executed 28 June 2012).

- The Full Bench confirmed that the relevant transitional sections did not require a fund to be deleted from a modern award if its successor fund offered a MySuper product. Therefore the Full Bench was not required to exercise its discretion under s.160 to insert Statewide Super in the LG Award.
- The Commission exercised its powers pursuant to s. 160 to reinstate Local Super within clause 20.4 of the LG Award.

Statutory framework:

Pursuant to s.160, the Commission may vary a modern award to remove ambiguity or uncertainty or to correct an error. Per the [Explanatory Memo](#) to the *Fair Work Amendment Bill 2012*

“The FWC may also vary a default fund term outside 4 yearly reviews of default fund terms to remove an ambiguity or uncertainty, or to correct an error, in accordance with section 160. This is consistent with the overall approach to the variation of modern awards, which is tightly circumscribed outside of 4 yearly reviews” (at [87]).

Because Statewide Super **merged** with Local Super, it is not a change of name situation; it is effectively a new company and a new product.

- There is no obvious link between Local Super and Statewide Super online. In practice, no new members could join Local Super but any existing clients would have been transferred to the successor fund at the time when the merger occurred.

Per s.156A, the Commission must conduct 4 yearly reviews of default fund terms. S.156C limits standing to submit to the list to “superannuation funds that offer a standard MySuper product”. LGA lacks standing under this provision.

- On 24 April 2014, Statewide Super [applied](#) to be listed as providing a standard MySuper product on the Default Superannuation List of LG Award under s156C. The review is currently not on foot as there are not enough Panel Members available to constitute an Expert Panel ([see Statement](#)).

S.159A permits the FWC to vary a default fund term of a modern award to reflect a change in name, or to omit a fund if it has ceased to exist. The FWC cannot add new super funds under this provision. As the inaugural 4 yearly review of default funds is currently in stasis, and the LG Award was made by [order](#) on 4 December 2009, it would appear s. 159A is not useful to this submission.

Conclusion:

The Commission may:

- Dismiss both variations; or
- Grant the variation to remove Quandrant Superannuation Scheme only.

The Commission may not grant the variation to replace Local Super with Statewide Super. Removing Local Super with no replacement could vary existing entitlements and obligations so it may be preferable to retain Local Super and allow employers to pay into a 'successor fund'.

¹ cited in [\[2017\] FWCFB 3433](#) at [81]

² ss.149A and 155A and clauses 10 and 11 of Schedule 1