TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

JUSTICE HATCHER, PRESIDENT
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT CLANCY

AM2022/29

s.157 - FWC may vary etc. modern awards if necessary to achieve modern awards objective

Modern award superannuation clauses review

Sydney

11.11 AM, WEDNESDAY, 13 SEPTEMBER 2023

Continued from 13/07/2023

PN41

JUSTICE HATCHER: I will take appearances. Ms Bhatt and Ms West, do you appear for the Australian Industry Group?

PN42

MS R BHATT: Yes, your Honour.

PN43

JUSTICE HATCHER: Ms Tinsley and Mr Farrow, you appear for the Australian Chambers of Commerce and Industry?

PN44

MS J TINSLEY: Yes, your Honour.

PN45

JUSTICE HATCHER: Mr Kemppi, you appear for the ACTU?

PN46

MR S KEMPPI: Yes, thank you, your Honour.

PN47

JUSTICE HATCHER: Mr Doukas, you appear for the Australian Public Service Commission?

PN48

MR N DOUKAS: Yes, your Honour.

PN49

JUSTICE HATCHER: Ms Abousleiman, you appear for the CEPU?

PN50

MS Y ABOUSLEIMAN: Yes, your Honour.

PN51

JUSTICE HATCHER: Mr Maxwell and Ms Wiles, you appear for the CFMMEU?

PN52

MR S MAXWELL: Yes, your Honour.

PN53

JUSTICE HATCHER: And, Mr Womersley, you appear for the UWU?

PN54

MR E WOMERSLEY: Yes, your Honour.

PN55

JUSTICE HATCHER: All right. Unless the parties have reached some alternative, agreed upon some alternative course of action I think because the ACTU is the main proponent of a contested change we will have the ACTU followed by the other unions go first. The employer groups can then respond and

we will see how we go from there. There's no disagreement about that, Mr Kemppi? I should indicate obviously we have read the parties outlines of submissions.

PN56

MR KEMPPI: Thank you, your Honour. I have had a very quick preliminary chat with Ai Group, and I believe ACCI is on board with the order of events, so we're happy to go first followed by affiliates as you suggest. Then of course the employer interests and potentially some replies, but as you say let's see how we go from there.

PN57

Another housekeeping matter I would like to raise is that the CPSU cannot be present at the moment, but they have given me some instructions. I'm happy just to take you through at the end of my submission what it is that they might say in support of - - -

PN58

JUSTICE HATCHER: Yes.

PN59

MR KEMPPI: - - - submission, but it will be just some fairly quick comments.

PN60

JUSTICE HATCHER: Yes.

PN61

MR KEMPPI: I will go in now to our submission. Firstly I want to talk about two things, one being superannuation in general, and I won't give the three hour history of superannuation, I will try to keep it quite quick. Then of course the modern awards objective and the purpose of this exercise.

PN62

In terms of superannuation I think there's some solid context in terms of the nature of the scheme which informs the exercise that we're embarking on. In essence superannuation arises out of a social compact made decades ago where certain increases in wages were forewent in light of increase retirement savings that were compulsory in their nature. The underlying legislative mechanism which gives effect to superannuation contributions is based on the Commonwealth's taxation power and requires employers to pay a super guarantee charge based on a shortfall calculated by the salary and wages, choice liability, nominal interest and administration. If they fail to make valid superannuation contributions to a fund that can accept those contribution and is complying under APRA's rules.

PN63

That all sounds quite complicated, and one of the key issues here is whether or not this is a complicate scheme or a simple scheme and what it is we do about that. Central we say to the employer submission is that the answer lies in superannuation law, and for reasons I have just gone through superannuation law is particularly complex and particularly tricky and not a lot of people understand it. I certainly won't put my hand up saying I'm somebody who understands

superannuation as well as others do, and I've been on the board of a super company, and I am an industrial lawyer. I don't have much faith, no offence to them, but I don't have much faith that the average small business owner is able to look at a reference to go look at superannuation law and proceed from there and figure out exactly what they need to do in terms of their superannuation obligations.

PN64

Not only is superannuation complicated, it's complicated and it's evolved recently in a particularly significant way. We have moved from superannuation as it's been applied for an extended period of time where there are default funds and then there is choice of fund, into an arrangement where there is now something called a stapled fund, which is distinct from chosen fund. And there's an entire process that employers must embark upon to identify that stapled fund and then work out where to allocate their contributions to, noting that there's a further requirement around whether or not a fund can in fact accept those contributions, which is also new.

PN65

Now, at this point I will just very briefly pause. I had intended to make a quick reference to the explanatory memorandum to the Your Super - Your Super (indistinct) choice changes. Now, just on that front would it be best if I look to the explanatory memorandum and the (indistinct) clause for a moment and then take the Bench to that, or rather just to simply cite it and take the Bench to those provisions and provide the link later?

PN66

JUSTICE HATCHER: So if you send us the link, Mr Kemppi, my associate will send it to the Bench and we will open it. Is that convenient?

PN67

MR KEMPPI: Fantastic. I will do that now. Thank you. And that should be with you shortly.

PN68

JUSTICE HATCHER: All right. We are just still waiting, Mr Kemppi. We will tell you when we're ready.

PN69

MR KEMPPI: Thank you.

PN70

JUSTICE HATCHER: It's just taking a while to load, Mr Kemppi, so bear with us.

PN71

MR KEMPPI: Thank you.

PN72

JUSTICE HATCHER: It probably would have been easier to Google it.

PN73

MR KEMPPI: Perhaps while we're waiting, your Honour, there is one case that I will refer to in a moment. Should I perhaps to save time send a link to that now, or - - -

PN74

JUSTICE HATCHER: That sounds like a very sensible idea. All right, mine is loaded now.

PN75

MR KEMPPI: Thank you. Shall I proceed?

PN76

JUSTICE HATCHER: Yes. We have got a working majority I think.

PN77

MR KEMPPI: I hope the anticipation of the wait has been worth - - -

PN78

JUSTICE HATCHER: Yes.

PN79

MR KEMPPI: I fear it may not. Not only is superannuation particularly complicated, the entire underlying mechanism of superannuation is already complicated. I draw the Bench's attention to this explanatory memorandum to highlight that not only was it complicated it has changed in a very significant way, and that change is highlighted on page 7 and 17 of the explanatory memorandum under the headings respectively 'Comparison of key features of the new law and current law'.

PN80

On page 7 the Full Bench will see that there is a comparison of the new law to the current law, and I won't take you exactly through that, but it does show that there's a scenario described where an employee has a stapled fund and no chosen fund. The current law has no equivalent. There's a scenario where an employee has a stapled fund and the employee is prevented from satisfying choice of fund, and the current law is very different.

PN81

There's a third scenario where again there is no equivalent in the current law. That comparison of key features is in my view the best illustration of just how much has changed and how big a change it is. The introduction of stapling is a very significant thing that, in our submission, employers who were doing things a particular way may not necessarily be fully across, and in our submission it is insufficient to say simply go look at superannuation law to find the answers.

PN82

On page 17 there's a description of the changes with respect to the annual performance testing. Again for all of those things you see no equivalent. The notion of what's in the industry book 'best in show' and funds not being able to accept contributions because of the annual performance test is entirely

new. Again, in our submission, it might reasonably catch many employers by surprise that they cannot contribute for this reason to a fund that they have already been contributing to for many years.

PN83

Stepping back from the complexity of superannuation, and in fact irrespective of how complex superannuation is, its scheme as part of the industrial landscape is particularly important, and we say that there is a strong need to ensure superannuation contributions are made correctly. And to the extent that the Commission can best assist in that process we say the Commission should be minded to do so in this matter.

PN84

Going now to the modern awards objective, here I will refer very briefly to the decision that I have just sent around in a moment. But before I do I just want to talk about the general significance of the modern awards objective. We acknowledge that this isn't an application made under section 157, but that said even though we're in territory of uncertainty, error, ambiguity, the modern awards objective is particularly relevant.

PN85

And our submission is that the relevance of that is that it would be counterintuitive and perhaps inefficient to come to an outcome for this process, which then left awards susceptible to an application made under 157 because they were found lacking in terms of their meeting the modern awards objective. So in our submission the modern awards objective is a relevant factor. It's not the basis for the application that's being made. In fact this is on the Commission's own motion. So it's not the fundamental underlying impetus for movement here. But that said we say that it should be a relevant consideration to the outcome of this process.

PN86

And one of the factors in particular in the modern awards objection is section 134(g), 'The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia.' In terms of simplicity and being easy to understand one of the central contests between the ACTU and the union position and the employer position is how best to achieve that simplicity. We say that simplicity and ease of understanding doesn't necessarily come from streamlining and having less. Sometimes explanation is key to achieving simplicity and ease of understanding.

PN87

With that point made, your Honour, I will just simply very quickly refer to the case that I have emailed around and I will just give the citation. It is [2021] FWCFB 4144, a Fair Work Commission Full Bench case concerning the casual award terms review. Just to highlight the relevance of the modern awards objective I point to that case, particularly at paragraph 45 where in that case even in a matter where it wasn't particularly clear that the modern awards objective was relevant, the Commission nevertheless considered that the objective had some relevance. In this case that precise sort of technical question about is it relevant doesn't arise. We say that case though bolstered the case for this present matter

where the modern awards objective is particularly relevant in terms of the end state that we get to has an (indistinct) for this.

PN88

Further, going to the efficiency of this process and what I said before around it being perhaps counterintuitive to leave us in a point where a separate application would subsequently need to be made to ensure compliance with the modern award objective I point to section 581 and the functions of the president. Of course as you know, your Honour, are actually (indistinct) that of course as you know you're responsible for ensuring that the Commission exercises its powers in a manner that is efficient. We say that it would be particularly inefficient to lead us - to have us land in a place where subsequent section 157 applications need to be made.

PN89

I will speak now to what is agreed and what is not agreed generally speaking between the parties. There is substantial agreement between the parties. There is agreement that there should be no change to the category 1 awards. As a caveat we say to that that that's subject to any view that might be put by a particular affiliate as to their industry circumstances of their particular award, but generally speaking we all are alike around the fact that the category 1 awards don't necessitate any particular change. We also agree that the category 2 and category 3 awards - - -

PN90

JUSTICE HATCHER: If we just pause there, for the purpose of 160 the parties in effect agree that there's no ambiguity, uncertainty or error, and that circumstances we do not have the power to change the category 1 awards. Is that effectively what's being put?

PN91

MR KEMPPI: Yes, your Honour.

PN92

JUSTICE HATCHER: That is it's not a discretionary choice, but that is there's nothing that gives rise to a power.

PN93

MR KEMPPI: Yes, and my colleagues will correct me if I am wrong, but, yes.

PN94

JUSTICE HATCHER: Yes, all right.

PN95

MR KEMPPI: As to the category 2 and the category 3 awards we agree that the current clauses do not deal with stapling. We agree that the current clauses do not deal with the performance requirements and the ability for a fund to accept contributions based on those performance requirements. Those are fairly simple matter of fact propositions. Moreover, and again my colleagues will correct me, moreover we agree that the clauses are therefore inconsistent with those new

requirements, and that for reasons of ambiguity, uncertainty or error the Commission does have jurisdiction to deal with those awards.

PN96

What's really not agreed is what the Commission does next, how it is that that problem is fixed, and there are two competing alternatives put forward. One, as put forward by the employer groups, is an effectively minimalist solution which refers to superannuation law, and in our submission or on our observation of that proposal assumes a level of familiarity with the reader of any modern award when interpreting their obligations for entitlements.

PN97

The second put forward by the unions is a solution which clearly sets out what an employer must do to meet their important superannuation obligations. And for the benefit of the reader makes it so that a worker can understand what it is their employer must do and what it is that they're entitled to when it comes to superannuation. It is submitted by the ACTU, unsurprisingly, that the union position as set out in our position paper is the preferable solution.

PN98

Turning now to the powers of the FWC, and I won't go too lengthily into this, but it is set out in our written submission. Section 160 gives power to the Commission to vary a modern award to remove ambiguity, uncertainty or to correct error. The central premise, in our submission, in that section is that the Commission may make a determination, and the purpose of the determination is to remove the ambiguity, uncertainty or error.

PN99

On its face and in line with the purpose of that section we say that it's clear that the purpose is about resolving the ambiguity, the uncertainty or the error itself, conceptually resolving the uncertainty, as opposed to simply being a mere power to excise certain words. This, in our submission, is a provision which allows the Commission to fix the underlying problem, not simply to cut words out. So it's a solution focused section, in our submission. It's more than simply removing some words. It gives the Commission obviously the power to insert new words which resolve an uncertainty or lead to a situation where there is no uncertainty.

PN100

For that reason we say that the Commission should go as far as is necessary to resolve the actual ambiguity, uncertainty or error, and that the resultant state should be one in which there is no such ambiguity, uncertainty, et cetera. The employers advance a more minimalist case and a more minimalist set of changes, which we say would residually leave behind some of that uncertainty.

PN101

ACCI at paragraph 6.7 of their submission cites the decision of Commissioner Bissett in *Australian Payroll Association*. It's at paragraph 7 of ACCI's submission. The citation is [2021] FWC 6228. And I will simply read their extract which says:

PN102

The purpose of the variation must be only to remediate the error identified and should avoid creating any new error, have an unintended consequence or result in ambiguity or uncertainty.

PN103

ACCI appears to advance that set of words for a slightly different proposition, to support a slightly different proposition to the one which I'm advancing. We say that the case does not stand for the proposition advanced in paragraph 6.7 by ACCI. In fact we say that extract supports the case that we are making, that it would be inherently undesirable to fix an ambiguity, uncertainty or error only to either create a new ambiguity, uncertainty or error, or to leave behind residually some level of ambiguity, uncertainty or error. And we say that appears to be what Commissioner Bissett was contemplating at that point.

PN104

Moreover, immediately above that paragraph at 96 of that decision the Commission considered the adequacy of a proposed variation, and immediately below that passage at 101 the Commissioner reached a state of satisfaction that their only proposed variation would leave the award in a position where it continued to meet the modern awards objective. We say reading the extract and the parts around it in full supports the case that we are making, which is in essence that the Commission should approach this task with a view to getting rid of any ambiguity, uncertainty or error around these provisions and ensuring that the award meets the modern awards objective, particularly around the simplicity and ease of understanding.

PN105

JUSTICE HATCHER: That appears to assume that the purpose of clauses in these categories is to explain anything about employers' obligations to make super, but that's not their function, is it? The existing clauses, I think if we take for example the Clerks Award - just give me a second - 10.1(b), it says, 'The rights and obligations in these clauses supplement those in the superannuation legislation.' So isn't the starting point that the clauses aren't trying to explain the obligations, because they're set out in the legislation themselves, but to add additional or supplementary obligations, and it's simply a case of ensuring that the expression of those supplementary obligations are not expressed in a way which would lead an employer not to comply with the legislation?

PN106

MR KEMPPI: I take your point, your Honour. Now, this does get to the heart of another central analytic contest between the unions and the employer groups. At 6.7 of the submission there's a submission made about employers generally do not - by the employer groups - there's a submission made that employers generally do not consult modern awards for guidance regarding their superannuation obligations.

PN107

We would take a different view to that. We accept that the fundamental purpose of an award might be to confer rights and entitlements. However, with the lens of ambiguity and uncertainty we would say that the award should go so far as is necessary to ensure that there isn't uncertainty about those provisions. And in

circumstances such as this where there is quite a significant degree of underlying complexity with the ultimate law, an explanatory statement which eases the uncertainty would be particularly helpful, such as that which we have set out.

PN108

In terms of the broader purpose of modern awards, modern awards enterprise agreements, other agreements which set out rights and conditions, are really intended to be perhaps not one source of truth, but certainly something that employers, employees, unions and employer groups can look at and very quickly identify sets of rights and obligations, whether or not they're the ultimate source of those rights, whether or not they're the first source of those rights.

PN109

We say that for something this complex, to answer your question, even if it's not the primary purpose of the award to create the obligation to pay superannuation, and nor could it be given the complexities of the taxation power, et cetera, we are of the view that in terms of meeting that objective to create an awards system that is simple and easy to understand, and for that matter practical and capable of application, some explanatory work does need to be done. So whether or not, to go to your point, whether or not that is the fundamental purpose of this clause we say that it is necessary to do so to have some level of explanation, because only through having some level of explanation, in our submission, is it possible to resolve that uncertainty.

PN110

The other option if we were to adopt the employer groups submission would be simply to have very little reference to the existence of stapling and the annual performance requirements, and lead employers to a fairly impractical situation where they would have to develop some level of expertise in superannuation law. The only guidance they would have would be a very short reference in that clause saying effectively go look at superannuation law if you want to know what to do.

PN111

In terms of practicality we say that would be a particularly impractical solution. It would offer no guidance, and putting ourselves in the shoes of most employers and most employees would leave them in a state where they were fairly uncertain, in our submission, as to what it is they're required to do.

PN112

JUSTICE HATCHER: We are not curing uncertainty in the minds of people using the award, we're trying to cure uncertainty in the expression of the obligations in the award. I mean for example you're not suggesting that we put the percentage in the clause, and by virtue of the fact that the clause doesn't express what the percentage is or percentage of what. That by itself means employers have to look somewhere else to find out what their payments obligations - it's not the purpose of the clause to try and explain how much they have to pay for each employee. So I am just wondering what is the purpose of attempting a partial explanation of some complex matters, but when leaving other fundamental matters out.

PN113

MR KEMPPI: In terms of ancillary and supplementary clauses we say that the clauses - the provisions we sought to insert essentially step out the process that's required of an employer, and it's common for industrial instruments to have those sorts of clauses. In essence, in our submission, they describe what it is that an employer must do. There are some necessary explanatory words that go to that, as in it's difficult to step out the process of stapling without explaining what stapling is and how it arises, et cetera. But there is a purpose of industrial instruments in awards to step out procedural obligations, and we say that our clause does that in a way that the employer clause does not, and that that is part of creating an award system that is simple and easy to understand.

PN114

We take your point that, yes, the legal ambiguity or the legal uncertainty is that the primary thing to fix here, however taking into account the modern awards objective, the underlying goal of having an award system that is easy to understand and easy to apply and practical and those sorts of sentiments, we say that there is no reason to hold it back from some level of explanation and some level of prescription as to the procedure and some level of description therefore of what it is that an employer must do.

PN115

In short the contest between us is around whether or not putting in more prescription into the award would cure the uncertainty and whether it's necessary to do so. We say that it is. We note that the ACCI submission appears to equate there being more guidance with complexity and in turn with uncertainty. We say the opposite to that. We say this is a case that calls for a slightly greater level of prescription in order to cure that uncertainty. The lack of that explanation in the employer groups proposal in our submission would lead to a residual uncertainty, the sort of uncertainty that in Commissioner Bissett's decision is to be avoided. For that reason we submit that the Commission ought adopt the ACTU position as it is outlined.

PN116

Before I turn to a few very quick points for the CPSU I might just pause there to say that those are the submissions of the ACTU, subject to whether there are any questions from the Bench.

PN117

DEPUTY PRESIDENT CLANCY: Just for my part your submission seems to be underpinned by superannuation's inherent complexity warrants the approach that you've outlined in your submissions. Is that the distinguishing feature you would say lies when one compares it to those sort of clauses in the award that simply reference the National Employment Standards?

PN118

MR KEMPPI: I would say firstly to that that we certainly say that the inherent complexity of superannuation and some of its idiosyncratic features warrant what we are proposing in this matter. That's not to say that this level of prescription might never be warranted with respect to say for example annual leave, even though that's in the NES, so without necessarily getting to that. For this case we

would say that there are a couple of salient differences. One is superannuation is particularly complex. It is particularly complex compared even to industrial law, which is also quite complex at times.

PN119

There's a second difference as well, which is that at least when it comes to things that point to the NES like annual leave, the personal leave for example, the answer is found within the rubric of industrial law. Awards are created under the Fair Work Act and the answer to a question in the award about interpretation is to be found in the parent legislation in the Fair Work Act.

PN120

Here we're dealing with an entirely different legislative scheme, and that's another reason which we say warrants pulling in some of the description and some of the prescription around the procedure. Yes, we understand that the NES provides for superannuation payments to be made, but as to the content of stapling, whether or not a fund can accept contributions and various other features of how it is that superannuation operates at the fund level and at the new employee and employment level, those answers are found in superannuation law which sits outside of the traditional Fair Work Act system. So we say that's a slightly distinguishing factor to the scenario in which it might be in some cases sufficient, but perhaps not all, to simply point to the NES and say there it is over there.

PN121

DEPUTY PRESIDENT CLANCY: Thank you.

PN122

JUSTICE HATCHER: All right. So the CPSU matters.

PN123

MR KEMPPI: Thank you. The CPSU position as I have been instructed is broadly similar to the ACTU, but it wouldn't be public sector employment without some unique peculiarities. The broad thrust of the CPSU position is that for the award they have a particular interest in and they do have an interest in categories 2, 3, 4 and 6, but particularly some of the awards in categories 4 and 6, for example the APS Award, which I understand they have submitted a draft clause on.

PN124

The sentiment behind their proposed changes is essentially the same as that which is put forward by the ACTU in our position. In essence it is to refer to stapling and refer to the fund requirements. The complexity or the slight difference of course is that in the public sector there are a number of different funds, some which like the PSS and the CSS, and there is precursors to those schemes, defined benefits funds and operate differently. The main fund of course in the accumulation side or the defined contribution side is PSSap.

PN125

So for the clauses that deal with the PSSap and accumulation funds they would say to essentially follow the principles behind the ACTU submission and make those changes, which they have helpfully set out in their draft, whilst also keeping

in tact the defined benefits. So as you turn to those awards you will see that there's probably a slight difference in approach for certain clauses or certain paragraphs of certain clauses given that some of them with defined benefits, and it's not the case where somebody might be in a defined benefit - or, sorry, where all people are in a defined benefit or people are in accumulation, some workers will be in each so there is a need to cater for both.

PN126

But in essence the thrust of their submission is that the principles outlined in the ACTU position paper should be followed for their award. So they add a reference to the NES. They maintain reference to the relevant public sector defined benefit schemes, which are unaffected by these changes. They add that where an employee is not a member of the defined benefits scheme, hasn't exercised choice or has a stapled fund, then the employer contributions are made to the PSS accumulation plan - ap - and (indistinct) reference to the reasons, the facts and reasons that a fund may not be able to accept those contributions. In essence those are the submissions that I put on behalf of the CPSU. Once again I am happy to take questions, but I will confess it's been some time since I have been at the CPSU. I'm not (indistinct) across it, but happy to take some questions either now or perhaps on notice for the proper advocate from the CPSU.

PN127

JUSTICE HATCHER: All right, thank you. All right, we will just turn to the other unions first. Ms Abousleiman?

PN128

MS ABOUSLEIMAN: Thank you, your Honour. The CEPU lively supports and adopts the position of the ACTU. We have an interest in category 2 and 3. So our preference is to adopt the CEPU's position, which is the detailed clauses are more beneficial for the readers. Thank you.

PN129

JUSTICE HATCHER: Mr Maxwell?

PN130

MR MAXWELL: Thank you, your Honour. Your Honour, the CFMMEU C&G supports the written submissions of the ACTU and the other unions, and the ACTU position on the clause for category 2 awards as filed on 4 August 2023. The CFMMEU C&G opposes the clause for category 2 awards set out in the AiG position paper of 4 August on the basis that it fails to specifically mention the staple fund requirements, the amended superannuation legislation and the restrictions on making contributions to underperforming funds.

PN131

Failure to identify these new requirements is likely to mislead employers and employees as to their superannuation requirements under the superannuation legislation and the award, a point raised by the former president Ross J in paragraph 8 of the 28 September 22 statement. In these proceedings there is no inconsistency between the award and the NES as it currently stands, or as the NES will be on 1 January 2024. There are inconsistencies between the award, superannuation clauses and the amended superannuation legislation which are

confusing and which create uncertainty for readers as to their entitlements or obligations. We submit it is therefore appropriate that the Commission act pursuant to section 160 of the Fair Work Act to remove the uncertainty.

PN132

The AiG and ACCI submissions essentially propose that the Full Bench take a minimalist approach to varying the awards to remove the uncertainty. They argue that the changes proposed by the ACTU are not necessary for the purposes of section 138 of the Fair Work Act. The ACCI goes further and claims that the ACTU's proposed variations exceed the intent of the scope of the review and are impermissible if the Commission relies on section 160, the jurisdiction to vary the awards.

PN133

We submit that AiG and ACCI are clearly wrong on all counts. The purpose of the review is set out in paragraph 6 of the 10 October 2022 statement, and that provided that as outlined on the 28 September 2022 statement that the proposed review has limited purpose; to consider the variation of award superannuation clauses so far as necessary to ensure that employers and employees are not misled by the award clauses as to their obligations under current superannuation laws. The particular concern is with the requirements in respect of stapled funds, staple superannuation funds and underperforming superannuation funds.

PN134

The former president clearly articulated that the purpose of the review was to ensure that employers and employees are not misled in regard to the requirements in respect of stapled superannuation funds and underperforming superannuation funds. There is no mention of either of these specific requirements in the course proposed by the employer parties, and therefore their proposed clause fails to adequately address the uncertainties that arise.

PN135

As set out in the ACTU's submission at paragraphs 13 and 16 once the Commission has identified the uncertainty the Commission's jurisdiction to act pursuant to section 160 is enlivened, and the Commission's task then becomes discretionary.

PN136

It is well within the powers of the Full Bench to determine what is necessary for the purposes of section 138 of the Fair Work Act. We submit that the variations in the ACTU's proposed clause are necessary because of the additional amendment made to the superannuation legislation identified in background document 1 published on 28 September 2022 at paragraphs 43 and 75. This amendment dealt with the enforceability of award clauses requiring contributions to be made to a particular superannuation fund.

PN137

The specific provision can be found in section 32Z of the Superannuation Guarantee (Administration) Act 1992. This section states that:

PN138

A requirement in a Commonwealth industrial award or a Territory industrial award that an employer make contributions to a superannuation fund on behalf of an employee is not enforceable to the extent that the employee instead makes the contributions on behalf of the employee to another superannuation fund: (a) in compliance with this part in a case where the other fund is a chosen for the employee; or (b) in compliance with subsection 32C(1A))about contributions to stapled funds); or (c) in compliance with subsection 32C(2AB) in a case where subparagraph 32C(2AB)(b)(iii) applies (about contributions to a successor fund of a stapled fund).

PN139

This section of the Superannuation Guarantee (Administration) Act 1992 clearly has an impact on the operation of the superannuation clauses in the awards. To ensure that an employer's obligations and employee entitlements are fully understood, and that employers and employees are not misled in regard to the operation of the award requirement to make contributions to particular funds identified in the award, it is necessary that both parties are informed by the award and requirements of the superannuation legislation in regard to stapled funds and non-performing funds, particularly where these matters are not dealt with in the NES.

PN140

The ACCI further claims that employers generally do not consult modern awards for guidance regarding their superannuation obligations, while they provide no evidence for this claim. This claim is disturbing given that most awards contain additional obligations over and above the superannuation legislation. Employees however are likely to be well versed in requirements of the superannuation legislation or be in frequent contact with the ATO on superannuation matters. There would be more (audio malfunction) on the award to understand their superannuation entitlements.

PN141

The CFMMEU C&G therefore submits that the variations proposed by the ACTU are necessary and that the Full Bench should adopt the clause proposed by the ACTU.

PN142

JUSTICE HATCHER: All right, thank you. Ms Wiles?

PN143

MS WILES: Thank you, your Honour. The CFMMEU Manufacturing Division, we filed a submission on 1 September and we continue on rely on the contents of that submission. We support and adopt the submission of the ACTU, both their written submissions and the oral submissions of Mr Kemppi earlier this morning, and also the oral submissions of Mr Maxwell this morning as well on behalf of the Construction and General Division.

PN144

And there's just a couple of points that I wish to emphasise. The position of ACCI and Ai Group and their position in terms of the proposed variations as we have understood and heard is incredibly minimalist. There's no reference at all in their

proposal to the issue of stapled funds or non-performing funds. These as Mr Kemppi indicated are quite complex issues and the average award dependent worker is probably unlikely to understand without there being some express reference to them what their employer's obligation is in relation to that and also what their own entitlements would be. We also want to raise - - -

PN145

JUSTICE HATCHER: But again they're not going to get that understanding from the ACTU's clause, are they?

PN146

MS WILES: They won't get a complete understanding, but it's a sign post. It's basically saying that - and Mr Kemppi made this point very well I think, that there's been a long history of awards providing provisions around default funds. And I think generally there's some understanding of that amongst most sectors. But these are significant changes which will significantly impact on what is a default fund effectively and what flows from that is the obligations on employers to make contributions.

PN147

There's a sort of overarching issue I think to all this, and we make this point in our submissions, that I think it's well acknowledged the systemic underpayments and non-payment of superannuation in Australia is chronic. From information that's contained in various reports it's more likely to happen in low paid workplaces and award dependent workplaces. So we think there is a case that a variation should sufficiently make reference particularly to those new developments, so that at least a person reading the award at least become aware of them. The other issue that - it's a discrete issue - - -

PN148

JUSTICE HATCHER: Sorry, just pause there. These issues don't really go to the issue of non-payment as such. That is the main function of the award clauses which we're talking about varying in reference to which fund the payment is to be made. And it seems to me that changes to the legislation affect the issue of which funds the payment is to go to, and the changes would be to ensure that employers don't breach the law by paying it to a fund which doesn't comply with the law. But that's got nothing to do with non-payment or underpayment, does it, which is an entirely different issue. There doesn't seem to be any version of these clauses would deal with that issue.

PN149

MS WILES: You're correct in a sense that it is a systemic wide-spread issue that an award (indistinct) in of itself cannot address, but in terms of making an award term that deals with super, a very important entitlement, in our submission there needs to be sufficient detail or sign posting so that an employer understands which fund they do have to contribute to legally. If they contribute to a wrong fund or fail to make a contribution or to a fund that cannot accept it, then that's another every day that goes on, that's a day that an employee doesn't have superannuation in their account.

PN150

So, yes, we concede that the bigger issue is not (indistinct) for award terms, but I don't think you can ignore the issue either. To have, as the employer groups would submit, to have an award term that doesn't even reference stapled funds or non-performing funds we say will lead to residual ambiguity for readers of the award, on a practical level.

PN151

The only other issue I want to raise, and we didn't raise this in our written submission, is that the Textile Clothing and Footwear Award is one I think of two awards that does actually include provisions that deals with the percentage contribution, and it's contained in Schedule F of that award which deals with outworker and related provisions. And there's an appendix to Schedule F which is required to be given to outworkers about their legal rights under the award and under super, and that schedule does include a percentage. So we say that it would be appropriate as part of this process for - I think it currently sits on a half per cent for that provision to be amended to at least include - - -

PN152

JUSTICE HATCHER: Sorry, Ms Wiles, I am just trying to pull it up. What schedule is it?

PN153

MS WILES: It's Schedule F, outworker and related provisions.

PN154

JUSTICE HATCHER: Yes.

PN155

MS WILES: And then there's an appendix to Schedule F which follows the main schedule, which is information which is required to be given to outworkers in the TCF industry by principles when they're given work.

PN156

JUSTICE HATCHER: Yes. So what do we do with the amounts?

PN157

MS WILES: In our submission it should be varied to reflect the current amount. Now, obviously this is legislated to increase each year. By way of background as part of the annual wage review - I know that's a different process, but the amounts in that schedule are (indistinct) each year as part of that decision. I just think for current purposes at a minimum it should be varied to reflect the current percentage.

PN158

JUSTICE HATCHER: In that expression 'approved fund' is that defined somewhere?

PN159

MS WILES: I'm not sure that it is. I think historically the schedule, or the appendix to the schedule was designed to be in some plain language so that people could understand it, but I don't think it is defined.

PN160

JUSTICE HATCHER: On the logic of your submissions that appendix would need some explanation of stapled and non-performing funds so that outworkers know which fund they can expect their payment to be made into.

PN161

MS WILES: I think that's correct unless the Bench ultimately decide to adopt the ACTU position, in which case there could be a reference back to the substantive superannuation clause.

PN162

JUSTICE HATCHER: That would vitiate the purpose of this appendix, wouldn't it, which is meant to be a self-contained brief explanation in plain language.

PN163

MS WILES: Yes. Well, we'd probably need to give that a bit more consideration. But, yes, that's a good point that you raise about what is an approved fund.

PN164

JUSTICE HATCHER: Ms Wiles, can I invite you to - you don't have to do this overnight - to think about it and in due course file what you would see as an appropriate variation to that appendix.

PN165

MS WILES: Yes, we can do that, thank you.

PN166

JUSTICE HATCHER: All right.

PN167

MS WILES: Other than that they're our submissions, your Honour.

PN168

JUSTICE HATCHER: All right. Mr Womersley?

PN169

MR WOMERSLEY: The UWU adopts the submissions provided by the ACTU and other unions and doesn't intend to provide any further submissions. Thank you.

PN170

JUSTICE HATCHER: All right. Ms Bhatt, do you want to go next?

PN171

MS BHATT: Yes, your Honour, thank you. Your Honour, we continue to rely on the position paper that we filed on 4 August and our written submission of 7 September. And for the reasons set out in that submission we say that our proposed variations should be preferred over those of the ACTU. Today I propose to supplement those submissions by dealing with three short points. Just before I move to those I should say that Ms Wiles has today from the Bar table made various factual assertions about the underpayment or non-payment of

superannuation. Just for completeness I note that those assertions are not accepted, they're contested.

PN172

Dealing with the first substantive issue, which relates to the ACTU's proposal, the ACTU has argued in these proceedings that awards should serve as a manual for employers in relation to superannuation obligations, and there's some overlap between the submissions we make now and the exchange that your Honour has had with Mr Kemppi and others this morning.

PN173

Whether you consider the superannuation terms in the context that applied before the recent legislative amendments to the superannuation laws or after, one way or another modern awards have not and do not serve that purpose of being a manual of the nature that's described by the ACTU. By and large superannuation provisions sign post the applicable legislation, and to that end all three peak bodies, including Ai Group, have proposed that the provision should be amended to now also refer to the NES for completeness. And they also deal with some supplementary matters such as employer contributions, identifying default funds and the like. Superannuation provisions do not and have not sought to reproduce superannuation legislation or to create obligations that run in parallel to that legislation. We say that that's quite appropriate.

PN174

Moreover, as your Honour has already observed this morning even if the ACTU's proposal were adopted awards would not serve the purpose that the ACTU seeks. Various aspects of superannuation, rights and entitlements, would not be dealt with expressly by awards, and it would remain the case that employers would need to consult superannuation legislation to properly and exhaustively understand their obligations.

PN175

The ACTU relies on section 160 of the Act, and is of course well known to the Commission section 160 grants the Commission power to vary an award to remove an ambiguity, uncertainty or error, and it seems that the ACTU relies on the uncertainty element of that provision primarily, not exhaustively. We would say that the adoption of the ACTU proposal would go well beyond simply removing any uncertainties that have arisen from the interplay between awards and the relevant superannuation legislation.

PN176

Not only would they remove any such elements of the clause, they would replace them with detailed provisions that purport to summarise or explain the relevant elements of superannuation legislation. Potentially erroneously, for reasons that I will come to in a moment, but in any event as a matter of merit we'd simply say that it's not appropriate for that proposal to be adopted for the reasons set out in our written submissions.

PN177

Turning then to the second point, which is a submission that's been made by ACCI regarding the operation of stapled fund laws, and ACCI deals with this

issue at paragraph 2.15 of their submissions. It might be convenient for the Bench to turn to that if they have it to hand.

PN178

JUSTICE HATCHER: Yes.

PN179

MS BHATT: I will briefly summarise to what is put there, but in effect ACCI says:

PN180

In relation to the stapled fund laws that an employer is not obligated or required to request the Commissioner of Taxation to identify or make contributions to a stapled fund to comply with superannuation legislation. An employer may make that request.

PN181

And then it goes on to say that it might not make that request.

PN182

Instead it's free to make contributions to a fund that is contrary to choice of fund requirements. This does not constitute a breach of superannuation law. Rather additional liability to pay superannuation guarantee charge arises.

PN183

JUSTICE HATCHER: If you stop there. Wouldn't that lead to a contravention of the NES provision?

PN184

MS BHATT: I think that's the submission that ACCI goes on to make, that one way or another - but I think the point that's being made is that in a technical sense under superannuation law alone there is not a mandate upon employers to make an enquiry of the ATO. Now, that explanation taken in isolation, I think, differs somewhat from - and I say this respectfully - the description of stapled fund laws that was published in the Commission's background paper. It differs from the understanding that we have had, and for much of the secondary material that was cited, including what has been published by the ATO.

PN185

But I just wanted to note for today's proceedings, for the purposes of today's proceedings, that what has been put by ACCI doesn't alter the substance of what we have proposed. So put another way even if that's the case the variations that we say should be made to the relevant award provisions continue to need to be made. And also to highlight that that analysis potentially strengthens the force of our arguments against the ACTU's proposal, and in particular the introduction of their proposed text at clause 22.1(b), which is set out in their position paper on the first page.

PN186

Those provisions, or that proposal purports to require an employer, the employer must ask of the ATO if the employee has a stapled superannuation fund, and then it goes on to set up the process that follows. It would seem that that would in fact create an inconsistency with the relevant superannuation legislation that it purports to summarise.

PN187

Finally, your Honour, if I can just deal very briefly with the issue of the operative date of any variations that are made by the Commission. As I mentioned earlier all peak bodies have proposed that a reference to the NES be introduced. The NES will be amended to deal with superannuation effective 1 January 2024. So it follows that any award variations should not commence prior to that date.

PN188

In respect of the other variations proposed by Ai Group, if the Commission exercises its discretion to vary the awards pursuant to section 160 then a question arises as to whether those variations should be made retrospectively. And then in turn whether there are exceptional circumstances that would allow it to do so. In our submission there are such exceptional circumstances and the variations should be made retrospectively, such that they commence operation at the same time that the relevant legislative amendments commenced operation, which was in 2021.

PN189

We say that the relevant uncertainties have come about due to amendments that were made to the relevant superannuation legislation. They clearly have a bearing on the way in which the relevant rights and obligations have been articulated in the relevant awards, and so in that context the Commission should exercise its discretion to vary the awards retrospectively for the purposes of removing any doubt as to how those award provisions have operated since that time.

PN190

JUSTICE HATCHER: Sorry, just to be clear, what problem were we trying to solve here? Are there some employers who face the threat of award contravention proceedings, because they have complied with the superannuation law, but not the award clause? Is that a real possibility?

PN191

MS BHATT: It's difficult to assess whether in a practical sense it is or it isn't. If one looks to the final sentence of the existing clause, it's numbered X.1(a) in our proposal, which we say should be exercised, that as it stands requires that wherever an employee does not choose a superannuation fund, the fund nominated in the award applies. Now, where an employee has in fact made a contribution to another fund, not a defaulted fund, because for instance a stapled fund has been identified, it should be clear that that has not resulted in any contravention of the award, or an employer has not acted in a manner that is inconsistent with the relevant award provision.

PN192

Just lastly, your Honour, if despite our submissions the Commission adopts the proposals advanced by the ACTU or in some other form, introduces new award obligations related to super, naturally we would say that they should not have any

retrospective application. Unless there are any questions those are the submissions, your Honour.

PN193

JUSTICE HATCHER: So can you just briefly explain again how those variations, the employers' jointly proposed variations, deal with the non-performing fund issue.

PN194

MS BHATT: Yes, your Honour. The final sentence of clause X.1(a) is on its face inconsistent with the underperforming funds laws. To the extent that if the default fund has been identified as an underperforming fund, and therefore it is no longer able to accept new members, contributions cannot be made to that fund. And that's the reason, or that's one of the reasons why we have proposed the deletion of the final sentence.

PN195

I think the other circumstances in which the underperforming funds issue arises - just bear with me one moment, your Honour - - -

PN196

JUSTICE HATCHER: You need a modification to X.4, don't you?

PN197

MS BHATT: Which we have proposed, your Honour. We've proposed that the words 'that is chosen by the employee' - - -

PN198

JUSTICE HATCHER: That deals with the stapled funds issue, doesn't it? I am just wondering how X.4 deals with a non-performing fund issue where the fund in question is a default fund.

PN199

MS BHATT: I think it deals with both, your Honour. If one reads X.4 without the words that we have struck out it would say that:

PN200

Unless to comply with superannuation legislation, for example the underperforming fund laws, the employer is required to make the superannuation contributions provided to another fund, the employer must make the contributions to the default funds.

PN201

JUSTICE HATCHER: But doesn't another fund mean a fund other than the listed default funds? If for example it's an award where there's three or four default funds and one of them becomes a non-performing fund those words don't do the job, do they? Because they're not required to pay to a fund other than a default fund, (indistinct) one of the default funds doesn't work.

PN202

MS BHATT: I understand the point that your Honour raises. I think it likely removes the relevant uncertainty, but perhaps doesn't go far enough in explaining what is to occur next where one of the default funds is an underperforming fund. It might be that that's an issue, your Honour, that we need to take on notice. I am not sure that on the run I can propose an alternate way of dealing with that, but I understand the issue you've raised.

PN203

JUSTICE HATCHER: Yes, all right. Okay, is there anything further, Ms Bhatt?

PN204

MS BHATT: Not from me, your Honour.

PN205

JUSTICE HATCHER: All right. Ms Tinsley?

PN206

MS TINSLEY: Thank you, your Honour. I propose to be quite brief with my remarks. I think as (audio malfunction) the parties that we're substantially in agreement with the majority of the points (indistinct) today. Really the outstanding point seems to be, to quote Mr Kemppi, really would be around whether additional detail is provided to provide guidance, so to speak, to employers.

PN207

So we're content to rely on our written submissions at paragraphs 6.5 to 6.12 with respect to the jurisdictional point. But I might just quickly run through, I guess, three practical considerations in response to Mr Kemppi's oral submission. So the first point here really is a practical issue about whether employers do in fact look to modern awards for guidance.

PN208

So with respect to Mr Kemppi here his organisation doesn't represent the employers as ours does, with a particular focus here. We have a number of small business members, and can say with certainty that employers look to modern awards for obligation. They do not look to modern awards for guidance. They're guided through the industry associations, through their payroll managers, through guidance that (indistinct) the Commission, or the Fair Work Ombudsman or the ATO produces. So that would be the first point I make with respect to that complexity point.

PN209

The second point I would make is something that, your Honour, you touched on earlier, this (indistinct) issue of providing a partial explanation, so to speak, so partial guidance. I think that there is a risk here of causing confusion where we have a situation where some obligations are provided greater explanation, others aren't. So I think that will have a practical impact of causing some confusion by doing that, and that's just not with respect to the superannuation changes. Even if we were to provide a complete guide within an award about superannuation matters that would still - employers may then grow to expect that such guidance from other aspects, other areas of say usual industrial laws.

PN210

So that will just cause confusion by having a different approach for different areas of law, and I think that would be what our central submission would be to Mr Kemppi's point around superannuation law being more complex. I think that really is an irrelevant consideration. It is irrelevant to this matter whether superannuation law is more complex than other areas of law.

PN211

Thirdly, again a practical point, we are concerned with respect providing unnecessary detail for performance and work that the Commission may need to undertake in future, and the timing of that. So the more detail we provide in the modern award superannuation changes will occur in the future, and this creates a lot of uncertainty - sorry, it creates additional work for the Commission in having to take a more (audio malfunction) role in fixing these ambiguities, these changes in the law. But more importantly there will be a time period of which the Commission will need to undertake to do a review like this where the awards will stay the same. It might be contrary to superannuation laws.

PN212

So I think from a practical point of view the more detail we include in it the more work the Commission will need to do in future, for no reason really, to vary awards in the future. And also we will see a period of time where employers, if they are going to the award, to understand their obligations, they may be tripped up by that. So apart from that, your Honour, I am happy to take questions in our submissions, but I just thought I'd be brief.

PN213

JUSTICE HATCHER: Ms Tinsley, do you want to have a go at the same question I asked Ms Bhatt; that is how the employers joint proposed clause deals with the underperforming funds issue if one of the default funds becomes an underperforming fund in circumstances where there's a number of default funds identified in the award?

PN214

MS TINSLEY: So I've taken your point here on board, your Honour, and to repeat Ms Bhatt's point we would say that in those words 'that is chosen by the employee' would deal with that. However, in terms of the point and reading in a different way, similarly to Ms Bhatt we'd be happy to take that on notice and come back to you, because I do see where perhaps slight more detail may be required to deal with that issue.

PN215

JUSTICE HATCHER: All right. And one further question, you probably won't be able to answer this on the spot, but one of your organisation's affiliate has traditionally represented employers under the Supported Employment Services Award, which has specified amounts. Do you have any instructions, or can you obtain any instructions about what we should do with that award?

PN216

MS TINSLEY: I don't have instructions for that now, but I can go away and take that on notice, your Honour.

PN217

JUSTICE HATCHER: Yes, all right. Thank you. Anything further, Ms Tinsley?

PN218

MS TINSLEY: No, that's all from us, your Honour.

PN219

JUSTICE HATCHER: Mr Doukas, do you want to make any submission, particularly in response to the CPSU submission?

PN220

MR DOUKAS: Thank you, your Honour. My oral submissions will be rather brief, generally relying upon our written submissions. The Bench would note that we haven't advanced any particular drafting, but as you have raised, your Honour, the CPSU has provided a draft in relation to the APS Award. We have engaged with the CPSU, we aren't provisionally opposed to the proposed variations. However, I suspect if the proceedings will result in the fundamental drafting being amended that may have a (indistinct) implication. But we would certainly note that the proposed drafts by the CPSU do acknowledge the specific Commonwealth superannuation legislative obligations. But that would be the main oral submissions I would make at this point, your Honour.

PN221

JUSTICE HATCHER: All right, thank you. Well, perhaps we will just give you a short opportunity for reply, Mr Kemppi.

PN222

MS BHATT: Your Honour, I'm sorry - - -

PN223

JUSTICE HATCHER: Ms Bhatt?

PN224

MS BHATT: This is Ms Bhatt. Just before you revert to Mr Kemppi, because he might wish to respond to this, can I just deal again very briefly with clause X.4. The proposal we've advanced is in the same terms as that of the ACTU, and I have reflected further on your Honour's comments in relation to that proposal. Can I suggest that given our proposals are in the same terms that we're given leave to have some further discussions between the peaks about that provision and see if some agreement can be reached about how it ought to be varied?

PN225

JUSTICE HATCHER: Well, I was going to deal at the end about how much longer the parties might need to do that. I think broadly speaking, leaving aside your submission about retrospectivity, broadly speaking my intention would be that the Bench would issue a decision as per our usual practice, provisional clauses for further comment, have a further opportunity for comment and then make the clauses operative - - -

PN226

MS BHATT: Yes, your Honour.

PN227

JUSTICE HATCHER: So as long as it can be fitted into that sort of timetable that's probably (indistinct).

PN228

MS BHATT: Thank you, your Honour.

PN229

JUSTICE HATCHER: All right, Mr Kemppi, do you want to say anything in reply?

PN230

MR KEMPPI: Thank you. Yes, your Honour. I will just make a few very, very brief reply remarks. As to further consultation we would welcome that and we anticipate that can be done fairly quickly. However, of course contextually that clause in our proposal occurs after clauses which do set out in our view the nature of the obligation and the nature of the scheme. But happy to have those discussions, and I anticipate we can turn that around fairly quickly.

PN231

In terms of - there was a point made about superannuation theft. I would just like to support Ms Wiles's point by saying that the evidence for superannuation theft is there. It is staggering to the extent that it's relevant. The evidence is there and it's well within the Commission's power to inform itself Industry Super Australia, Queensland Wage Theft Report, and the parliamentary inquiry into wage theft in 2020 all deal with the extent of superannuation theft.

PN232

While we're on the subject, I wasn't going to pick the point, but while we're on the subject of evidence led from the Bar table there's been significant evidence about the interaction of employers and the fact that they don't engage with awards, and what they do look at awards for and what they don't look at awards for that's been led from the Bar table and in submissions, and we would say that that should probably be taken with some degree of caution given the nature of how that evidence is put in the submissions.

PN233

By way of reply one of the central things that came up in the submissions of the employer groups and in your question, your Honour, was around whether or not the award should be a manual. We would point on that point to the provisions of the Act, section 149C and 149D. There has to be a default fund term in an award, and that default fund term has to be in certain terms.

PN234

So we're in a position where the law is a little imperfect in the way that it sets those default fund terms, but there has to be a default fund term. So there has to be in each award a term that deals with when an employer is in a scenario where they get to pick from a list and allocate somebody who's new in the workplace to a

default fund. And all our proposal does is list out the steps of how the employer gets to that scenario in a comprehensive and rational way, in our submission.

PN235

In our submission it wouldn't be enough to simply list the default funds, but have the employer left with no idea of how it is they get to that scenario, and that's why our provision sets out the stapling requirements flags the fact that a fund may not be able to receive contributions. And then, in our submission, clearly delineates when it is that those steps are exhausted, and the list of default funds becomes a list that the employer can pick from in terms of where they make their contributions to.

PN236

So in that way this clause already operates to some extent as a little bit of a procedural manual. It already deals with the fact that there could be choice and that the default funds don't apply. And then it goes on to deal with what happens if there is no choice of fund the default funds then apply. So in our submission, and this again partly because of the nature of superannuation and the way that it works, there is some support for having a set of steps outlined in the award that outline the procedure by which an employer will engage a new employee, make those relevant enquiries with the ATO, ascertain whether there's a chosen fund, and then find themselves into a default fund.

PN237

If on the other hand the employer proposal is accepted we would say that that could lead to the undesirable scenario in which employers may bolt to the default fund provisions without necessarily recognising that there is a stapling requirement, that there are choice of fund requirements, et cetera. In our submission that would be an undesirable scenario to be left in.

PN238

So as to the manual point we point to the end game around describing when it is that employer is picking from that list of funds, and the necessity to step out the process and the enquiries that the employer must make within the terms of the instrument itself to reach a more satisfactory state of the award.

PN239

JUSTICE HATCHER: Now you've raised section 149C does subsection (2) - paragraph (b), is it - is that consistent with (audio malfunction) fund; that is this expression 'chosen fund', has that ever been updated?

PN240

MR KEMPPI: It would be arguable, your Honour. In my submission it would depend on the way in which that provision is interpreted. If it was interpreted very strictly in a sense that the award must include a term that literally requires in all cases the paying to a default fund, then there could be a question there about whether or not that particular section in fact is consistent with the stapling requirements.

PN241

If on the other hand it were capable of an interpretation that perhaps read in some words or looked at it as there must be a term in an award that does have that requirement to pay into a default fund, but that's not inconsistent with the term describing when it is that the requirement arises in the way that we have set out.

PN242

JUSTICE HATCHER: Is that expression 'chosen fund' defined in the Superannuation Guarantee Act?

PN243

MR KEMPPI: I would have to double check, but, yes, is my understanding. I believe the exact phrase 'chosen fund' is defined. If not then some other variation of that term would be, but I am fairly certain without going to the Act exactly that 'chosen fund' is a defined term. And it's one that doesn't include, however it's phrased, a stapled fund. There is of course the distinction between a stapled fund and a chosen fund.

PN244

JUSTICE HATCHER: And now you've pointed it out (indistinct) must comply with section 149C.

PN245

MR KEMPPI: Yes, it must be a term that requires, permits or prohibits the making of contributions, which we would say supports our case, because the clause we have submitted in favour of would require or permit contributions to those funds on the default fund list. But in essence, and perhaps it can be strengthened, it would also describe the circumstances in which a contribution is not made to the funds on that default fund list. So in essence it would live up to the prohibition on going to the default fund list in a way that, in our submission, the employer groups position does not quite achieve. And taking your Honour's point it could well be that perhaps our position needs to be strengthened to say make the reference to stapling and choices, say these are the - or make the reference to stapling and say these are the scenarios in which an employer cannot make a contribution to these default funds, but nevertheless that occasions some description of what stapling is and what is required by it.

PN246

JUSTICE HATCHER: Yes, all right.

PN247

MR KEMPPI: Thank you.

PN248

JUSTICE HATCHER: How long might the parties need to address the matters we have identified?

PN249

MS BHATT: Can I propose in respect of the issue of clause X.4 a period of three weeks to report back in writing.

PN250

JUSTICE HATCHER: Does three weeks suit Mr Kemppi, Ms Tinsley and anyone else?

PN251

MR KEMPPI: Three weeks is fine for us.

PN252

MS TINSLEY: That's fine for us, your Honour.

PN253

JUSTICE HATCHER: Is that enough for your issue, Ms Wiles?

PN254

MS WILES: Yes, it is, thank you.

PN255

JUSTICE HATCHER: All right. We will allow a period of three weeks for further submissions that are proposed about the issues that have been raised in the hearing. Subject to those matters we propose to reserve our decision, and we will now adjourn.

ADJOURNED INDEFINITELY **[12.37 PM]**