13 November 2012

Committee Secretary
Senate Standing Committees on Education, Employment and Workplace Relations
PO Box 6100
Parliament House
CANBERRA ACT 2600

Email: eewr.sen@aph.gov.au

Dear Sir/Madam,

Re: Fair Work Amendment Bill 2012

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 provides this submission to the Senate Standing Committees on Education, Employment and Workplace Relations ("the Committee") in response to the inquiry into the *Fair Work Amendment Bill 2012* ("the Bill). In this submission, AIST is only commenting on Schedules 1 and 2 of the Bill, and will refer throughout our submission to the Productivity Commission Inquiry Report into *Default Superannuation Funds in Modern Awards* ("the Report").

AIST fully supports the Bill in relation to the selection of super funds in awards.

AIST has made submissions to the issues paper issued by the Productivity Commission in April 2012, its report in August 2012, and was involved in meetings with the Productivity Commission and the public hearings.

Throughout this process, and the subsequent response of the Government, AIST has seen a progressive strengthening of consumer protections, and increased transparency, contestability, accountability and practicality in the emerging proposals.

In summary, the AIST position is:

- Superannuation is an entitlement associated with employment, and should be regulated through the workplace relations system.
- The process for the selection of default superannuation funds in industrial awards must be robust and transparent. The current system can and should be improved upon.

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- It is most efficient for all stakeholders, including employers, and society generally for the existing industrial regulator, Fair Work Australia ("FWA"), to be directly responsible for the selection of default funds.
- An expert panel within FWA provides appropriate alignment between expert superannuation knowledge and the overall regulation of workplace relations.
- The current system has served members well and provides an important safety net.
- The implementation of Stronger Super reforms, including the introduction of MySuper products, will improve the prudential regulation of superannuation and consumer protections.
- To reduce the burden on employers and to ensure the best fit between superannuation funds and the employees/employers covered by the award, these reforms should be supplemented by additional (to MySuper) requirements for the selection of default funds.
- These additional measures are similar to those recommended by the Productivity Commission for consideration, that is:
    - Investment performance;
    - Fees and costs;
    - Governance and transparency;
    - Insurance;
    - Financial advice; and
    - Administrative efficiency.
- There should be a usual range of 2 to 10 default funds nominated in each award.

The safety net – Why default superannuation arrangements are necessary

The end purpose of the Productivity Commission's inquiry into *Default Superannuation Funds in Modern Awards*, as specified by the then Assistant Treasurer in the Terms of Reference for the Inquiry[1], was "*to ensure that the best interests of members are met if their superannuation contributions are allocated to a default fund under a modern award*." In other words, to provide a safety net in respect of superannuation entitlements.

This safety net should apply when an employee does not make a choice or cedes that choice to their employer. In all instances, this is about the best interests of members as employees, as this question is posed in the context of employment conditions.

A default arrangement continues to be needed, as it remains commonplace for employees covered by modern awards to make *no* active choice of their superannuation fund. A default

[1] Arbib, M (2012) *Productivity Commission Inquiry Into Default Superannuation Funds In Modern Awards*. 20 January 2012, [online] , http://tinyurl.com/a9x2kco [accessed 12 November 2012].

arrangement is needed to ensure that employees receive their superannuation entitlements from the time they start work.

Default superannuation arrangements have existed in the industrial relations system since prior to the advent of the Superannuation Guarantee. They have operated to ensure universality, fairness and balance, in a way that is supported by the representatives of employers and employees, and by the industrial tribunal itself.

The *Fair Work Act 2009* maintains the key focus on safety net provisions. The Act seeks to provide a balanced framework for co-operative and productive workplace relations, and explicitly identifies the role of safety net provisions (ss.3(b)&(c)).

Why default arrangements should be regulated within our industrial system

Default arrangements have operated well, and in the best interests of members, over the past 20 years.

The Productivity Commission upheld the key criterion of the "best interests of members", recommending at Recommendation 7.2 of the Report that, at a minimum:

> *…there is an explicit focus on meeting the best interests of employees who derive their default superannuation product in accordance with a modern award.*

The selection of default funds has to provide real assistance to employers as well. An unintended consequence of Choice of Fund has been the increased administrative burden on employers, as they now often have to send contributions to a larger number of superannuation funds. The level of interest and engagement of employers on superannuation matters is not high, and is even resented in some cases.

Employers often do not want to select a default fund, and they often do not want to make a choice from a long and unqualified list. Recommendation 8.4 of the Report recognised that a small subset of superannuation products would assist employer choice and encourage competition.

If default arrangements did not exist in the current environment, it may also be possible for employers to make default choices for their employees that could result in outcomes not in the best interests of employees. This is because the interests of employers and employees are not necessarily aligned. This kind of principal-agent conflict is identified at various points throughout the Report, and can be illustrated with an example: While an employer might not want to choose a fund that has an effective contributions arrears process, employees might benefit from such a service.

Default arrangements can exist comfortably alongside Choice of Fund by members, and does not diminish competition. Choice of Fund has existed since 1 July 2005, and continues to do so. Not only are employees able to choose the superannuation fund that best meets their needs, they are encouraged to do so. They are able to choose from any complying superannuation fund, and no-one under existing or proposed arrangements is able to deny them choice.

The new expert panel

AIST supports the creation of a new expert panel within Fair Work Australia. During the consultation process, we highlighted the following risks that might arise if superannuation was devolved to an eternal body:

1. The proposal regarding a body outside Fair Work Australia sought to create a representative group from the superannuation industry. AIST pointed out in our submissions to the Commission that this would result in a battleground between competing segments of the superannuation.
2. Another issue was the lack of input from the industrial parties themselves – employers and employees. Given that an award is an agreement between industrial parties, it is difficult to see how giving the industrial parties equal weight in the process as those of competing product providers might have been in the best interests of employers or employees.
3. The third issue discussed the additional bureaucratic layer that would be created, should an external party be created. We discussed how this would require infrastructure that was already available within Fair Work Australia, such as budget allocations, a secretariat, the need to travel across Australia to meetings and a means to publish decisions.

AIST agrees with the Bill's creation of an expert panel within the regulator, as recommended in the Report. We support this for the same reasons that we considered in our submission of August 2012 on the draft Report published by the Commission.

The most significant issue that was faced in the option where an expert panel is created within the regulator is the asserted lack of expertise within Fair Work Australia in the area of finance and superannuation. AIST believes that this lack of expertise may be overstated, with a number of members of Fair Work Australia having significant expertise and experience in this area.

The President of Fair Work Australia was one of the architects of the current superannuation system, and one Vice-President is a former long-term director of the Commonwealth Bank of Australia. These are high level credentials. Other members have been long term trustees of major superannuation funds.

Nonetheless, even if this lack of expertise is assumed to be the case, then the Productivity Commission provided the answer to the problem in its draft report. The model of the minimum wage panel was cited and this reference was retained in the final Report. The Minimum Wage

Panel works well; it is integrated into the tribunal's operation; it is subject to the Fair Work Act, including the requirement to balance interests and have regard to broader economic factors; it uses the resources and infrastructure of Fair Work Australia, and so there are minimal extra costs; and its point of difference is the ability to co-opt members with specialist expertise. In other words, it is a model ideally suited for extension into superannuation.

The Productivity Commission identifies the potential issue of bias, but AIST believes that this is less likely to be an issue when the part-time members are sitting alongside other members of Fair Work Australia who generally come from a partisan background, but whom are focused on fulfilling their statutory obligations. This is therefore a much lesser risk than it would be if the expert panel was created externally to Fair Work Australia.

Additional selection criteria

AIST supported the conclusions of the Commission, in discussion about distinguishing between funds. Thought was given in chapter 7 of the report into reducing the administrative burden on employers by use of a 'quality filter'. The report then discussed the merits of what criteria could be used in order to provide this quality filter.

The Productivity Commission recommended that factors additional to MySuper authorisation by APRA be considered when selecting products to be included in modern awards. The Commission considered in the Report that, at a minimum, the following should be taken into consideration:

- *The appropriateness of the MySuper product's long-term investment return target and risk profile for employees who derive their superannuation products in accordance with a given modern award (as a primary factor).*
- *The fund's expected ability to deliver on the MySuper product's long-term investment return target, given its risk profile (as a primary factor).*
- *The appropriateness of the fees and costs associated with the MySuper product, given:*
    - *its stated long-term investment return target and risk profile*
    - *the quality and timeliness of services provided.*
- *Whether governance practices are consistent with meeting the best interests of members, with particular focus on the mechanisms put in place by fund trustees to deal with conflicts of interest, and the transparency involved with disclosing those conflicts.*
- *The appropriateness of the MySuper product's insurance offerings for employees who derive their default superannuation product in accordance with a given modern award.*
- *The quality of intra-fund advice.*
- *The administrative efficiency of the fund.*

(Pp.132-133)

AIST supports the additional factors the Productivity Commission identified for consideration. Furthermore, we consider that these factors can be used as more than the basis for guidelines and can be framed as prescriptive criteria, given the clear and direct link of these factors with the best interests of members.

Recommended funds

AIST supports the requirement for default funds to be reviewed every 4 years. AIST supports efforts to ensure that the relevance and appropriateness of default funds is reviewed frequently, and we believe that the creation of default superannuation fund lists as proposed in section 156B is suitable for this. We also believe that this process achieves the Productivity Commission's principles from Recommendation 7.2 of best interests, contestability and competition, transparency, procedural fairness, minimum regulatory burden, market stability, consistency with other policies and regular assessment.

At the same time, AIST recognises that existing members and employers who contribute to superannuation should not be inconvenienced. The transitional authorisation provided to the regulator under the proposed section 156K ensures that employers can be given a reasonable amount of time to transition across to new default arrangements, should this be necessitated by changes to a default fund term in an award.

In addition, AIST supports the requirement in section 156H to ensure that limits are placed on funds specified in awards. The extensive discussion in section 8.1 of the Report unearthed significant commentary around this point from employer groups who were almost unanimously opposed to unlimited choice of MySuper funds in awards, seeking to ensure that employers can focus on work and reducing their compliance load. The Commission went on to agree with these groups in the report, stopping short of recommending a limit on the number of funds, but considering in Recommendation 8.4 that:

> *…it is highly desirable that, where possible, the panel identify in each modern award a small subset of those products found suitable for listing that it judges best meet the interests of employees who derive their default superannuation product in accordance with that modern award. Identifying a small subset of products will assist employer choice and encourage competition.*

We agree that the guidelines setting minimum and maximum limits at two and ten respectively, are sensible and easy to enforce, but that other numbers of listed funds may be appropriate in special circumstances.

Yours sincerely,

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