Submission on the Commonwealth Government's Better Regulation and Governance Discussion Paper, 12 February 2015

Ai GROUP SUBMISSION

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing; engineering; construction; automotive; food; transport; information technology; telecommunications; call centres; labour hire; printing; defence; mining equipment and supplies; airlines; and other industries. The businesses which we represent employ more than 1 million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with more than 50 other employer groups in Australia alone and directly manages a number of those organisations.

Ai Group is the employer shareholder in the Trustee of AustralianSuper - a leading Australian superannuation fund.

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Executive Summary

Ai Group welcomes the process of community-wide discussion the Government initiated with its 28 November 2013 Discussion Paper *Better regulation and governance, enhanced transparency and improved competition in superannuation* and we welcome the opportunity to provide feedback on the Discussion Paper.

Ai Group is the employer shareholder in the Trustee of AustralianSuper - a leading Australian superannuation fund.

This submission sets out our views in response to the Discussion Paper specifically in relation to the areas of governance and default superannuation arrangements.

In relation to the former, Ai Group does believe that a closer alignment of the definition of independent directors can be made to address some shortcomings in the definition in the SIS Act. These changes would ensure that members of a fund's management team who were directors would not be regarded as independent directors and that membership of a fund would not preclude a person from being regarded as an independent director of the fund.

We are keenly aware of the strong performance that the equal representation model has delivered for fund members and, while we are open to improving the scope for the additional appointment of independent directors and independent chairs, we do not believe that a clear case has been made to mandate such appointments. We support changes that would increase the scope to raise the number of independent directors on funds and appoint independent chairs while retaining the strength of the equal representative model.

Notwithstanding this preferred position, if the Government were to mandate the appointment of independent directors to superannuation fund boards, to assure an appropriate balance we would urge that the mandated proportion of independent directors be no more than one-third of board positions.

In relation to default superannuation arrangements, Ai Group notes that these have been the subject of considerable debate and that, following considerable consultation, a new set of arrangements have recently been put in place. The implementation of these arrangements is already well advanced and we propose that further substantial changes at this time would be disruptive and costly and would occur before there was any chance to assess how the new approach was working. We propose that the sensible time to reconsider the new arrangements is the second four-yearly review of default funds in awards which the *Fair Work Act* requires to be conducted as soon as practicable after 1 January 2018.

Part 1: A Better Approach to Regulation

Ai Group welcomes the statement in the Discussion Paper that the "Government is keen to ensure that superannuation regulation maximises benefits to members, while minimising disruption and compliance costs to the sector."

To this end Ai Group supports "light-touch" approaches to regulation as opposed to prescriptive approaches where the former can achieve the outcomes desired. We also support the objective of avoiding disruption to regulatory arrangements unless there is a clear case for changing them. We particularly support the focus on benefits to members whose interests, including their interests in keeping regulatory costs to a minimum, are often overlooked in discussions about regulation.

These considerations are fundamental to the development of our responses to the Discussion Paper.

Part 2: Better Governance

Ai Group agrees with the statement in the Discussion Paper that "Good governance arrangements are fundamental to the stability and efficiency of Australia's superannuation system."

Ai Group has always supported the considerable efforts taken to ensure AustralianSuper has an approach to governance that is of the highest order and characterised by ongoing examination of opportunities for further improvement. A part of this lies in AustralianSuper's efforts to ensure that it readily meets existing regulatory obligations and to ensure that Directors are aware of their individual duties and obligations and have good opportunities to keep abreast of developments in governance concepts and practices.

We strongly believe that AustralianSuper is very well governed and, while we remain open to changes that facilitate further ongoing improvements in governance, we do not believe the case has been made to put in place new regulatory arrangements compelling a change of approach to governance in relation to the composition of trustee boards.

AustralianSuper is a not-for-profit, industry superannuation fund with an equal representation board structure. We are aware that this model has delivered above-average benefits for members over an extended period not just for members of AustralianSuper but also for members of other not-for-profits funds with equal representation governance models.

We note in particular that, as part of the evolution of governance arrangements, the equal representation model has not prevented the appointment of independent directors to Boards or the appointment of independent members to Board Committees.

Before turning to a number of the specific questions related to governance, we would like to comment on this statement in the Discussion Paper (page 10):

> "Independent directors provide an external, dispassionate perspective, enabling boards to benefit from a diversity of views and provide a check on management recommendations. By being free from relationships that could materially interfere with their judgment they can provide an objective assessment of issues."

Firstly, an implication that could be taken is that non-independent Directors (however defined) are not "dispassionate", do not contribute to a diversity of Board views or do not undertake "an objective assessment of issues". This is very clearly not the case and, indeed, directors, irrespective of whether they are independent, have fiduciary

obligations to act in the best interest of members and to exercise their duties conscientiously.

Secondly, it is worth pointing out that we have not found any empirical evidence, including in the Discussion Paper, to suggest that the presence of independent directors on Boards systematically improves the performance of the entities they oversee.

Definition of Independent Directors

In his foreword to the Discussion Paper, the Assistant Treasurer stated that the Government's intention is to "align governance structures in the superannuation system more closely with the corporate governance principles."

Ai Group welcomes this objective and sees it as opportunity to address two shortcomings in the existing definition of "independent director" in the SIS Act.

- The first is that the SIS Act does not appear to exclude a representative of the management of the fund from being regarded as an "independent director". This appears anomalous given the general conception of "independent director" is one of independence from the organisation's management.

- Second, the SIS Act prevents a person being regarded as an independent director of a superannuation fund if they are a member of the fund. This also appears anomalous and stands in contrast to the ability of (and indeed the desirability of) independent directors of listed companies being able to be shareholders of the company.

One way to achieve the Government's objective of consistency in the definitions of independent directors would be to adapt the ASX Corporate Governance Council (ASXCGC) definition of independence. This could also be a way to overcome the shortcomings mentioned above in relation to the SIS Act.

> For the ASXCGC an independent director is a non-executive director who is not a member of management and who is free of any business or other relationship that could materially interfere with - or could reasonably be perceived to materially interfere with - the independent exercise of their judgment.
>
> When determining the independent status of a director the following relationships[1] should be considered. Whether the director:

[1] These factors bearing on independent status are adapted from the definition of independence given by Corporate Governance: A Guide for Fund Managers and

- Is a substantial shareholder of the company or an officer of, or otherwise associated directly with, a substantial shareholder of the company;
- Is employed, or has previously been employed in an executive capacity by the company or another group member, and there has not been a period of at least three years between ceasing such employment and serving on the board;
- Has within the last three years been a principal of a material professional adviser or a material consultant to the company or another group member, or an employee materially associated with the service provided;
- Is a material supplier or customer of the company or other group member, or an officer of or otherwise associated directly or indirectly with a material supplier or customer;
- Has a material contractual relationship with the company or another group member other than as a director.

Family ties and cross-directorships may also be relevant in considering interests and relationships which may affect independence, and should be disclosed by directors to the board.

FOCUS QUESTION 2

Ai Group has worked closely with a number of other organisations associated with industry superannuation funds to put together a definition of independent director that is consistent with the ASXCGC approach and that fits the particular circumstances of the superannuation industry.

An independent director is a non-executive director who is not a member of management (of the RSE licensee or any of its related bodies corporate) and who is free of any business or other relationship that could materially interfere with – or could reasonably be perceived to materially interfere with – the independent exercise of their judgment.

When determining the independent status of a director the following should be taken into account. Whether the Director:

- Is a substantial shareholder of the RSE licensee or any of its related bodies corporate or an officer of, or otherwise associated directly with, a substantial shareholder of the RSE licensee or its related bodies corporate;

Corporations – Blue Book, Investment and Financial Services Association, 2004 at www.fsc.org.au.

- Is employed, or has previously been employed in an executive capacity by the RSE licensee or any of its related bodies corporate, and there has not been a period of at least three years between ceasing such employment and serving on the board;
- Has within the last three years been a principal of a material professional adviser or a material consultant to the RSE licensee or any of its related bodies corporate, or an employee materially associated with the service provided;
- Is employed in an executive capacity and/or is an officer of an employer representative group or employee representative group which is a shareholder of the RSE licensee, or which under the Trust Deed may appoint directors to the board of the RSE licensee, and there has not been a period of at least three years between ceasing such employment and serving on the board;
- Is a sponsor, or an employee or an officer of a sponsor, that is a substantial shareholder of the RSE licensee;
- Is a material supplier or customer of the RSE licensee or any of its related bodies corporate, or an officer of or otherwise associated directly or indirectly with a material supplier or customer;
- Has a material contractual relationship with the RSE licensee or any of its related bodies corporate other than as a director.

Family ties and cross-directorships may be relevant in considering interests and relationships which may affect independence, and should be disclosed by directors to the board.

This definition of independent director could provide the consistency with the definitions applied in other areas of corporate activity and address the limitations referred to above in relation to the SIS Act's definition of independent director.

Proportion and Role of Independent Directors

Over the past couple of decades, equal representation trustee boards have developed organically in line with their own circumstances and developments in governance practice. As mentioned earlier in this submission, this has included the introduction of independent trustees and chairs in instances where it has been considered that this can add value to the skills matrix and board dynamics. Many boards have developed processes which allow for independent and expert input into key decision making bodies such as investment committees.

While this organic process has seen the introduction of independent directors and committee members, this development is more rightly seen as a result of the ongoing effort to improve governance than as a cause of those efforts.

These changes that have occurred particularly in the not-for-profit sector of the industry, have resulted in a diversity of board models within the industry aligning with efforts to better address the circumstances of funds and their membership.

Ai Group views these processes very positively. As far as AustralianSuper is concerned, its present governance framework has overseen an organisation that has generated, and is intent on continuing to generate, superior benefits for members.

A significant part of this success is the equal representation model where interests of members and employers are brought to bear in governance processes through the role of representative organisations nominating candidates for board and committee positions for the consideration of boards.

In view both of the success of the equal representation model and the entrenched organic process of self-improvement that is clearly evident in the governance of AustralianSuper (and more broadly across the not-for-profit sections of the industry), Ai Group cautions very strongly against potentially disruptive mandatory changes to governance processes.

Certainly, the Discussion Paper does not in our view make the case for the introduction of changes that would mandate a certain proportion of independent directors on the boards of superannuation funds. While there are a number of claims in the Discussion Paper about the benefits of independent directors, they are not substantiated with empirical evidence about improved governance or the performance of entities with greater numbers of independent directors.

That said Ai Group also holds that, where improvements in governance can be made by appointing more independent directors – for example in ensuring an appropriate mix of skills – or an independent Chairperson, they should be made. Of course, given its demonstrated benefits, we would be very wary of changes that diluted the equal representation model.

FOCUS QUESTIONS 3 AND 4

In light of these considerations, Ai Group has worked with other organisations associated with industry funds and developed a proposal that:

- Avoids the inflexibilities associated with mandating particular board compositions;
- Recognises the strengths of the equal representation model; and,
- Ensures there is scope for boards to appoint more independent directors.

The proposal is for a positive obligation to be placed on boards to consider their composition with a view to adopting a governance structure that includes an enhanced role for independents (as defined above), including an independent chair and a board composition of up to one third independent directors.

Where a board considers it would be best served by a board composition that differs from a one third of independent directors and an independent chair, the reasoning and consideration process adopted should be transparent and available to APRA.

In avoiding mandating a statutory minimum proportion of independent directors or placing a regulatory obligation for an independent Chair, the proposed approach would avoid the potentially compromising situation where funds were compelled to adopt governance arrangements they felt were sub-optimal and would mesh with the evolutionary process of self-improvement outlined above.

Notwithstanding this preferred position, if the Government were to mandate the appointment of independent directors to superannuation fund boards, to assure an appropriate balance we would urge that the mandated proportion of independent directors be no more than one-third of board positions.

Further Governance Issues

The following responses are made in relation to Focus Questions 5 to 12 from the Discussion Paper.

FOCUS QUESTIONS 5 AND 6

The method of appointment of independent directors should align with the method of appointment of other directors under the rules of the particular fund.

While a typical and successful method is for the board to consider nominations from shareholders, other models of appointment developed for different funds also have merits and we do not believe a case has been made to standardise the method of making board appointments across the industry.

FOCUS QUESTION 7

In relation to the conflict of interest regime, Ai Group does not see any need for further strengthening the current, very thorough, APRA requirements.

FOCUS QUESTION 8

In relation to the idea of a maximum term for directors, Ai Group is very wary of imposing a one-size-fits-all model on the tenure of directors and cautions against the risks to boards and their organisations of losing experience and expertise merely because of a regulatory requirement.

If there were to be a maximum term of appointment of directors, we would very strongly urge that all directors should be eligible for re-appointment for a successive term or terms at the discretion of the shareholders and board provided they continue to satisfy all relevant eligibility criteria and performance standards.

FOCUS QUESTION 9

Ai Group supports the regular appraisal of directors' performance of boards and board committees as is currently the case in accordance with APRA standards. We do not believe there is a case for changes to these arrangements.

FOCUS QUESTIONS 11 AND 12

The appropriate timeframe for transitioning to new arrangements will depend on the nature and extent of changes made. If the recommendations in this submission about the definition of independent director and the approach to facilitation of the appointment of more independent directors were taken, a transition of two years would be preferred to give time for funds to adjust before the changes came into effect.

Part 4: The Default Superannuation Market

Overview

Ai Group is well-qualified to provide input on appropriate arrangements for default superannuation funds in modern awards, given that we:

- Have been an active employer representative in industry superannuation funds for many years and have a particularly close association with AustralianSuper (and its predecessors);
- Have been registered as an industrial organisation of employers for more than 100 years and have a long history of playing a constructive role in the development of fair and productive awards;
- Have played a leading role in representing employers during the making and reviewing of modern awards;
- Have an interest in most of the 122 modern awards;
- Were a party to more than 100 pre-modern awards in numerous industries; and
- Have played a major role in key Tribunal and Court cases over the years relating to award superannuation.

Default funds in awards play a very important role. The majority of employees rely on the default superannuation system, despite having freedom to choose their own fund. Most modern awards contain a list of default superannuation funds which offer a MySuper product.

The *Fair Work Act 2009* (FW Act) and other relevant legislation have recently been amended to implement new arrangements for determining the list of default funds in modern awards, and a major 4 Yearly Review is underway within the Fair Work Commission (FWC) to implement the new arrangements.

The process which is underway should be permitted to continue. Once the FWC's Review has been completed and awards have been varied, the outcomes should be assessed after a reasonable period has elapsed. We propose that the sensible time to reconsider the new arrangements is the second four-yearly review of default funds in awards which the *Fair Work Act* requires to be conducted as soon as practicable after 1 January 2018.

The History of Superannuation as an Award Matter

There is a great deal of history associated with the inclusion of superannuation provisions in awards.

Developments in the 1980s were summarised in the Australian Industrial Relations Commission's (AIRC's) *Review of Wage Fixing Principles October 1993 Decision* (Print K9700) as follows:

> "The provision of superannuation benefits emerged as an industrial issue of prominence in the Commission during the 1980s. This was, in part, the result of industrial disputation over superannuation and decisions of both the Commission and the High Court. In its judgement in *Re The Manufacturing Grocers' Employees Federation of Australia and another; Ex parte The Australian Chamber of Manufactures and another* [(1986) 160 CLR 341] in May 1986 the High Court made clear that the jurisdiction of the Commission in relation to disputes concerning superannuation was not as limited as had generally been thought.
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> In the National Wage Case decision of 26 June 1986 the Commission dealt with an application pressed by the ACTU that there should be awarded a 3% wage equivalent by way of superannuation contributions in satisfaction of an application for a 4% increase in wages and salaries. In the course of its decision the Commission identified a number of difficulties that attended the claim. The Full Bench did not accede to the claim but said that the Commission would be prepared to certify agreements or make consent awards dealing with superannuation subject to certain conditions. These included the contributions not involving the equivalent of a wage increase in excess of 3% of ordinary time earnings. A subsequent statement made by the President on 8 July 1986 said:
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> > "The decision of the Commission of the 26 June 1986 clearly contemplates that discussions about the introduction and improvement of superannuation arrangements should take place.
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> > In particular, parties to awards of this Commission who agreed before the National Wage Case decision to negotiate following the decision, should continue with those negotiations. In these cases, if the talks break down it will not be necessary for direct action to take place before the assistance of the Commission will be available."

> The statement went on to identify what the Commission would expect in other cases.
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> The National Wage Case decision of 23 December 1986 again dealt with the issue of superannuation. The Commission rejected an application by the Confederation of Australian Industry that a moratorium be imposed on the implementation of the superannuation principle which had resulted from the June 1986 decision.
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> The question of how the Commission should deal with the issue of superannuation was further developed by the next National Wage Case decision of March 1987. That decision allowed, for the first time, for the arbitration for superannuation contributions, as part of the wage fixing principles of the Commission. The result could be two amounts, in aggregate, of a maximum of 3% to be phased in. The decision dealt with the submissions of the various parties including those of the Commonwealth whose submission was summarised as follows:
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> > "The Commonwealth argued strongly for the need to introduce superannuation 'in a more rational and orderly fashion, without the level of disputation seen in recent times, and in a way consistent with current economic circumstances'. It proposed that the existing principle should continue to operate subject to the same conditions as at present but, in addition, the Commission should be prepared to arbitrate on a case by case basis where agreements cannot be reached. Any new or improved superannuation contributions flowing from such arbitration should be phased in." [Print G6800, p.21]
>
> By 1989 the principles of the Commission allowed for the arbitration of superannuation contributions up to an amount equal to 3% of ordinary time earnings."

In the late 1980s superannuation awards were made in many industries, e.g. the *Metal Industry (Superannuation) Award 1989*. These awards typically listed one or more industry funds and required that a three per cent superannuation contribution be paid into such fund if the employer was not already contributing at least this amount to an alternative superannuation fund approved under the relevant legislation.

The Superannuation Guarantee Legislation was introduced in 1992. As a consequence the superannuation provisions in awards became less important but they still had a significant effect by:

- Specifying funds into which contributions were to be paid;
- Defining the 'earnings base';[2] and
- Requiring employers to continue making superannuation contributions for up to a maximum period (usually 12 months) during workers' compensation absences.

In the *Review of Wage Fixing Principles October 1993 Decision* (Print K9700) the AIRC called on the Government to convene a Conference of relevant industrial parties to address problems associated with the relationship between award superannuation and the Superannuation Guarantee Legislation. The Conference was chaired by the Treasury and held on 24 March 1994.

Following the Conference and other developments, the AIRC decided to conduct a *Superannuation Test Case* to determine what provisions, if any, awards should contain in respect of superannuation. The *Superannuation Test Case Decision* (Print L5100) was handed down on 7 September 1994. The AIRC decided that awards would continue to contain superannuation provisions. The Commission also decided that in determining applications as to the specification of a fund:

- Any fund specified in an award must be one which meets the employer's obligations under the Superannuation Guarantee Legislation; and
- The Commission would have regard to the *Superannuation Industry (Supervision) Act 1993*. In particular, the requirement for equal representation of employers and members on 'standard employer-sponsored funds'.

In conjunction with the *Superannuation Test Case Decision*, the AIRC developed a Model Superannuation Clause which was included in many awards either through a specific variation or as a result of the Award Simplification process in 1997/98.

Superannuation Developments in Modern Awards

During the initial stages of the award modernisation proceedings in 2008, the Full Bench of the AIRC heard extensive arguments about which, if any, default funds should be listed in modern awards.

The Full Bench also considered a submission made by the Minister for Superannuation and Corporate Law, Senator the Hon Nick Sherry, on 18 July 2008 which included the following proposal:

[2] The ability for employers to apply less generous earnings bases in awards was removed from 1 July 2008 through an amendment to the Superannuation Guarantee Legislation.

> "Therefore, while strongly supporting the continuation of the nomination of default funds in awards, I urge the Commission to ask the parties to awards to consider the performance of the superannuation fund specified in their award when they conduct consultations for the award modernisation process."

During the award modernisation proceedings Ai Group adopted a neutral approach to the issue of default funds. We made no submissions on whether or not additional default funds should be listed in awards or on the criteria which should apply in determining which funds are listed.

The issue of default funds in awards was dealt with in a number of award modernisation decisions of the Full Bench. The following extract from the 2 September 2009 Award Modernisation Decision ([2009] AIRCFB800) includes relevant extracts from earlier award modernisation decisions and statements:

> **"SUPERANNUATION**
> **[63]** We turn now to deal with the model superannuation clause and in particular to the question of default funds. The model superannuation clause provides that the default fund may be one of a number of funds specified in the clause or any fund to which an employer was making contributions for the benefit of employees on 12 September 2008. Some suggestions were made that the relevant date should be 1 January 2010 rather than 12 September 2008. It was submitted that this would minimise uncertainty and costs of compliance for employers and minimise negative impacts for employees. These submissions raise some fundamental issues concerning default funds which go beyond transitional provisions.
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> **[64]** The Commission's statement of 12 September 2008 contains the following passage:
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> > "[29] We have drafted a model superannuation provision to be included in modern awards if those awards deal with superannuation. The clause will nominate a default fund or funds should an employee fail to exercise his or her right to nominate the fund to which employer contributions should be made. We do not think it is appropriate that the Commission conduct an independent appraisal of the investment performance of particular funds. Performance will vary from time to time and even long term historical averages may not be a reliable indicator of future performance. We are prepared to accept a fund or funds agreed by the parties, provided of course that the fund meets the relevant legislative requirements."

[65] In its decision of 19 December 2008, the Commission, in commenting on the model superannuation clause, said:

> "[90] The terms of the exposure draft concerning the default fund provision were the cause of a number of submissions from employer and employee interests, from superannuation funds and the superannuation industry. We have decided to allow as a default fund any fund to which the employer was making contributions for the benefit of employees on 12 September 2008. This approach is likely to minimise inconvenience for employers. While funds other than those provided for will not qualify as default funds employees may still exercise their right to choose in favour of these funds."

[66] In our view the nomination of default funds should be made on some readily ascertainable basis and one which does not lead to any disruption. For that reason it was decided to provide for named default funds as the primary basis. The secondary basis was any fund to which the employer was making contributions before 12 September 2008. That date was chosen because it was the date on which the exposure drafts of the priority modern awards were published.

[67] A number of funds have since made applications to be included as named default funds on the basis that the fund was nominated as a default fund in an award-based transitional instrument relevant to the coverage of the modern award or on the basis that the representatives of the main parties covered by the award consent. In our view either basis would constitute a good reason for the fund being specified as a default fund in a modern award. Where such grounds exist an appropriate application could be made. We do not intend to deal with such applications, however, in this decision.

[68] Returning now to the proposal that we should change the relevant date from 12 September 2008 to 1 January 2010, and assuming the proposal could be characterised as a transitional provision, we doubt whether such a variation would go to the heart of the matter. Most funds voicing objection to the default fund provision did so on the basis that they are fundamentally opposed to any limitation on the ability of an employer to choose the default fund. Simply substituting one date for another would not remedy that complaint. Indeed, it might create a deal of disruption in the industry between the publication of this decision and 1 January 2010.

[69] The relevant legislation provides for default funds to be included in awards. Our present view is that we should continue to provide for default

> funds where there is a history of award regulation of superannuation in the industry or occupation the modern award covers. It should be emphasised, however, that, self-evidently, the default fund provision only operates where the employee does not nominate a fund. The superannuation legislation enshrines the right of an employee to choose the fund into which the employer should make contributions. Consistently with the legislation the award provision does not limit an employee's right to nominate a fund. Nor does it limit the ability of superannuation funds which are not default funds to market their products to employees and employers. We have decided, on the basis of what has been put in the proceedings, not to alter the date of 12 September 2008.

In a decision of 19 January 2010 ([2010] FWAFB 12), the Award Modernisation Full Bench made the following statement in determining an application to vary several awards to insert Westscheme as a default superannuation fund. The decision identifies the criteria which the Tribunal had determined would apply when considering additional default funds for inclusion in a modern award:

> "**[2]** The Full Bench decision of 2 September 2009 ([2009] AIRCFB 800 at para 67 indicated that there were two grounds upon which a fund could be considered for inclusion in a modern award; where the fund was nominated as a default fund in an award-based transitional instrument relevant to the coverage of the modern award (eg. a Notional Agreement Preserving a State Award (NAPSA) or a federal award) or where the representatives of the main parties consented."

The FWC applied the above criteria in determining applications for additional default funds to be included in modern awards over the period up to 31 December 2013. From 1 January 2014, legislative amendments came into operation implementing new arrangements for determining which default funds will be listed in modern awards.

Amendments made to all Modern Awards in December 2013

In December 2013, the FWC varied the superannuation clauses in all modern awards to ensure compliance with the MySuper reforms. The variations include the following amendments to the default superannuation fund provisions in awards:

- Deletion of superannuation funds which did not offer a MySuper product;
- Specifying that an employer is entitled to contribute to a superannuation fund which the employee is a defined benefit member of;
- Amending the grandfathering arrangement in awards to insert the following underlined wording:

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

Productivity Commission Recommendations and the Approach Implemented by the Labor Government

In 2012, the Productivity Commission conducted an inquiry into default superannuation funds in modern awards. Ai Group was heavily involved in the inquiry. We filed detailed written submissions and appeared at the public hearings. On pages 27 and 28 of the Australian Government's Discussion Paper key points from the Productivity Commission's Recommendations are set out.

The Labor Government amended the FW Act and other relevant legislation to implement many of the Productivity Commission's proposals including:

- A two stage process for assessing which funds should be listed as default funds in awards;
- A first stage filter, which includes the application of the criteria which APRA uses for MySuper product authorisation;
- A second stage filter which centres around the FWC being satisfied that specifying a particular default superannuation fund in an award would be in the best interests of the employees covered by the award;
- The establishment of an Expert Panel within the FWC to make decisions on the listing of default funds in awards; and
- A periodic wholesale reassessment of the default funds in awards.

The most significant difference between the Productivity Commission's recommended approach and the approach implemented by the Labor Government was the inclusion of the requirement in section 156H of the FW Act that at least two and no more than 15 superannuation funds should be listed as default funds in an award (unless the FWC is satisfied that more than 15 funds are warranted, taking into account the range of occupations covered by the award).

Ai Group supports the above limit being retained to avoid confusion and complexity for employers and employees.

Proposed Approach

Ai Group proposes that the FWC's major 4 Yearly Review of Default Superannuation Funds which is underway be permitted to continue. When the Review has been completed and awards have been varied, the outcomes should be assessed after a

reasonable period has elapsed. We propose that the sensible time to reconsider the new arrangements is the second four-yearly review of default funds in awards which the *Fair Work Act* requires to be conducted as soon as practicable after 1 January 2018.

Consistent with the above approach, the following answers to the focus questions in the Discussion Paper are provided:

FOCUS QUESTIONS 27 AND 28

> **Does the existing model (which commences on 1 January 2014) meet the objectives for a fully transparent and contestable default superannuation fund system for awards, with a minimum of red tape?**
>
> **If not, is the model presented by the Productivity Commission the most appropriate one for governing the selection and ongoing assessment of default superannuation funds in modern awards or should MySuper authorisation alone be sufficient?**

Ai Group supports the process which has been implemented which delivers a far more transparent and contestable system than what was previously in place. Once the FWC's 4 Yearly Review of Default Superannuation Funds has been completed and awards varied, the outcomes should be assessed after a reasonable time to determine whether an appropriate level of transparency and contestability has been achieved.

FOCUS QUESTION 29

> **If the Productivity Commission's model is appropriate, which organisation is best placed to assess superannuation funds using a 'quality filter'? For example, should this be done by an expert panel in the Fair Work Commission or is there another more suitable process?**

An Expert Panel within the FWC is appropriate.

FOCUS QUESTION 30

> **Would a model where modern awards allow employers to choose to make contributions to any fund offering a MySuper product, but an advisory list of high quality funds is also published to assist them in their choice, improve competition in the default superannuation market while still helping employers to make a choice? In this model, the advisory list of high quality funds could be chosen by the same organisation referred to in focus question 29.**

Ai Group supports the retention of default funds in modern awards, with the number of funds listed generally limited to no more than 15.

FOCUS QUESTION 31

If changes are made to the selection and assessment of default superannuation funds in modern awards, how should corporate funds be treated?

The arrangements for the treatment of corporate funds were the subject of a great deal of discussion and debate between the Labor Government and industry and eventually workable arrangements were implemented through Subdivision D (The Schedule of Approved Employer MySuper Products) of Division 4A of Part 2-3 of the FW Act. These arrangements should not be varied unless problems are identified after they have been fully implemented.