

AIST

20 February 2023

The Secretariat
Department of Employment and Workplace Relations

Email: WRSubmissions@dewr.gov.au

Dear Sir / Madam,

Consultation on workplace relations measures

Brief

AIST supports the inclusion of superannuation into the National Employment Standards and a continued role for the FWC in reviewing default fund provisions that is separate from APRA's product-specific oversight.

AIST also supports the inclusion of superannuation in parental leave to improve equity for primary carers and better incentivise sharing of flexible leave entitlements.

About AIST

Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public sector superannuation funds.

As the principal advocate and peak representative body for the \$1.7 trillion profit-to-members superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

AIST advocates for financial wellbeing in retirement for all Australians regardless of gender, culture, education, or socio-economic background. Through leadership and excellence, AIST supports profit-to-member funds to achieve member-first outcomes and fairness across the retirement system.

Submission

AIST would like to thank the Department of Employment and Workplace Relations for the opportunity to comment on these proposals. We limit our comments to the measures that pertain directly to superannuation.

1. Insert a right to superannuation in the National Employment Standards

AIST has long called for greater action on SG non-compliance and is strongly supportive of prioritising this measure into legislation. Including a right to superannuation in the National Employment Standards (NES) will deter employer non-compliance in the first instance and provide avenues for redress for workers where non-compliance does occur.

The inclusion of super in the NES will emphasise to employers that super is an industrial right for all workers as a form of diverted wages, not an optional extra benefit to be provided at the discretion of the employer. This is especially true since mandatory super has been extended to workers earning less than \$450 a month as the incentive to game the hours of casual and part-time workers to avoid SG obligations has been removed.

There are merits in the FWO and the ATO having a dual enforcement role. The ATO has traditionally been tasked with enforcing SG compliance but successive reviews have generally classed their activities as reactive rather than proactive and focused more on debt recovery after a trigger event than prevention and early intervention. Currently the only legal framework imposing mandatory superannuation compliance on employers is the *Superannuation Guarantee (Administration) Act 1992* and the penalty for non-compliance is the potential imposition of a SG charge by the ATO. As a result, the ATO has limited tools at their disposal and their role is interpreted to be a light-touch incentiviser of voluntarily compliance rather than a punitive enforcer.

Enshrining SG as a workplace right opens SG non-compliance to a range of interventions and penalties available under the Fair Work Act and will allow individuals, the FWO and other third-party intermediaries to assist with the pursuance of claims when workers have not received their full entitlements.

It was noted in the 2017 report *Superbad – Wage theft and non-compliance of the Superannuation Guarantee* that the FWO already undertakes some enforcement of superannuation matters although most are simply referred to the ATO. It is appropriate for the FWO to actively assist with SG matters as with any other industrial contravention, with the ATO playing a complementary role in recovering and distributing unpaid amounts.

2. Reform of the 4-yearly review of superannuation default fund provisions

We note that the DEWR consultation document identifies the following as a consideration:

"The Fair Work Commission should have the power to review and, where necessary, vary default superannuation fund terms in modern awards. Superannuation products listed in such terms should be able to be scrutinised and contested by relevant stakeholders."

It is unclear what is meant by 'relevant stakeholders'. Does this refer to the industrial parties or does it also include product manufacturers?

If it is intended to apply beyond industrial parties, the role and standing of other parties should be clearly defined and be the subject of specific discussion. In AIST's view the primary scrutiny should be the task of the industrial parties, and the role of product manufacturers and others should be limited to providing information about their products and their performance, and related information (E.g., the results of performance assessment).

The next bullet point for consideration also requires further elaboration.

"Any amendments to the default fund provisions of the Fair Work Act should avoid duplicating processes of other government agencies which have direct regulatory oversight of superannuation, including the Australian Prudential Regulation Authority (APRA)."

Both the Fair Work Commission and APRA are required to fulfill legislative obligations, and it cannot be assumed that FWC's obligations are secondary to those of APRA or other regulators. This requires specific consideration of each element in each statutory body's legislative obligations.

Section 159A of the Fair Work Act sets out the process for the variation of default fund term of modern award:

(1) The FWC may make a determination varying the default fund term of a modern award in relation to a superannuation fund specified in the term in relation to a standard MySuper product (the specified product) in the following circumstances:

- a) to reflect a change in the name of the fund or the specified product;*
- b) if the fund has ceased to exist--to omit the name of the fund and the specified product;*
- c) if the specified product has ceased to exist and no other MySuper product is specified in relation to the fund--to omit the name of the fund and the specified product;*
- d) if the specified product has ceased to exist and another MySuper product is specified in relation to the fund--to omit the name of the specified product;*
- e) if the Australian Prudential Regulation Authority gives the FWC notice under subsection 29U(4) of the Superannuation Industry (Supervision) Act 1993 that the fund no longer offers the specified product and no other MySuper product is specified in relation to the fund--to omit the name of the fund and the specified product;*
- f) if the Australian Prudential Regulation Authority gives the FWC notice under subsection 29U(4) of the Superannuation Industry (Supervision) Act 1993 that the*

fund no longer offers the specified product and another MySuper product is specified in relation to the fund--to omit the name of the specified product.

(2) The FWC may make a determination under this section:

- a) in any case--on its own initiative; or*
- b) on application by an employee, employer, organisation or outworker entity covered by the modern award.*

This section provides an administrative mechanism for the FWC to keep default fund terms up to date, including in relation to relevant MySuper product authorisations. This gives limited power to APRA and references other limited power by APRA to give the FWC notices.

Any extension to this mechanism and powers of the statutory bodies recommended by this review should be limited and specific to the operation of the MySuper product performance assessment prescribed under part 6A of the SIS Act.

The role of APRA should be confined to advising the FWA of the results of performance assessments, and whether products have failed once or twice as a consequence of this. The APRA advice should include information about the specific consequences of failure for each product that has failed, and to provide updates if necessary on the implementation of these consequences.

It is also accepted that APRA may have an appropriate role in advising changes of fund and product name, mergers, and which funds have gone out of existence, although this is not currently mentioned in s.159A.

An Expert Panel was constituted in January 2014 to exercise certain functions in relation to the assessment of default superannuation in modern awards. These functions include reviewing applications to include MySuper products in modern awards. Although there have been obstacles in constituting the Expert Panel, it could be now be used to assist the FWA in assessing MySuper products, including information received from APRA.

APRA's product-testing will remove underperforming funds over time, limiting the pool of available default funds, but performance testing does not apply industry-specific quality filters that should be factored into the terms and default fund selection in industrial agreements. The relevance of tailored insurance, occupational exclusions, unpaid super interventions and other product/fund features to specific industries do not factor into APRA's remit. These are things that should be taken into account by the FWC.

AIST asserts that default fund selection should remain grounded in the industrial relations system with appropriate avenues for review.

We request further detail and consultation about what specific reforms are being considered by the department and what outcomes are being sought from this recommendation.

4. Provide stronger access to unpaid parental leave so families can share work and care responsibilities

While the focus of this question is on improving flexibility to allow new parents to share their working hours and parental leave entitlements more equitably, the question also canvasses any other improvements that that could be made to the scheme. Regardless of new flexibility, many couples will continue to take a heavily gendered approach to parenting due to existing disparities in working incomes, which then become magnified once the usually lower-earning primary carer takes time out of the workforce. Improving workplace rights and entitlements for working parents and carers will increase the likelihood of more families taking up shared flexible arrangements.

AIST has long been a strong supporter of parental leave attracting superannuation as it is among the few working entitlements that are exempt from mandatory super and overwhelmingly impacts women, contributing to the gender retirement savings gap.

Furthermore, periods of unpaid parental leave should still be recognised as active service to ensure the accrual of all entitlements, including superannuation.

For further information regarding our submission, please contact Kate Brown, Senior Manager, Advocacy & Research via email at kbrown@aist.asn.au or David Haynes, Senior Policy Manager at dhaynes@aist.asn.au.

Yours sincerely,



Eva Scheerlinck

Chief Executive Officer