ACTU RESPONSE TO THE GOVERNMENT'S DISCUSSION PAPER:

'BETTER REGULATION AND GOVERNANCE, ENHANCED TRANSPARENCY AND IMPROVED COMPETITION IN SUPERANNUATION'

FEBRUARY 2014

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KEY POINTS

On Governance

- No evidence has been presented that the governance of not-for-profit and industry funds is failing members and that such funds should therefore be compelled to alter their governance structures (for example, by appointing independent directors and chairs to their boards).

- On the most important measure of fund performance (net returns to members) not-for-profit and industry funds have, on average, consistently outperformed their retail rivals.

- The boards of many retail funds comprise independent directors who are in the majority and yet, on average, they underperform funds governed by representatives of employers and employees.

- These representative trustees are independent of executive management and are nominated by shareholders or guarantors who have no beneficial interest in the fund.

- Where not-for-profit and industry funds believe appointing independent directors and chairs to boards is in the best interests of their members, they have done so already.

- APRA has existing powers to deal with any circumstances where a governance failure requires alterations to board composition or other governance related structures. These include both general supervisory powers and powers of direct intervention.

- As a result of the Stronger Super reform process, improvements to fund governance are already being implemented. Their impact should be assessed after an appropriate period of time before further changes are considered.

- There is no evidence to warrant mandating change to the composition of boards of not-for-profit and industry funds. If the government is determined to further change fund governance despite this lack of evidence, there are more appropriate steps that could be taken. For example, the existing obligation on boards to regularly review their performance and procedures for renewal could be strengthened by requiring boards to also consider if appointing an independent chair and/or independent directors (up to one-third of total board membership) may be in the best interests of fund members. The outcome of this review, supported by an account of the relevant reasoning, would then be reported to APRA.

- The ACTU supports a definition of 'independence' for directors of superannuation funds that is already in use as part of the ASX Corporate Governance Guidelines (modified slightly to make it relevant to RSE licensees, including to take account of trust structures and non-beneficial shareholdings). This definition should apply equally to all superannuation funds who decide to appoint independent directors.

On Default Funds in Modern Awards

- Nearly all workers are required by law to make superannuation contributions, but many do not choose which fund to contribute to. In this context the government has a special duty to protect their interests.

- Superannuation contributions are deferred wages, a benefit of employment that belongs to workers and which many routinely bargain to improve. It is therefore appropriate that modern awards (as a key element of the workplace relations safety net) help to protect the interests of employees who are disengaged from their super by obliging employers to make default contributions to funds that operate in the best interests of the workers covered by each award.

- Contrary to some misleading public reports, the modern awards system does not operate to deny individuals choice in relation to their super fund. It allows those who wish to choose to do so, but offers appropriate protection to those who do not and who therefore rely on default arrangements.

- The ACTU strongly supports the current two-stage process for naming MySuper products in modern awards. It combines the input of an Expert Panel with the views of employers, employers and their representatives. Existing arrangements require that any potential conflict of interest that arises in this context must be declared to the Fair Work Commission.

- Many employers support being guided in their choice of default fund by a modern award. It relieves them of the costs and risks of choosing from among hundreds of potential default products.

- The ACTU agrees with the Productivity Commission that MySuper compliance is not sufficient to justify being used as a default fund by employers. There will be considerable variation in performance and cost between MySuper products. Many employers are not in a position to make informed choices that best represent the interests of employees. It would therefore be highly inappropriate to allow employers full discretion to select default funds without independent oversight.

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INTRODUCTION

The Australian Council of Trade Unions represents nearly 2 million working Australians and their families. Many more have their pay and conditions of employment shaped by the work of our affiliates.

For over 40 years Australian unions have played a leading role in campaigning for better retirement incomes for working people. Without unions there would be no Superannuation Guarantee, and many workers in Australia today would not have their own superannuation account containing savings that will help them live a more comfortable life in retirement. Without unions Australia would not have some of the largest, best performing and well-run not-for-profit superannuation funds in the world.

The ACTU has consistently argued that the superannuation industry, and the public policy that regulates it, must always place the long-term financial interests of workers above all other considerations.

This is why we have serious concerns about the government's discussion paper '*Better regulation and governance, enhanced transparency and improved competition in superannuation*.'

Over the past 5 years the superannuation industry in Australia has undergone the most wide-ranging and exhaustive period of review and reform in its history. As a result of the Cooper Review, the Stronger Super process and the Productivity Commission's inquiry into default funds in awards, superannuation funds have been involved in implementing major reforms to their products, administration systems and governance arrangements.

Most of these reforms have been devised and implemented with the involvement and support of unions. We welcome all efforts that are motivated by a genuine concern to improve retirement outcomes for workers, and particularly those workers who are compelled by law to make contributions but who trust others to manage those contributions on their behalf.

However, before many of these reforms have had a chance to prove their effectiveness, the present government has decided to re-open matters relating to governance and default funds when change in these areas is still in the process of being implemented and tested. While citing a concern to minimise disruption, costs and uncertainty, the government appears intent on implementing a new round of change that will intensify the sense of 'reform fatigue' already felt by many parts of the superannuation industry and many fund members.

More importantly, the government has decided to initiate a new reform process in relation to governance and default funds with a Discussion Paper that offers a highly selective, evasive and misleading account of many of the relevant issues. In doing so the paper does not engage with any of the relevant evidence gathered by earlier inquiries and reviews. Instead the paper merely assumes that mandating independent directors is a necessary reform, and suggests that the interests of default fund members would be better served by imposing some form of choice on employers. Any evidence to the contrary is simply ignored.

This is an irresponsible way to conduct the development of public policy.

In addition to responding to the Discussion Paper's Focus Questions this submission discusses the issues and evidence that the government has chosen to disregard.

The ACTU is happy to engage with and support any and all reforms to superannuation that are grounded in the following principles.

Firstly, the primary concern of any reform must be to improve retirement outcomes for fund members. The over-riding purpose of our superannuation system should be to help workers save and invest for their retirement, not to provide a quick and easy source of profit for funds who wish to exploit member disengagement and low levels of financial literacy.

Secondly, reform must be based on evidence, not assumptions derived from abstract theories of competition. Millions of workers in Australia do not engage with their super but are nevertheless compelled to contribute. In this context notions of 'competition' are entirely inappropriate, usually serving as code for increasing the vulnerability of disengaged workers to being allocated to high-cost funds that are not in their best interests.

Thirdly, all reforms must acknowledge that superannuation is an industrial issue. Superannuation contributions are deferred wages; a benefit of employment that belongs to the worker. Our industrial relations system, in the form of modern awards and enterprise agreements, facilitates employees, employers and their representatives having a say in relation to the quantum of contributions and the funds those contributions are paid to.

It is unfortunate that the government's Discussion Paper does not appear to recognise any of these principles. Nevertheless, the ACTU would welcome the opportunity to engage further with the government about any of the issues raised in this submission.

It is our expectation, given the far-reaching nature of the questions raised in the Discussion Paper, that the government would conduct a robust and transparent consultation process on any proposed changes prior to adopting final positions.

To do otherwise would be contrary to the long-term financial interests of millions of Australian workers.

BETTER GOVERNANCE

Unions have a long record of supporting reforms to the governance of superannuation funds that protect and enhance the interests of members. Good governance plays a vital role in advancing member interests and promoting public confidence in our system of mandated contributions to privately operated funds.

To this end, and with the unanimous support of our affiliates, the ACTU Congress in 2012 endorsed a positive and comprehensive agenda for continuing to improve fund governance. This agenda included calls for the following:

- Appointments to trustee boards should be on a renewable fixed term basis with an ideal term of no more than 3 years;

- Nomination and renomination decisions by sponsoring organisations should be made having regard to advice from the trustee board. Sponsoring organisations should obtain and consider advice of the trustee board regarding the skills and experience sought by the board;

- New directors without previous superannuation trustee experience should be required to complete a clearly defined minimum program of professional training including induction and orientation in the absence of which they will not be eligible for re-nomination;

- Directors should be required to participate in an ongoing program of professional development and training in accordance with a formal policy adopted by their fund which is consistent with standards set by a professional body such as AIST, with participation a pre-condition for renomination;

- Directors with a potential conflict of interest (from another directorship or otherwise) should excuse themselves from conflicted matters without consideration of materiality;

- Recognising the important role of service providers (including in relation to administration and investment) funds and the importance of public transparency throughout the superannuation system, funds should a) make full disclosure to members about these arrangements (including in relation to investment fees), and b) implement standard contractual terms with material service providers requiring public disclosure of the remuneration of their directors and officers.

In the context of mandating reform where system-wide legislation is appropriate we also called for the following:

- The government to reconsider the proposal in the Cooper Review (recommendation 2.1) to amend the *Superannuation Industry (Supervision) Act* to establish a distinct new office of ‘Trustee-Director’ (with appropriate duties) in recognition of the importance of the role;

- Require superannuation funds to conduct business with related parties on terms no more

favourable to the related party that would be reasonable if the fund were dealing at arm's length;[1]

- Consider ways to require comparable reporting by superannuation funds of the social utility of their investments and operations apart from long term net returns, including contributions to employment and investment in Australia, public goods arising from investments, such as infrastructure, and efforts to perform and promote sustainable investing.

We believe these reforms, if implemented, would make a significant contribution to improving the quality of fund governance and further enhance public confidence in our superannuation system. They build on the ongoing process of reform that was initiated by the Cooper Review and they are concerned first and foremost with protecting the long-term interests of fund members. We believe the proposals deserve the support of government and regulators, and we would welcome the opportunity to discuss their design and implementation with the appropriate public representatives and officials.

However, it is because we approach the issue of governance reform from the perspective of what is in the best interests of members that we hold serious concerns about a number of aspects of the government's Discussion Paper. These concerns relate to the Paper's assumption that the present model of Equal Representation requires reform in the form of mandating independent directors, and that comparing superannuation funds with the banking and insurance industries offers an appropriate basis for such reform.

Equal Representation Governance

The ACTU is a strong supporter of the Equal Representation model of fund governance. It has played an important role in the success of not-for-profit funds over the past 20 years.

The most recent APRA data demonstrate, yet again, that at the aggregate level superannuation funds operating under representative trustee governance arrangements consistently outperform retail funds over 1, 5, 10 and 15 years. Table 1 summarises the APRA data released on 8 January 2014.

Table 1: Rate of return by fund classification over 1, 5, 10 and 15 years (%)

	1yr	5yr	10yr	15yr
All entities	13.70	3.50	6.00	4.80
Corporate	12.30	4.40	6.50	5.30
Industry	14.40	3.80	6.70	5.30
Public Sector	14.20	4.00	7.00	5.90
Retail	13.10	2.90	4.90	3.70

Source: APRA (2014) Annual Superannuation Bulletin

[1] The *Superannuation Legislation Amendment (Trustee Obligations and Prudential Standards) Bill 2012* determined that trustees must give priority to the duties to and interests of beneficiaries over the duties to and interests of the trustee to other persons (Schedule 1, item 12, subparagraph 52(2)(d)(i)). While appearing to deal with the problem of conflicts of interest generated by intra-group transactions, in practice the legislation does not require trustees to change already existing contractual arrangements that may not be in the best interests of beneficiaries.

APRA's analysis of annual rates of return over a 10 year period show that 96 per cent of the 50 top performing funds are from the not-for-profit sector. Of the 50 lowest performing funds, 80 per cent are for-profit funds.

If there was a positive causal relationship between the proportion of fund boards that comprise independent directors and the rates of return to fund members, we would expect retail funds to outperform not-for-profits. But they do not. The evidence is clear. In terms of the most important measure of member interests (i.e. net returns) funds governed by representative trustees perform better for members than their retail rivals.

Research has identified the two main drivers of this better performance. Firstly, the explicit and embedded expenses charged by retail funds are significantly higher than those charged by the not-for-profit sector.[2] Secondly, the performance of not-for-profit funds is enhanced by a representative trustee model of governance which acts to radically reduce the agency costs normally associated with the provision of complex financial products and services.[3]

The proven record of diligent stewardship of member contributions and prudent investment of funds is testimony to the enduring effectiveness of the model. We therefore agreed with the Productivity Commission in 2001 when it concluded:

> 'The equal representation rules for trustee boards of standard employer-sponsored funds provide balanced representation of employer and employee interests. They are conducive to active member interest in the prudent management of these funds. This benefit exceeds the cost of finding and appointing members who are capable of undertaking trustee duties.'[4]

The Productivity Commission's view that the benefits of having the membership of trustee boards decided under the equal representation rules exceeds the cost of finding and appointing members by other means is significant in light of the present government's stated concern to minimise costs to fund members resulting from new regulation.

The ACTU is not aware of any evidence base that has emerged since the Productivity Commission offered this conclusion in 2001 that should cause the government to challenge this view or cause us to withdraw our endorsement of it.

A further reason why the ACTU supports the Equal Representation model is that it can be adapted to the needs and circumstances of particular funds. Over the past 20 years a number of the largest not-for-profit funds, such as AustralianSuper, Cbus, UniSuper and Hesta, have chosen to appoint independent board chairs and/or independent board members. This experience demonstrates that when not-for-profit boards believe appointing directors and chairs from outside the representative structure is in the interests of members they are able and willing to do so under current arrangements.

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[2] APRA (2008) Investment performance, asset allocation, and expenses of large superannuation funds, *APRA Insight*, issue 3.

[3] Bryan, D., R. Ham, M. Rafferty and K. Yoon (2009) *Governance and Performance in the Australian Occupational Superannuation Industry*, Workplace Research Centre, University of Sydney.

[4] Productivity Commission (2001) *Report into the Superannuation Industry (Supervision) Act 1993 and certain other Superannuation Legislation*.

Unfortunately, the government's paper does not report or discuss this flexibility and the diversity in board composition it has given rise to. By default it cultivates the impression that the formal Equal Representation rules represent the entirety of practice. This is not the case.

A particularly disappointing and worrying feature of the government's Discussion Paper is that it offers no evidence that the Equal Representation model of governance is failing members and that mandating independent directors is a necessary reform. Such an approach to policy development is inconsistent with the conventions of evidence-based policymaking and gives the impression that the government's interest in mandating independent directors is being driven by factors other than the interests of fund members.[5]

In 2010 the Cooper Review recommended that the SIS Act be amended so that no less than one-third of the total number of member representative trustee-directors, and no less than one-third of employer representative trustee-directors, should be non-associated.

This recommendation flowed from the Cooper Review panel's assertion that such a requirement reflected 'contemporary best practice in corporate governance.'[6] The Cooper report did not offer or discuss any evidence that Equal Representation governance in Australia was inconsistent with advancing members' best interests and therefore required mandated change. Nor did the Cooper Review's report consider any of the evidence and debate generated by researchers in corporate governance which questions the extent to which non-associated or independent directors actually deliver better performance and governance in practice.

For example, a Melbourne University study of the relationship between board composition and corporate performance in Australia and internationally in the 1980s and 1990s drew the following conclusions:

> 'Those studies that have sought to find a relationship (direct or indirect) between board composition and corporate performance have, overall, not produced convincing evidence that independent directors enhance corporate performance…as far as Australia's largest listed companies are concerned, independent directors do not appear to have added value over the 1985 to 1995 period.'[7]

In the context of considering *why* independent directors do not necessarily add value the Melbourne University research concluded that formal 'independence' may be an inappropriate proxy for what makes a director an effective monitor of a CEO and executive management. In short, there is no necessary relationship between being an independent director and being willing and able to devote the time, energy and critical thinking needed to hold management to account.[8]

In the absence of evidence the Cooper Review opted for assertion based on one view of corporate governance which is not universally accepted and has not been proven to be

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[5] On the importance and components of evidence-based policymaking see Banks, G. (2009) *Evidence-based Policymaking: What is it? How do we get it?* ANZSOG/ANU Public Lecture, 4 February, Canberra.

[6] Super System Review (2010) *Final Report: Part One Overview and Recommendations*, p. 12.

[7] Lawrence, J. and G. Stapledon (1999) *Do Independent Directors Add Value?* Centre for Corporate Law and Securities Regulation, University of Melbourne, pp. vi-vii.

[8] Lawrence, J. and G. Stapledon (1999), p. 55.

appropriate to the operation of not-for-profit superannuation funds in Australia. The previous government therefore decided not to accept the Review panel's recommendation in relation to non-associated directors.

In 2012 the Productivity Commission conducted an inquiry into the selection of default funds in modern awards. As part of its inquiry the Commission considered the relevance of governance to the naming of default funds. Partly in response to our criticism that the Cooper Review had failed to generate evidence-based recommendations to support its advocacy of non-associated directors, in its Draft Report the Commission recommended that the 'government should consider assembling a panel of corporate governance experts and relevant regulators to assess the appropriateness of board structures of default superannuation funds…'[9]

In its Final Report the Commission revised this recommendation:

> '…in view of the lack of definitive evidence in favour of any particular board structure, it does not consider that this exercise would provide net benefits of this time. The Commission prefers that the impact of the Stronger Super reforms on governance be observed before recommending such a review.'[10]

In short, the Commission concluded that there is no evidence to justify mandating changes to board structures, but any further consideration given to this issue should await an assessment of the impact of the recent reforms to governance already being implemented by government and APRA.

We are concerned that less than 18 months after the Productivity Commission published these conclusions the present government appears to have decided that expert consideration of board structures is not necessary and that change should be mandated before a reasonable assessment of the impact of the Stronger Super reforms to governance can be made. This is not only inconsistent with the conventions of evidence-based policy, it contradicts the government's stated claim that:

> 'Regulation is not the default position for this government and will only be imposed where unavoidable.'[11]

In light of the performance of not-for-profit funds, the absence of evidence that Equal Representation governance is failing to serve the best interests of members, and recent reforms to governance as a result of the Stronger Super agenda, it is unclear why mandating independent directors has now become 'unavoidable'.

The Distinctive Nature of Superannuation Funds

A further worrying feature of the government's Discussion Paper is that the authors do not appear to appreciate the distinctive legal framework within which Registered Superannuation Entities operate and the important implications this has for the nature of the relationship

[9] Productivity Commission (2012) *Default Superannuation Funds in Modern Awards Draft Report*, p. 89.
[10] Productivity Commission (2012) *Default Superannuation Funds in Modern Awards Inquiry Report*, p. 103.
[11] Australian Government (2013) *Better regulation and governance, enhanced transparency and improved competition in superannuation, Discussion Paper*, p. 7.

between funds and their members. This leads the Discussion Paper to assume that it is appropriate to compare superannuation funds with banks and insurance companies for the purposes of identifying potential reforms to how funds are governed. However, such a comparison is not appropriate.

With the exception of public sector funds and Retirement Savings Accounts, all superannuation funds in Australia must be established as trusts. Trust law proscribes a set of principles and rules of general application that govern the relationship between the trustee and beneficiaries of the trust, central to which is the notion of fiduciary duty. This duty means that the trustee is expected to serve faithfully the interests of the fund members within the terms of trust to the exclusion of the fiduciary's own interests.

This general law expectation is codified and reinforced by a set of non-excludable and irrevocable covenants prescribed by Section 52(2) of the *Superannuation Industry (Supervision) Act 1993* and Regulations. In particular, the trustee must act in the best interests of the beneficiaries [s.52(2)(c)] and exercise due care, diligence and skill in dealing with the property of another [s.52(2)(b)].

The Stronger Super reforms resulted in the Section 52(2)(b) covenant being strengthened. Previously, trustees were expected to exercise judgement in a manner comparable with an 'ordinary prudent person'. The SIS Act has been amended so that all judgements must be consistent with those that would be made by a 'prudent superannuation trustee'.

The legal obligations placed on the directors of superannuation funds are therefore qualitatively different than those placed on the directors of banks and insurance companies. Fund directors have a fiduciary relationship with fund members, one which imposes standards of trust, care, diligence and prudence that are not comparable to the commercial contractual relationships that banks and insurance companies have with their customers.

In the context of Equal Representation governance this fiduciary relationship is further enhanced by the appointment of directors all of whom are independent of executive management and are therefore well placed to hold management to account. The willingness of member and employer-nominated directors to apply independent critical judgement to how fund management perform is reinforced by the fact that they are nominated by shareholders and sponsoring organisations none of whom have a beneficial interest in how funds operate.

This contrasts sharply with the practice of retail funds where many directors are appointed by a related corporate body which has a strong commercial interest in how member contributions are managed and invested.

The government's Discussion Paper assumes that the logic for recommending or mandating the appointment of independent directors to the boards of large listed companies is relevant to superannuation funds that are governed wholly or mostly by representative trustees. However, this assumption is misplaced. The primary reason for including independent directors on the boards of listed companies is to check the influence and interests of directors who are also members of executive management. In Australia, no fund with a representative governance structure has a director who is also a member of the fund's executive management.

Focus Questions on Better Governance

In the above text we have discussed a number of serious concerns the ACTU holds about important omissions and apparent misunderstandings evident in the government's Discussion Paper as it relates to fund governance. Our answers to the Focus Questions on governance should be read and understood in the context of those concerns.

a) What is the most appropriate definition of independence for directors in the context of superannuation boards?

A definition of independence for directors in the context of superannuation boards should have equal application across the whole superannuation industry, be consistent with how independence is defined in comparable areas of Australian corporate governance, and allow those bodies responsible for deciding board membership to be able to choose from a reasonably large and diverse group of potential members with relevant experience, knowledge and skills.

The ASX Corporate Governance Guidelines provide a useful definition of independence that has proven to be practical, effective and consistent with good governance across the listed corporate sector. In a superannuation context this definition would have to be modified to make it relevant to RSE licensees, and relevant parts of the SIS Act amended to facilitate the new definition and its application to all RSE funds.

Application of the definition should recognise the important distinction between beneficial shareholders whose primary interest is to maximise returns on their investments, and non-beneficial shareholders in a superannuation trustee context whose primary duty is to advance the best interests of fund members.

The ACTU recommends the following definition of independence for use when funds decide appointing independent directors is appropriate:

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 judgement.

When determining the independent status of a director the board should consider whether the director:

a) 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;

b) 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;

c) 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;

d) 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;

e) is a sponsor, or an employee or an officer of a sponsor, that is a substantial shareholder of the RSE licensee;[12]

f) 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;

g) has a material contractual relationship with the RSE licensee or any of its related bodies corporate other than as a director.

Persons being considered for appointment to a position of independent director should, prior to appointment, disclose any familial ties and cross-directorships that may compromise their independence.

b) What is the appropriate proportion of independent directors for superannuation boards?

The government has failed to present evidence to warrant mandating that not-for-profit superannuation funds include independent directors and/or chairs on their boards. Existing arrangements allow funds to appoint independent directors and chairs if they believe such appointments are appropriate to their needs and circumstances.

If the government is determined to further reform fund governance at this time there are more appropriate steps that could be taken.

For example, existing prudential standards require boards to regularly review their skills, performance and procedures for renewal. This review could be strengthened by placing a positive obligation on boards with representative members to consider if appointing an independent chair and/or independent directors (up to one-third of total board membership) may be in the best interests of fund members. The outcome of this review, supported by an account of the relevant reasoning, would then be reported to APRA.

c) Both the ASX Principles for listed companies and APRA's requirements for banking and insurance entities either suggest or require an independent chair. Should superannuation trustee boards have independent chairs?

A number of funds with representative governance structures already have independent chairs. Existing regulation allows the appointment of independent chairs if funds believe they are appropriate. There is no evidence that mandating change in this area is necessary. The question of what is the appropriate status of the board chair should be something that funds be required to consider as part of a 3 yearly review of its governance structures and board composition (see our response to the previous Focus Question).

[12] An employee or officer of a sponsor may be eligible to be appointed as an independent director depending on the materiality of the sponsor's business or other relationship with the RSE licensee.

d) Given the way that directors are currently appointed varies across funds, does it matter how independent directors are appointed?

How funds appoint independent directors varies, depending on the content of trust deeds and the roles defined for related corporate entities, shareholders and sponsoring organisations. Existing prudential regulations recognise this diversity and rightly avoid detailed prescription. Each board is required to have a charter that defines its roles and responsibilities, and this will usually cover the matter of how independent directors may be chosen.

In funds with representative board structures, shareholders in trustee companies and sponsoring organisations have a non-beneficial interest in the operation of the funds. It is therefore appropriate they have responsibility for appointing independent directors. The selection process may be delegated to the board or a sub-committee of the board, with final approval remaining with the shareholders and sponsors. Many of those funds with representative boards who have chosen to include independent directors follow this model of appointment.

There is no evidence that one particular model of independent director appointment is superior to others. Given this, and given existing diversity in practice and in the content of trust deeds, funds should be left to implement appointment processes appropriate to their circumstances.

e) Should the process adopted for appointing independent directors be aligned for all board appointments?

Across the superannuation industry there is considerable diversity in how directors are nominated and appointed and this diversity is embedded in trust deeds. An attempt to standardise the appointment process in this context is likely to encounter significant legal obstacles in a context where the benefits of doing so are unclear and unproven.

We are not aware of any evidence from within Australian or international corporate governance to suggest standardisation is a necessary or desirable measure that requires a legislated mandate.

In light of this, and the practical problems that aligning appointment processes would encounter, we believe that existing prudential regulation relevant to board appointments is appropriate.

f) Are there any other measures that would strengthen the conflict of interest regime?

As discussed earlier in this submission, ACTU policy calls for the following measures which are relevant to strengthening the conflict of interest regime.

Firstly, recognising the important role of service providers (including in relation to administration and investment) and the importance of public transparency throughout the superannuation system, funds should a) make full disclosure to members about these arrangements (including in relation to investment fees), and b) implement standard contractual terms with material service providers requiring public disclosure of the remuneration of their directors and officers.

Secondly, superannuation funds should be required to conduct business with related parties on terms no more favourable to the related party that would be reasonable if the fund were dealing at arm’s length.

g) In relation to board renewal, should there be maximum appointment terms for directors? If so, what length of term is appropriate?

ACTU policy is that appointments to trustee boards should be on a renewable fixed term basis with an ideal term of no more than 3 years. APRA should develop prudential guidance in support of this arrangement which allows for variation on an 'if not, why not' basis.

We do not believe it is appropriate for government or APRA to mandate a maximum number of terms. There is no length of service after which a director can be assumed to be less effective. Requiring that a director leave a board regardless of their performance and the circumstances of the fund risks depriving the board of important experience and skills at potentially significant moments in the fund's operation.

Whether particular directors should be removed from a board after one or more terms should be a matter for those responsible for appointing such directors to the board. The policy of the ACTU, as both shareholder and sponsor of a number of not-for-profit funds, is that nomination and renomination decisions should be made with regard to advice from the trustee board. Nominating organisations should obtain and consider advice of the board regarding the skills and experience needed.

h) Should directors on boards be subject to regular appraisals of their performance?

It is important that all directors receive the support and spend the time needed to make an effective contribution to the collective governance of their fund.

ACTU policy is that new directors without previous superannuation trustee experience should be required to complete a clearly defined minimum program of professional training including induction and orientation in the absence of which they will not be eligible for re-nomination. All directors should be required to participate in an ongoing program of professional development and training in accordance with a formal policy adopted by their fund which is consistent with standards set by a professional body such as AIST, with participation a pre-condition for renomination.

To this end we would welcome the development of prudential standards in this area that requires all directors be appraised on a regular basis, perhaps at least once during each 3 year term of appointment, in a manner appropriate to how long they have served on the board.

i) Would legislation, an APRA prudential standard, industry self-regulation or a combination be most suitable for implementing changes to governance? What would the regulatory cost and compliance impacts of each option be?

In the context of the reforms advocated by the ACTU, those relating to strengthening the conflict of interest regime by requiring disclosure of fees and remuneration paid to material service providers and their directors, and by requiring that all business dealings with such providers be conducted on an arms-length commercial basis, require legislation. Without clear and firm legislative direction it is very unlikely that funds which conduct business with service providers who are part of the same corporate group will reform their practices in the interests of beneficiaries.

In terms of those reforms relating to the structure, performance and composition of boards, it is important to recognise the considerable variation in practice across the industry and already existing scope for flexibility and fund-generated reform. In this context it would be appropriate for APRA to consult with the industry about developing appropriate guidance and standards some of which, as in the case of appointing directors for renewable 3 year fixed terms, may be on an 'if not, why not' basis.

The government's apparent preference for mandating a certain proportion of independent directors should be subject to a rigorous regulatory cost analysis. For some funds the costs of potentially terminating contracts, dealing with related legal claims, and recruiting suitable replacements in a context where there is a rush by other funds to also find suitable candidates, could be considerable.

j) What is the appropriate timeframe to implement the government's governance policy under each option?

As stated above, the ACTU does not believe there is an evidence-based case for mandating that not-for-profit funds include independent directors on their boards. Funds with representative governance structures have a proven record of adapting their governance arrangements over time to meet their particular circumstances and needs. Mandating change in this context would be needless, costly and disruptive.

However, if legislation does require a greater number of independent directors on fund boards, to minimise costs and disruption it would be advisable that funds are allowed at least 5 years to manage the transition. In most cases this would allow existing contracts to expire and allow funds to recruit appropriate replacements. It should be open to funds to seek exemption from APRA on the basis that implementing the transition within 5 years may cause material damage to the interests of fund members. Such funds should be allowed to work with APRA to develop a transition plan appropriate to their particular circumstances.

k) Given that there will be existing directors appointed under a variety of terms and conditions, what type of transitional rules are required?

See our response to the previous Focus Question.

ENHANCING COMPETITION IN THE DEFAULT SUPERANNUATION MARKET

Superannuation contributions are deferred wages. They are a benefit of employment that belongs to the employee. Many workers and unions successfully bargain to increase the contribution rate above the legislated minimum. Because the performance of superannuation funds varies widely, unions also place a priority on making sure contributions are made to those funds that best represent their members' interests.

The ACTU is therefore a strong supporter of the arrangements for selecting default funds to be listed in modern awards that began to operate on 1 January 2014. They are an improvement on previous arrangements and those proposed by the Productivity Commission in its final inquiry report on the issue published in October 2012.[13]

Before responding to the Focus Questions on default superannuation contained in the government's Discussion Paper, it is important to understand the broader context within which current arrangements are intended to operate and the problems they are intended to address. This is necessary because, unfortunately, the Discussion Paper does not offer a balanced and thorough examination of the issues relevant to default superannuation selection for employees who rely on modern awards to help protect their interests.

The government will be aware that some in the financial services sector have a significant commercial interest in securing greater access to default contributions partly because it is easier to impose high fees, charges and commissions on those who do not engage with the detail of how their superannuation is managed by others. It is therefore vital that in our system of compulsory contributions public policy places the interests of disengaged members first and recognises the highly distinctive nature of the market for default superannuation that exists, not in economic theory, but in practice.

The Market for Default Superannuation

The market for default superannuation is characterised by a number of important features:

a) Participation in the market is mandated by statute: the *Superannuation Guarantee (Administration) Act 1992*. This mandate now applies to nearly all employed people in Australia. While most involuntary market participants are then free to choose which superannuation funds their contributions are made to, very few actually do so. Only around 3 per cent of fund members switch funds each year. Around half of those who switch only do so because they move to a different employer. Over 90 per cent of fund members do not take the opportunity to switch between investment options.[14]

b) There is significant information asymmetry between most fund members and superannuation professionals. To millions of Australians superannuation appears complex, opaque and shrouded in impenetrable jargon. The proliferation of products and investment options in recent years, far

[13] Productivity Commission (2012) *Default Superannuation Funds in Modern Awards Inquiry Report*, No. 60, 5 October 2012.
[14] Industry Super Network (2009) *Competition in the Superannuation Market*.

from encouraging engagement and empowering consumers, has often served to reinforce the image of an industry beyond the understanding of many ordinary people. 'Choice overload' in the context of limited financial literacy tends to reinforce consumer passivity and inertia. For many, the time and costs involved in acquiring sufficient knowledge to make informed decisions about how the compulsory contributions they must make should be managed and invested by others are too great.[15]

c) Multiple conflicts of interest. For many financial institutions our superannuation system is primarily an opportunity to accumulate private profit. The existence of a large number of customers who are compelled to participate in a market they often do not understand and are unable to influence has provided financial institutions with many opportunities to apply a raft of fees, charges and commissions at the expense of member benefits. This is evidenced by the fact that while retail funds on average underperform relative to industry funds in terms of net returns to members, they nevertheless charge significantly higher fees.[16]

In this market context, which the government's Discussion Paper does not acknowledge or engage with, the practice of allocating some disengaged employees to default funds via modern awards offers a number of important advantages.

Firstly, and most importantly, in terms of net returns to fund members these arrangements have a proven record of operating in the best interests of the large majority of employees affected by them. Earlier in this paper we noted the outperformance of not-for-profit and industry funds relative to retail funds and the reasons for this. The government's Discussion Paper, while quick to cite some criticisms of these arrangements made by the Productivity Commission, neglects to mention a key point made by the Commission in its 2012 report:

'The current default superannuation arrangements have resulted in net returns of default funds (that is, those listed in modern awards) generally exceeding those of non-default funds. Over the eight years to 2011, default funds in modern awards averaged an after-tax rate of return of 6.4 per cent, compared with 5.5 per cent for non-default funds.'[17]

Secondly, they relieve employers of the responsibilities and costs involved in choosing from a large number of potential default funds. Research shows that many employers strongly support the inclusion of default funds in awards.[18] In part this is because many employers regard managing their compulsory super obligations as a burden to be minimised. This is why, as the Cooper Review panel noted, many of those employers not formally covered by an award are nevertheless content to use a default fund named in an award appropriate to their industry.

Thirdly, they offer flexibility. Under pre-2014 and current arrangements all those employees whose default fund membership is guided by an award can leave that fund at any time and join another one of their choice. Prior to 2014 it was open to each employer and their employees to

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[15] Fear, J. and G. Pace (2008) *Choosing Not To Choose: making superannuation work by default*, The Australia Institute, Discussion Paper 103.

[16] Bryan, D. et al (2009) *Agents With Too Many Principles? An Analysis of Occupational Superannuation Fund Governance in Australia*, Workplace Research Centre, University of Sydney.

[17] Productivity Commission (2012) *Default Superannuation Funds in Modern Awards Inquiry Report*, p. 8.

[18] Industry Super Network (2009) *Super System Review Phase 2 Operation and Efficiency: Appendix 2 Employers and workplace Default Superannuation Funds*.

reach an enterprise agreement that names one or more default funds that differ from those named in the relevant award. That remains the case today, with the condition that agreements must specify a fund that is MySuper compliant.

Under pre-2014 arrangements any fund not named in an award could, with the support of a relevant employer or employee or their representatives, apply to the Fair Work Commission to be included. Many such applications were successful. As the Productivity Commission noted in its inquiry into award default selection, 14 per cent of funds listed in awards in 2011 were retail funds.

That only 14 per cent are retail funds has been used by some critics of the awards system to suggest a lack of transparency and contestability. This ignores the fact that retail funds could apply for inclusion without the support of collective industrial representatives – be they unions or employer groups. A fund that could gain the support of any employer or employee covered by an award could have their application for inclusion in that award considered by the Commission. In practice, the problem that many retail funds encountered was not that the award selection process lacked transparency and contestability; it was that they could not get an employer or employee to support their application.

Under the new arrangements, once the Expert Panel has determined the Default Superannuation List any fund named on that list which does not have the support of an industrial representative to be named in an award can nevertheless apply to be named if they have the support of an award-relevant employer or employee.

The new arrangements that began to operate on 1 January 2014 have three advantages.

a) They preserve the flexibility of the previous arrangements (albeit now subject to MySuper-compliance). No MySuper-compliant fund that has been selected by the Expert Panel, and which can gain the support of a relevant employer, employee or industrial representative, is excluded from applying to the Full Bench during the second stage of the selection process to be named in an award.

b) They recognise that MySuper compliance is, by itself, not a sufficient basis for inclusion in awards. The Productivity Commission view on this was clear:

'The Commission considers that, while the MySuper legislation seeks to provide information that will better enable superannuation products to be compared, employers are not best placed to make this comparison from the expected full suite of products that will be available in the medium term. This is due to the inherent principle-agent issues that exist between employers and employees, and the stated lack of interest and expertise on the part of many employers when it comes to choosing a default product, particularly from a large number of available products. Therefore, the Commission currently does not support [employers choosing any MySuper product].'[19]

In this context the newly created Expert Panel will play an important role in determining which MySuper products, from the universe of such products, should be eligible for potential award inclusion. In a new, crowded and unproven MySuper environment the Panel will provide a vital

[19] Productivity Commission (2012) *Default Superannuation Funds in Modern Awards Inquiry Report*, pp. 191-2.

‘quality filter’ that will both guide employer and employee representatives and protect all award employees from the risk of poorly informed choices.

c) They recognise the status of superannuation as an industrial issue. Superannuation contributions are a benefit of employment, they belong to the employee, and many employees routinely bargain to increase the contribution rate above the legislated minimum and to have default contributions made to particular funds. This helps to explain why nearly one-quarter of employers in Australia made contributions above the 9 per cent minimum in 2010.[20]

The matter of default contributions is an important industrial issue for many workers because given persistent and significant differentials in performance between funds, how the quantum of these deferred wages is set, allocated and managed can have important consequences for the quality of life they experience when they retire. In this context it is appropriate that the views of employers, employees and their representatives have precedence in the context of the Fair Work Commission when it is deciding the content of industrial instruments such as modern awards.

Any potential conflict of interest that arises because an employer, employee or their representative may be involved in the governance of a fund they are also advocating for must be declared to the Commission.

Unfortunately, the government does not appear to understand an important aspect of the new default arrangements. In its Discussion Paper the government states:

‘Unlike the Productivity Commission’s model, the *Fair Work Act 2009* limits the number of default funds to 15, encouraging a manageable number for employers to choose from, but preventing the FWC selecting the most appropriate number that they determine relevant for each award.’

This is untrue. Section 156H(3) of the Act states:

‘The default fund term may specify more than 15 superannuation funds in relation to standard MySuper products that satisfy the second stage test if, taking into account the range of occupations of employees covered by the modern award, the FWC is satisfied it is warranted.’

Limiting the number of named funds normally to 15, but allowing for more when industrial circumstances justify it, is in part a response to the concerns of employers who rely on award guidance to help them meet their default obligations. In its submission to the Productivity Commission inquiry, Eldercare, a large aged care provider, stated:

‘From an employer perspective, we would prefer not to be given the responsibility of choosing a default fund from an extensive list, and would favour choosing from a small number of proven funds in awards.’[21]

This was a view common to many employers who took part in the Productivity Commission’s inquiry. Unfortunately, the government’s Discussion Paper does not acknowledge or engage with this evidence and the issues it raises. However, the matter of employer choice, and the problems

[20] ASFA (2010) *Employer Contributions to Superannuation in Excess of 9% of Wages*, Research Report.
[21] Eldercare (2012) *Submission to the Productivity Commission Inquiry into Default Superannuation in Modern Awards*, p. 1.

associated with it, deserves further discussion.

Problems of Employer Choice

An alternative to current arrangements favoured by some is one based on 'employer choice': having employers choose any MySuper-compliant fund independently of award content. The government's Discussion Paper asks for views on a model of 'employer choice' where any MySuper product could be chosen, but employers could use an 'advisory list of high quality funds' to help guide their choice.

It is worth noting that the primary advocates of 'employer choice' in Australia today are not employers, but retail funds and their related corporate parents. There is no evidence that a significant number of employers who are currently guided in their selection of default funds by modern awards wish instead to have responsibility for making that choice from among hundreds of potential products. In its submission to the Productivity Commission inquiry into default funds in awards, the Council of Small Business Australia (COSBOA) stated:

'Many consumers and small business owners do not have the interest, information or expertise required to make informed choices about their or their employee's superannuation.'[22]

Having failed to gain significant support for their products via the industrial relations system, many retail funds hope lack of employer expertise in the context of 'employer choice' will help them expand their share of the default market.

In its draft inquiry report the Productivity Commission canvassed views on a draft recommendation that employers should be able to choose a MySuper fund outside those listed in the relevant award. In effect, the Commission's draft recommendation was broadly similar to the model currently being canvassed by the government's Discussion Paper, with award-listed funds playing a role akin to the government's suggested 'advisory list of high quality funds'. In both cases employers would have full discretion, but could refer to some form of list if they wished.

We opposed the Commission's draft recommendation for the following reasons.

Firstly, while employers are obliged to pay superannuation contributions, those contributions belong to the employee. It is therefore important that employees and/or their representatives have a say in relation to which fund those contributions are made. In the absence of individual choice this say is facilitated by the system of modern awards and enterprise bargaining. The Commission's one-sided concern with the obligations and preferences of employers was therefore misplaced.

Secondly, it was not clear from the Commission's draft report exactly what the nature and scale of the problem is that would justify allowing any employer to unilaterally opt-out of the awards system on the matter of default superannuation. It was suggested in the draft report that award arrangements may be acting to hinder the 'closer tailoring of superannuation to the needs of particular workplaces'. Aside from anecdotal assertion we were not aware of any substantive

[22] COSBOA (2012) *Submission to the Productivity Commission Inquiry into Default Superannuation in Modern Awards*, p. 2.

body of evidence to support this suggestion.

Many employers are happy to be guided in their selection of default funds by award provisions. So legislating to allow an opt-out, in response to a problem the nature and scale of which is unproven and unclear, seemed very likely to prove pointless at worst or disproportionate at best. It would complicate the regulatory framework, adding to uncertainty, and expose employers to selection and compliance risk.

Employers and employees who wish to depart from award terms can do so by reaching an enterprise agreement. It is open to employers and employees to make an agreement that allows every employee to choose any fund they wish. If the Commission was claiming that for some employers the costs of reaching such an agreement are excessive relative to the benefits of being able to choose a non-award default then this was claim that required proper evaluation prior to being used to justify significant regulatory change.

Thirdly, we expressed concern that the risks to members of allowing employers to unilaterally opt-out of awards on the matter of default superannuation would out-weigh the supposed benefits. The Commission's proposal appeared to rest on the assumption that employers will typically make choices that are in line with the best interests of employees.

However, it is well known that the level of superannuation-related literacy and engagement among employers is low. A marketing-driven climate of 'employer choice' risks encouraging some employers with little understanding of default superannuation to consider changing their default arrangements, selecting new funds that are not in the best interests of employees.

This problem is likely be aggravated by the use of inducements. Section 68A of the SIS Act prohibits a superannuation provider from offering inducements in relation to the choice of a default fund. However, a number of products such as administration services and those that are also made available to employees are exempt from the inducement prohibition. In addition, research for the Australian Tax Office into employer attitudes and behaviour in relation to superannuation found that 13 per cent of employers admitted either to receiving inducements to use their current default fund, or to not being sure if inducements had been offered. 11 per cent of large employers admitted to having been offered inducements to select their current default.[23]

It seems likely that the real level of use of prohibited inducements will be higher than that admitted in an anonymised survey. The researchers commented:

'Employers would be more inclined to consider changing their default superannuation if it was clear that membership of one fund would provide financial or resource benefit to the company.'[24]

Finally, the Commission stated that introducing employer discretion would 'add a competitive element to the system which will enhance incentives for all superannuation funds to meet the best interests of members'. However, we argued that unilateral discretion in the context of low employer literacy and aggressive pro-choice marketing would be unlikely to generate the

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[23] Colmar Brunton (2010*) Investigating Superannuation: Quantitative Investigation with Employers, Final Quantitative Report*, p. 56.

[24] Colmar Brunton (2010) *Understanding Superannuation Preliminary Report: Qualitative Investigation with Employers, Consumers & Industry*, p. 28.

competitive processes that the Commission hoped for. If added discretion did lead to a degree of greater competition it was important to recognise that competition generates additional distribution costs as funds invest more in marketing their products to sustain their revenue base. Research by Rice Warner estimates that such costs for the average industry fund member could increase by up to $45 per annum.[25]

In the absence of evidence that the interests of members were being damaged by the requirement that employers comply with awards on the matter of default superannuation, and given our concern that allowing employers to unilaterally opt-out would likely expose employees to an increased risk of poor and badly motivated choices, we strongly opposed the Commission's draft recommendation.

In its final report the Commission withdrew the draft recommendation on the grounds that it was not possible to assume that employer choices would align with the best interests of employees and that any mechanism designed to police such an alignment would place an undue burden on employers.

For similar reasons we oppose any move to 'employer choice' as a result of the government's current review of default arrangements.

Unfortunately, the government's Discussion Paper does not engage with any of the problems associated with employer choice and does not acknowledge or comment upon the Productivity Commission's conclusions on this important issue. The Paper outlines a potential reform that may have a detrimental impact on the financial interests of millions of workers without any attempt to provide substantive context or evidence. This is an irresponsible way to conduct the development of public policy in an area where government has a special responsibility to protect the interests of millions of disengaged fund members.

Focus Questions on Default Superannuation

a) 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?

The primary objective of public policy in this area should be to protect the interests of millions of disengaged fund members who are compelled by statute to make superannuation contributions and who must trust others to manage those contributions in a manner conducive to maximising their retirement benefits. In this context matters of transparency and contestability, while important, should be of secondary concern. They should be understood as means to an end rather than an end in themselves.

For the reasons discussed earlier in this paper, the ACTU supports the existing model. It recognises the status of superannuation contributions as deferred wages, and combines expert input with the views of employers, employees and their representatives in deciding which funds are best suited to serve as defaults. All funds can apply for listing by the Expert Panel and any

[25] Rice Warner (2012) *Default Superannuation Funds in Modern Awards, research prepared for HOSTPLUS*, Sydney.

fund that can gain the support of a relevant employer, employee or their representatives can make a case to the Fair Work Commission to be named in particular awards.

b) 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?

The ACTU supports the existing model. It would be inappropriate and inconsistent with the Modern Award Objectives to give standing to superannuation funds in an institutional and regulatory context designed to promote and conduct industrial representation and bargaining. Under the existing model any fund selected by the Expert Panel, and which can gain the support of a relevant employer, employee or their representatives, can be considered for award inclusion by the FWC.

The existing model provides for between 2 and 15 funds to be listed in each award. More than 15 can be named if there is an industrial logic for doing so. This approach responds to the concerns of many employers who want a concise list of appropriate default funds to guide their selection. It also means that the FWC can select a larger of funds where awards cover a particularly large and complex range of occupations that have diverse needs in terms of superannuation and related services such as insurance and collection of arrears.

c) 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?

Under the existing model the Expert Panel will combine individuals with detailed knowledge of superannuation with FWC members who have extensive understanding of awards and the broader industrial relations context within which they operate. This is the appropriate body to decide which MySuper products deserve to be considered for listing in awards.

d) 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 (the previous Focus Question).

For the reasons discussed earlier in this paper, the ACTU agreed with the Productivity Commission in 2012 when it concluded that allowing employer choice would not be in the best interests of default fund members. Under the existing model there will be a list of high quality funds for use by employers and they will be named in awards. In the context of low employer interest and literacy in relation to default superannuation, and the associated risk of poorly informed and badly motivated choices, it is appropriate that employers are required to observe award terms.

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

It is important that all default contributions are made to a fund that merits receiving those contributions because of performance and the quality and industrial relevance of the related services it offers. No fund, including any corporate fund, should be exempt from being regularly assessed on these grounds. Therefore no corporate fund should be subject to grandfathering provisions or be exempted from the process of expert and industrial evaluation applied to all other default products.

The existing model deals with this issue by requiring that during every four year review the Expert Panel within FWC makes a list of ‘employer MySuper products’ titled The Schedule of Approved Employer MySuper Products. The Expert Panel will invite applications from funds offering such products to be included on the Schedule and will consider related submissions.

The default term of an award will then only permit contributions to those employer MySuper products that the Expert Panel has approved on the basis of the first stage selection criteria and which the Commission has concluded are in the best interests of the relevant employees during the second stage.

This process will help to ensure that corporate funds do not receive default contributions simply because of precedent and inertia. The existing model should therefore be maintained.

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