PRODUCTIVITY COMMISSION

INQUIRY INTO DEFAULT SUPERANNUATION FUNDS IN MODERN AWARDS

MR M. WOODS, Presiding Commissioner
MR P. COSTELLO, Associate Commissioner
MS A. MacRAE, Commissioner

TRANSCRIPT OF PROCEEDINGS

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MR WOODS: Good morning, ladies and gentlemen. Welcome to the public hearings for the Productivity Commission inquiry into default superannuation funds in modern awards following the release of our draft report in June. My name is Mike Woods. I'm the presiding commissioner on this inquiry. My fellow commissioners are Angela MacRae and Paul Costello.

The purpose of these hearings is to facilitate public scrutiny of the commission's draft report, to get comment and feedback on it. Following these hearings in Melbourne, we will have the hearings in Sydney tomorrow. We will then be receiving final submissions from participants and complete a final report for government in October, having considered all the evidence presented at the hearings and in submissions. Participants in the inquiry will automatically receive a copy of the final report once released by government which can be up to 25 parliamentary sitting days after completion.

We would like to conduct all hearings in a reasonably informal manner but I remind participants that a full transcript is being taken and will be made public. For this reason, comments from the floor cannot be taken but at the end of the proceedings for the day, there will be an opportunity for anybody who wishes to make a brief presentation.

Participants are not required to take an oath but should be truthful in their remarks and participants are welcome to comment on all issues, including those raised in other submissions. A transcript will be made available to all participants and will be available on the Commission's web site following the hearings, as are submissions.

To comply with the requirements of the Commonwealth OH and S legislation, you are advised that in the unlikely event of an emergency requiring evacuation of this building, you should follow the green exit signs which are no doubt at the door and head to the left. Lifts should not be used and in fact aren't to be used. Please follow the instructions of floor wardens at all times. If you believe that you would be unable to walk down the stairs, please advise the wardens who will make alternative arrangements. The assembly point for the commission in Melbourne is at Enterprize Park at the end of William Street near the bank of the Yarra River.

We would now like to welcome, from the Australian Institute of Superannuation Trustees, Fiona Reynolds and David Haynes. Could you please for the record each of you separately state your name and the organisation that you are representing.

MS REYNOLDS (AIST): Fiona Reynolds, the Australian Institute of Superannuation Trustees.

MR HAYNES (AIST): David Haynes, the Australian Institute of Superannuation Trustees.

MR WOODS: Thank you very much. Thank you for your initial submission and for meeting with us and for your supplementary submission which we have received. We appreciate the support that you have given the inquiry and the forthright way in which you have expressed your views. They are very clear and that's always very helpful. We look forward to this session. Do you have an opening statement you wish to make?

MS REYNOLDS (AIST): Yes, we do. First of all, we would also like to thank the Commission for the opportunity to present today and for the opportunity to participate with the submissions and meetings that we've subsequently had. We do want to make some introductory comments and then we plan to really spend our time talking about the criteria for being selected as a default fund, how and by whom the funds should be selected in our view and the issue of employers being able to opt out of the system.

For the record, we want to begin by saying that we believe that default funds play an important role in compulsory superannuation system. They contribute to one of the key public policy objectives of overall retirement income policy and that is maximising benefits to members. AIST also believes that given the compulsory nature of the system that policy objectives must encompass structural efficiency, minimising intermediation, profit taking and market concentration. AIST believes that as the super system is compulsory and primarily employment based that there must be a mechanism in place to determine where members' contributions are placed should they not make an active choice themselves. Therefore, AIST believes that Fair Work Australia and our national modern award system provide the most efficient, equitable and appropriate structure to efficiently determine where default contributions should go.

AIST contends in actual outcomes for the several decades that the industrial relations system has looked after superannuation that the system has served people well, the longer-term, lower costs and outperformance of not-for-profit funds being recognised by the regulator, rating agencies and a range of surveys and studies from both within and outside the superannuation industry. Within this overall framework, AIST is of the view that the funds chosen as default funds must be the best performing funds and they must be fit for purpose for the members of a particular award.

AIST believes that superannuation is an important social policy. We don't believe that superannuation is merely a financial product that you pluck off the shelf with a one size fits all approach. We believe that in many instances, although we

recognise not in all instances, that funds need to be designed for the members of certain industries and we think that that is an important part of the award system.

We therefore believe that factors other than being a MySuper fund and having a MySuper licence need to be considered as default funds, although we recognise that being a MySuper fund would be your starting point. Given the compulsory nature of superannuation, the government and regulators in our view have an added duty of care to protect members' interests and they also have a duty of care to employers to ensure that they are not overly burdened and asked to make complex decisions about things that they are ill equipped to do. As I said, AIST believes the current default system has served members well. It has provided this protection as well as superior performance.

We therefore think that any changes made to the system need to be done with care and need to retain having members' best interests at heart. We don't believe the changes to the system should simply be driven by political rhetoric and pressure about so-called closed shops; nor, however, should the system be about favouring one sector over another.

AIST believes that given that we're going through a number of regulatory changes within superannuation and that we're moving from 9 to 12 per cent that a review of the default fund's selection is nonetheless warranted. Furthermore, we of course support transparency, disclosure and contestability and we are open to changes to the system provided they provide better outcomes for members and that changes to the system that make it easier for people to understand we agree would be good for the superannuation system as a whole.

We also want to note that retail funds often say that they're not part of awards. As your report itself has pointed out, retail funds are in 16 per cent of awards. They're in more awards than public sector funds and more awards than corporate funds. We also remind the commission that not-for-profit funds on average have outperformed by 2 per cent and that this 2 per cent translates to tens of thousands of dollars in people's retirement savings accounts.

AIST believes awards play an important role for workers in setting out their minimum entitlements and superannuation is one of these entitlements, so it makes no sense to us that superannuation is divorced from the rest of the award system and therefore we believe that Fair Work Australia needs to continue to have a role. We also believe that it makes no sense to build a new system that's been reviewed and is designed to be more open and transparent and then to allow employers to opt out of it. We remind the Commission that choice of fund has been in operation since 2005 and choice of fund of course allows for this selection outside the default system by the individual. To assist employers, we also believe that up to 10 funds, rather than

an endless list of funds, is the most appropriate number to appear in each award.

Before discussing the criteria in detail which we will in a minute, I'd just like to say that whilst we agree with the additional criteria in MySuper as set out in the draft report, we do reject the recommendation from the Commission to recommend the establishment of a panel to consider the governance and board structures of superannuation funds. We say that because you're aware that APRA is in the process of being given standard-making powers and that they're about to put out 12 new prudential standards. These standards will deal with APRA's views on board structure and independence and we therefore believe that APRA is the best regulator for this area and it would further complicate matters to have another panel looking at it. I'm going to hand over to David now to talk in more detail about the criteria in particular and the employer opt-out.

MR HAYNES (AIST): Thank you, commissioners. The position of AIST in relation to the nine criteria that you identified is that AIST generally supports the identification and characterisation of each of those criteria. However, we believe that those criteria can be used as more than just the basis for guidelines and can in fact be framed as prescriptive criteria. Given the direct link of these factors with the best interests of members, the Productivity Commission should be comfortable about recommending their use on this basis.

We also strongly support the manner in which the Productivity Commission has divided the nine criteria into primary and secondary criteria. The emphasis on net investment returns we submit is entirely appropriate and is consistent with the framework that has been constructed for the implementation of MySuper.

In relation to the particular details of each of the criteria, AIST was particularly pleased that the Productivity Commission had identified flipping as a significant issue and we note that throughout the Stronger Super reforms, there has been an active debate going on between the industry, the government and others about the extent to which flipping is a problem. While it is our view that the Productivity Commission has probably under-emphasised the impact of flipping, we think the criteria needs to be enhanced somewhat by actually supporting the prohibition on flipping from one MySuper product to another MySuper product, given that we anticipate that a number of funds will set by generic MySuper products with higher than necessary fees which will then feed on the natural churn of employees over a relatively short period of time.

In relation to the issue of advice, while AIST also supports the identification of the quality of member and fund-specific intra-fund advice as an appropriate consideration, we think that the Productivity Commission should take a wider view about the provision of advice services and also have a look at general product and

education services beyond intra-fund advice that can involve, at one end, seminars, and at the other end, it can involve access to appropriate fee-for-service advice services.

The Productivity Commission has also identified administrative efficiency as a matter for consideration and AIST strongly supports this as a criteria, not least because I think the efficiencies that will come about as a result of the implementation of the Stronger Super reforms are probably under-realised and there will be some parts of the industry that will be faster and more efficient in terms of implementing those efficiencies than others. So we believe that that should be rewarded in the selection process. Fiona also identified that, talking about our concerns in relation to the opt out of employers from the selection process, and we understand that this has been a matter of significant submissions already to the Productivity Commission. Our position is that if, on the one hand, there is an opt-out mechanism that is not the subject of consideration and review by an appropriate process, then that makes a mockery of the whole of this process, and yet on the other hand, if there is an opt-out mechanism that is subject to some sort of best-interests test or no-disadvantage test, it leads to a situation where there will be an alternate and parallel mechanism in place that we think necessarily would involve additional bureaucracies, additional resources, something that we say is entirely unnecessary, given the ability of employers to seek creation of an enterprise agreement.

While we understand that not all employers would want a complete code of employment forming an enterprise agreement, we believe that there should be the capacity to amend the Fair Work Act to facilitate the making of a single issue enterprise agreement simply covering the issue of superannuation which would then bring the matter within the framework of Fair Work Australia. So thank you, commissioners, I think that concludes our introductory remarks.

MR WOODS: We appreciate that, and the concise way in which you expressed those views and we do have the benefit of the more fulsome document. If I can just tidy up a couple of the factors for consideration issues first and then we might spend a little bit of time exploring your issues on what you have described as the "opt out", although we didn't use that phrase in our report as I recall.

MR HAYNES (AIST): Yes.

MR WOODS: But in terms of process, the first one, you commended our identification of the first two factors, being the appropriateness of the investment return objectives and the ability to deliver on those investment objectives, I note in your original submission in fact that you express it in a way that perhaps is even closer to what we're trying to achieve. Some parties have put to us that it is just the long-term net returns, whatever they may be, but I notice in your original submission

you used the phrase "provide long-term net returns that meet the investment targets", so I think that's an important differentiation. So it's not just a raw number, it is: what are the investment targets of the fund and their ability to achieve those? Presumably you're fairly comfortable with our formulation which tries to draw that further distinction.

MR HAYNES (AIST): We are very comfortable with that approach, commissioner. We would emphasise the fact that in setting investment targets, funds will also have regard to their risk profile and the risk appetite of their members and we think that in turn supports the linkage of particular awards with particular funds. A fund with young members may well accept greater volatility in returns, given that the average member of that fund may have 40 years to retirement, whereas a fund that has large account balances with older members may have a member who has got less risk appetite, and so the alignment between the members of that fund and the nature of the industry we think is appropriate. REST, for example, is the example of a fund with young members with low account balances, whereas in the utilities industry, you typically have older members with large account balances.

MS REYNOLDS (AIST): Further to that, we think it's not where you end up in some arbitrary ranking, it's basically that you are meeting the objectives that you told your members you would meet. So if you told you members your return was CPI plus 3, it's more important that you meet that objective than you happen to be in the top 20 of the super ratings rating table. As David said, while there are certainly some generic funds there, there are certainly also tailored funds for specific industries and we don't want to see funds just worry about where they are in a table, we want to see that funds deliver the best services for their members, and their members are not necessarily the same as the members in the next fund.

MR WOODS: That's an important distinction which we've tried to bring out and we were heartened by the way you expressed it in your submission.

MR HAYNES (AIST): Commissioner, if I can just conclude on that point, there is another factor that perhaps isn't fully appreciated by the wider community yet and that is, APRA we understand are developing further risk ratings which funds would have to adopt and publicise, and that will be a very significant factor in terms of people making sure that there's the right risk return mix. APRA have identified that they were involved in this exercise but the details of those requirements haven't yet been published and we understand an APRA discussion paper on that matter is being released towards the end of next month.

MR WOODS: Thank you. Can I just briefly turn to our fourth factor for consideration which is governance structures as far as legislative requirements allow consistent with meeting the best interests of members. As we've reflected on

response to that, an alternative formulation would be to focus not so much on the structure itself, because different structures might produce different outcomes, but whether it's the governance process that is consistent with best meeting the interests of members. If there was a formulation along those lines, governance processes, that would then also mean that we would need to reconsider our draft recommendation 5.2 which is considering assembling a panel of experts to look at structure. We don't have a view on it yet, but just exploring with you, given that you raised it, if that factor was expressed more in terms of processes, would that alleviate some of your concerns and do you have a response to that?

MS REYNOLDS (AIST): Without knowing exactly what you mean, the detail, it's hard to respond. So I think I would still generally say that I think it is the role of APRA to do this and that they are getting new powers. They regularly review superannuation funds and the processes that funds have in place to make their decisions. So to me it would seem, again, to be a duplication. If you had concerns, I think there could certainly be discussions with APRA about those issues and about knowing how APRA covers those issues off, but I think superannuation is highly regulated and adding in some other process, I just don't - I mean, APRA is so vigorous a regulator, particularly in our sector - - -

MR HAYNES (AIST): One of the things that we have done throughout our submissions is identify which regulator we believe is appropriate for which function and we've settled on the view that Fair Work Australia is the appropriate regulator in relation to workplace matters. But in relation to governance matters, it is clearly an existing responsibility of APRA and I think I take you to mean that the Commission may make some comments which it would perhaps recommend to APRA that they take on board in further developing their guidelines around the governance prudential standard.

MR WOODS: That could be a way to go. Can I just pick up one more and then let my colleagues have a moment's airspace. You mentioned in terms of flipping providing greater protections against that. We have a clear view that flipping in itself is not an acceptable practice but there has to be a balance against preventing discounting of fees and other aspects of a fund where that can in fact provide a benefit, particularly at the upper end with large employers et cetera. So when you talk about greater protections, I don't know if you want to particularly pursue it - if so, briefly - but whether you want to flesh that out some more, so that somehow we still get the balance out.

MR HAYNES (AIST): We are specifically concerned with abuse associated with the removal of discounted fees when you're a member of a large employer MySuper fund when a person leaves that fund. It is possible for a person in that situation to be transferred to a generic MySuper product or to an eligible rollover fund and for that

to happen without their knowledge or consent. We think that process is open to manipulation and abuse. In other submissions that we have made, we have suggested some sort of tolerance limit about the extent of the discount and some sort of rules that would apply in relation to the setting of fees by an eligible rollover fund which is a repository for small and inactive accounts.

MS REYNOLDS (AIST): We're certainly happy to come back with some more thinking around that. We don't want to see flipping, but the government is allowing within a MySuper framework for there to be discounted fees, so there has to be a protection mechanism put in place.

MR WOODS: Which would include consideration of what is the default to which they then move - - -

MS REYNOLDS (AIST): Yes, exactly.

MR WOODS: - - - and whether that in itself is an appropriate fund.

MR HAYNES (AIST): We're at an interesting stage in superannuation at the moment. Just as governance matters are not fully settled, similarly, all of the matters associated with flipping are not fully settled. The government has said that it would look at other mechanisms to protect against flipping and it has identified further disclosure mechanisms associated with that. So we will certainly be sharing with the Commission the views that we have put to the government on this question.

MR WOODS: All right. Although there is a notional time frame of two days hence, we would allow you some tolerance to develop those issues.

MS REYNOLDS (AIST): Great, thank you.

MR WOODS: Anything else on the processes briefly?

MS MacRAE: Just in relation to the criteria, I was also just interested in your view that at the moment, we've deliberately phrased our criteria as "guidance" rather than strict rules and we did put some thought into that. I guess in this area - and you would be as aware of it as anybody - prescriptive rules can become a straitjacket and we were concerned that if the rules are too specific and too direct that in fact you might be in a situation where you're preventing a fund from being able to do things that would actually be in the best interests of members, and that's really the prime reason behind why we went for guidance rather than a prescriptive sort of list. I just wonder if you could comment a bit more on that.

MS REYNOLDS (AIST): Yes. We agree with that approach. We would envisage

that you would make your application to be in the award, that you would have your basic criteria; you would go along and make your application, whatever the process would be, and that these would, yes, form guidance. But we recognise that there will always be instances where a fund may do something different and, yes, it might be completely appropriate for it to do it and you don't want hard, fast rules.

MS MacRAE: Sorry, I thought you said in your opening statement though that you were concerned that we had gone for a guidance approach rather than a strict set of criteria.

MR HAYNES (AIST): The approach that we've taken generally in the Stronger Super reforms is to support a principles based approach to regulation. We are not saying in relation to investment returns that a fund has to be in the top quartile but what we are saying is, "Here are nine criteria," and we would expect that each fund or industrial party making application on behalf of the fund would identify each of these criteria in turn and identify how they meet the principle behind each of these criteria.

MS MacRAE: Okay, sorry. That's a very different point than what I understood you to say. Okay, that's fine, thank you.

MR HAYNES (AIST): But there can be many different ways in which you could do this.

MS MacRAE: Sure, yes. But what you're saying is you would see it is a requirement that they must be addressed but not that the criteria would say they must be met in this particular way.

MS REYNOLDS (AIST): Yes.

MR HAYNES (AIST): For example, I'll take the example of fees; all other things being equal, it's good to pay low fees, but if you're sacrificing high returns just to have low fees, then that's not appropriate. So you could say, "Yes, we have some high fees in this area because we have greater emphasis on unlisted assets" - or infrastructure or private equity, whatever - "and so we can justify that." So it's not a matter of saying, "Your fees have to be under 30 basis points," it's a matter of saying, "Here are fees that are appropriate to the assets that form part of this asset allocation that drive these investment outcomes consistent with our investment objectives."

MS MacRAE: Sure, yes.

MR WOODS: Which is what we're trying to capture.

MS MacRAE: Yes, that's right.

MS REYNOLDS (AIST): So that's fine.

MR WOODS: Commissioner Costello.

MR COSTELLO: Thank you. This is a new structure to me, so I'll try and do well. Therefore I think that leaves points of clarification: you say that what's contained in the draft report that a review into appropriate or optimal governance structures of superannuation funds would be unnecessary and unhelpful and you would counsel against it.

MS REYNOLDS (AIST): Yes.

MR COSTELLO: Would you support retaining, as part of the assessment process, some assessment of how a fund is going, or would you prefer to see this completely removed from the selection criteria?

MS REYNOLDS (AIST): We're not against it being part of that criteria, as in you want to look at or know how they're governed. Obviously we think the equal representation system is the best system and it works well with having the mixture of employers and employees on the board, so we think that's an important part of the system. As I said, I just don't think that it needs to go into great detail and I just don't want to see it get murky with the role of APRA. So I think it depends on what approach that you take.

MR COSTELLO: Okay. Then the second point to clarify - and I think you answered the question but just to be absolutely sure - you expressed concerns about the process by which in a large workplace, fees which reflect scale might be offered and you expressed concern that that process might be abused and that when the person leaves that large employer, they pay out higher than reasonable or a low-value fee. So just to clarify again, your view would be rather than rule out the ability for people to enjoy that kind of discount in a large workplace, you would support keeping a close eye on the expected experience of that person post-employment or do you reject the concept of that lower fee being offered and therefore, technically at least, then being moved into a higher-cost product when they leave?

MR HAYNES (AIST): There's a difference here, commissioner, between what we want and what's happening.

MS REYNOLDS (AIST): Yes.

MR HAYNES (AIST): Our view is that flipping should be prohibited and that

there should be more specificity and inflexibility around MySuper fees. That's not how the government is implementing the system. The government is allowing there to be some discount factors. We say that those factors should be limited, they should be monitored and that there should be an appropriate disclosure regime so that people who are subject to flipping understand what it is that's happening to them and gives them an opportunity to make some alternate choice. But unfortunately, we feel that where people have got low account balances or multiple superannuation funds, that might not necessarily be clear to people, even with the best disclosure regime in the world.

MR WOODS: Can I move to the employer discretion recommendation, draft recommendation 8.2. You've put forward that there is some merit in employers having discretion to allow closer tailoring to the needs of particular workplaces than a system based on awards can, and we thank you for that. You've then offered a way of achieving that through enterprise agreements, being a single-issue enterprise agreement. This is a bit of a vexed area. We would want to avoid bringing therefore superannuation into all awards. At the moment we have quite a hybrid situation; some awards are silent on super, some awards mention super but are silent on funds, some awards mention super and identify specific funds. So we don't want to create a situation where that is necessarily overturned.

It's a question of how you would see a single-issue enterprise agreement being structured and what might be some unintended consequences of it. I would appreciate whether you've thought through all of those issues in some detail. You do spell out some of this in your written material. Do you have a level of certainty that a single-issue enterprise agreement could even exist? You mention about it coexisting with other enterprise agreements that relate to terms and conditions of employment, leave, wages and other matters. How confident are you that this could occur and that it would operate without any unintended consequences?

MR HAYNES (AIST): Firstly, commissioner, this is a ground that has already been covered. I'll come back to the provisions of the Fair Work Act. But it has been the case historically that single-issue enterprise agreements have been able to be made and indeed when the superannuation system was established in the mid-1980s, a significant number of single-issue awards were created, dealing with the subject matter of superannuation. Indeed, I myself was involved in the creation of the Tertiary Education Superannuation Award which was a national award covering the university sector in about 1987. So it is certainly possible to - - -

MR WOODS: But did two enterprise agreements coexist at the same time, ie, a single-issue enterprise agreement relating to super coexisting with an enterprise agreement that codified a whole range of other terms and conditions?

MR HAYNES (AIST): No, in fact it was more complicated than that. There was a single-issue federal award covering superannuation and a multiplicity of state awards and agreements. So the interrelationship between them was probably even more complicated than is envisaged in this case. We do accept that there can be some complexity in relation to the relationship of enterprise agreements and it may be that a superannuation enterprise agreement might have to have a life, a term, that is in alignment with a more general enterprise agreement. I would anticipate that the consultative mechanism and the dispute settlement procedure that was in the superannuation agreement would be the same as that in an enterprise agreement covering the rest of the workforce, so there's not then confusion about which dispute settlement procedure do we handle, and if there is a dispute over a range of matters that it's not dealt with in any sort of schizophrenic way.

MS REYNOLDS (AIST): We've taken it too that from certainly the employers - and I'm not saying we've spoken to every employer in Australia - but certainly from the employers that we've engaged with through the Stronger Super process on a number of the working groups, those employers have all expressed the desire for superannuation to stay within the award system, that it does provide them with a protection mechanism; as I said in the opening, that they're not trying to make decisions about things that they feel ill equipped to do; that they do worry about what are the ramifications if they make the wrong decisions. So I think we see this as there might be a few employers who are extreme outliers and have tried to come up with some response for those outliers, but we wouldn't want to see a situation whereby because there's a few outliers, that everybody is then allowed to opt out.

MR WOODS: Yes. You can see that in the formulation of our draft that even we've struggled with where's the right line, and we're waiting for responses from employers but to date it would be fair to say that we haven't had a deluge of employers who say, "We'd really like to take this over ourselves, thank you."

MS REYNOLDS (AIST): Yes.

MR WOODS: We will wait patiently, as we always do in these matters, to see the employer response.

MS REYNOLDS (AIST): Yes, and that comes back to not creating some large structural issues for a few.

MR WOODS: That might be a very small group of employers.

MS REYNOLDS (AIST): Yes.

MR WOODS: Agreed. Anything else on that one?

MS MacRAE: Just in relation to that opt-out - and I'm using that term in a loose sense because I know it's loaded, so I should have used "employer discretion clause" - one of the situations that has been put to us might be an employer that has a range of employees that are covered by different awards and the administrative issues of paying into a whole range of different funds. What would your view be if the employer discretion was limited to being able to only choose among the funds that are listed elsewhere in awards? So they have gone through a process, they're listed in an award and their range of employees might be in six different awards and the employer is saying, "Look, really on balance, given the age - maybe my employees don't necessarily fit the profile of that particular award, they're generally young in REST but my one is an older one," whatever it might be. "So I'd really like to, if I can, pay into one award listed fund for all my employees. I think it fits them all pretty well. Can I do that?" In that sense then, we're not taking it outside of the system in quite such a dramatic sort of way but we are giving the employer a bit more flexibility than they would have under the current system. How would you like that sort of - - -

MR WOODS: So there could in fact be two tiers of that. There could be either a fund listed in any award or a fund that's listed in one of the awards that are currently covered within that employer's workforce.

MS REYNOLDS (AIST): Employees of course are able to opt out and within that framework the employer needs to make that payment. So an employer might end up paying into a whole range of funds, no matter what is happening within enterprise agreements or otherwise. I think in considering some of these issues, we also need to think about the new Super Stream process that will be in place and it will make it much easier to accommodate payments and the whole payment system. I know it's not going to be done tomorrow but it's well down the way.

MR HAYNES (AIST): All of the arrangements for the MySuper structures are not finally determined. None of the MySuper legislation has yet passed through both houses of parliament. There are some unresolved questions about the relationship between corporate funds and exempt public sector funds in relation to their MySuper status. In other words, there may be some corporate funds who are listed in an enterprise agreement and nowhere else. We would want to ensure that those corporate funds are able to be continued to be listed as the default in relation to that particular employer. We're talking about some quite large corporate funds here. So while I think the overall approach that you suggest, commissioner, is one that we have sympathy with, we would want to make sure that it doesn't lock out corporate funds or exempt public sector funds from that process.

MS MacRAE: Sure.

MR WOODS: Any other questions?

MS MacRAE: Could I just ask two quick ones?

MR WOODS: Yes.

MS MacRAE: One of the things that you mentioned in your opening comments that you supported was the suggestion that we had made that each award list five to 10 funds. There is a question around grandfathering, and particularly because the proposal as we had it was to allow employer discretion, that they could choose another fund if they wanted, we thought that grandfathering would no longer be required. If the nature of the employer discretion clause changes, kind of changes the balance of the view around the need for grandfathering, I wonder if you have a view, and somewhat related to that, other parties have put to us that to provide more stability and make life easier for employers, they should continue to be able to pay into a fund even if it gets dropped from an award out of the process. So should funds that are already listed have to reapply? If they were dropped out, would employers still be able to make payments to those funds under our very broad sort of grandfathering provision that would say, I assume, in their view, as long as the fund has ever been listed and you were making funds at a time it was listed, that you should be able to continue to make those payments. There's a lot of questions wrapped up in that but that's the - - -

MS REYNOLDS (AIST): Yes.

MR WOODS: While you're considering your answer to it, then the question of if they have been dropped off because they are poorly performing, is it appropriate that they should continue to be grandfathered if that's necessarily in the best interests of members?

MR HAYNES (AIST): Grandfathering can mean a number of different things, and I'll refer back, first of all, to Fiona's comments about the fact that employees will continue to be able to exercise choice and employees will continue to be able to be members of whatever funds they are in. So grandfathering doesn't mean that it would be shifted out of their existing superannuation funds; I take it to mean that grandfathering would mean that employers cannot choose that fund as a future default fund for new employees. By and large, grandfathering is often a solution; not just here but in relation to a whole range of policy matters, grandfathering is often the easy way out. It's, "What do we do about them?"

MR WOODS: Can I raise a point there though. Quite often, grandfathering is used to protect an entitlement that is no longer then available and so it says, "You were

under this regime. It gave you a set of entitlements. We're changing the regime but your entitlements are protected." But in this particular case, if a fund has not been deemed to be performing in the best interests of members relative to other funds, then sure, an employee could choose to remain in that fund, but should that fund continue to manage the funds of those who continue under default, even though it has been judged through this process to not necessarily be in the relatively top group that is in the best interests of members?

MS REYNOLDS (AIST): Can we think about that one and come back to you because there's a few questions in there.

MR WOODS: We're not seeking an instant response but I think Commissioner MacRae's question is a good one because it does raise some important issues.

MS REYNOLDS (AIST): Yes. Then there's other complications to think about in terms of the people who are remaining within the fund if no more default money is going into it and what does that mean. That is something that we're still grappling with, I think.

MR HAYNES (AIST): Yes, indeed. Without commenting on the merits or otherwise, the notion of transferring people out generally of a live superannuation fund is not something that happens within the system, so I think it's something that would have quite some significant flow-on implications which we need to consider.

MR WOODS: We would be happy for you to think through that.

MS REYNOLDS (AIST): Yes, we'll come back on that.

MS MacRAE: Just one very last question, if I may. This is something that we didn't really address very directly in the draft but we're trying to do some more work on for the final. I wonder if you have any views in relation to the level of sanction that is currently applied should an employer not pay into the fund that's specified in the award but they should have been. Are you aware of cases where employers have not paid into the correct fund, in the sense that the employer hasn't made a choice, they're required to pay into a fund that's specified in an award and they have paid to a different fund? Are you aware of cases where that's been brought to your attention? Has there been legal disputation on this point? Do you feel that there's adequate sanction around those things or is it operating well enough and we don't really need to look at it too much further?

MR HAYNES (AIST): I think the sanctions are probably appropriate. I think the enforcement of those sanctions has probably been deficient. But having said that, the

ATO, who has responsibility for this area, I think has put and is putting a range of additional mechanisms in place that should make the tracking of compliance much easier than it has been in the past.

MR WOODS: Thank you very much. Could I encourage you to wrap up as much as you can into a formal response in a timely manner but on a couple of those points, grandfathering, enterprise agreements and so on where you might want to take a few more days. We would appreciate a more thought through and complete response, so we're happy to allow a few days for those.

MS REYNOLDS (AIST): That would be great. We will certainly go back and consult with members on those issues and come back with a view.

MR WOODS: Do you have any concluding comments?

MS REYNOLDS (AIST): No. Thank you for your time and input throughout the whole process.

MR WOODS: Thank you.

MR WOODS: Thank you for your tolerance in allowing us to spend a bit more time with the previous participants. Could you please for the record, each of your separately, state your name and the organisation you're representing.

MR LYONS (ACTU): Tim Lyons. I'm the assistant secretary of the Australian Council of Trade Unions.

MR FISHER (ACTU): Michael Fisher, I'm a research officer at the ACTU.

MR WOODS: Thank you very much, gentlemen. Thank you for the very detailed initial submission that you provided to the Commission and other clarifications during the process. Do you have an opening statement that you wish to make?

MR LYONS (ACTU): I do. Thank you. I might just touch on what we see as being the headline issues, if you like, that occur to us as a result of the draft report and then spend the majority of the time I think in a more discursive process.

I think I've made this observation a couple of times, but in one sense, we do have the view that this inquiry is almost in search of a problem. We say that advisedly and with respect to the reference that the government has provided you with, but in essence we feel vindicated in that view by the headline findings, if you like, of the draft report and that is that in basic terms, the system as it has operated to this point has served employers and employees well. It has resulted in a set of default funds being named in awards which are demonstrably, we say, in the interests of members and has resulted in appropriate products being used as the default funds in our industrial instruments. We think that, broadly taken, your report does acknowledge that at the start.

We also I think in opening are pleased that you have in the draft report rejected the view that's been put by for-profit providers, that simply any product that is a MySuper-compliant product can be used. We do think that would be an inappropriate response and would take the MySuper process, which was designed for a specific purpose and applied for a different one; that is, the provision of default super for which it would be inappropriate, in the sense that it doesn't contain the broad sweep of considerations that are necessary in setting award super.

We do have a series of concerns about the draft report and I might go to them. In framing those, I actually thought it was worth going back to the Australian unions' original proposition about universal occupation with super. We said that there are a number of key characteristics of what we wanted the system to look like. The first thing is that we wanted all employees' super to be universally vested and that's an important feature of the system as we now have it. The second thing, we wanted it to be accountable to the members of those funds because before universal occupation of

super, it was not a feature of the system that funds were accountable to the members of those funds. We say of course that in particular, the equal representation model and member representative trustees are an important aspect of that.

Finally, of course, we wanted it to be a transparent system and a system where the fees that were payable by people were clearly understood and where market competition operated in a way that put appropriate products in the hands of individual consumers. So in broad terms, we think the MySuper reforms are an indication of those original positions. We do think that the factors which you have suggested might lend themselves to the selection of default funds and awards are in broad terms sensible ones and reflect in many ways the submission that we put.

I might say, just picking up, if you like, on an observation of an exchange I heard you have with AIST, bear in mind that we say that we need to have a process which is within Fair Work Australia, so it's predicated upon that, but the appropriate step is for the statute to provide some guidance as to criteria. I share the view of Commissioner MacRae that you can set criteria which becomes a straitjacket because you haven't thought of the circumstances. It's been a criticism of ours of broader aspects of industrial regulation that the parliament has sought to micromanage the discretion of the tribunal in a way that it's basically impossible for a parliament to do. The appropriate course is to set some broad guidelines as to discretion and leave it to an independent decision-maker to take all of those things into account in addition to its overarching statutory obligation to consider matters in accordance with - it used to be described in industrial legislation as "equity good conscience in the substantial merits of the case" and indeed that wording in large part remains in the statute in terms of the exercise of the functions.

So we think we need to establish some factors which go to the exercise of that discretion and I'd just like to make some observations about the ones contained in the draft report. The first is that we think that you have put insufficient weight on historical returns to members. Speaking with my trustee hat on, of course, I am alive to the fact that past returns are not a guide to future returns, but the reality is they are close to the best proxy that we have. I understand, and we've had the advantage of seeing some material that the Industry Super Network will put to you tomorrow. I don't intend to go to it in any detail but I can indicate to you that I support the conclusions of that, that previous returns are an important element of the matters to be considered.

MR WOODS: Just on that, can I clarify then will you be wanting to explore that particular issue in some detail today or are you happy to let ISN pick that up?

MR LYONS (ACTU): I think on that one, we will put some written material in to you, commissioner, but given I'm aware of the volume of material, if you like, that

ISN intend to put to you, I think perhaps in the interests of time, we're happy to adopt that view.

MR WOODS: Sure.

MR LYONS (ACTU): We think it makes a very persuasive case, based on what amounts to a regression analysis of people's existing performance; that it is, while an imperfect proxy, the appropriate proxy for you to use and to be included in the overarching framework for the exercise of the discretion.

MR WOODS: Okay. We will exploring with them whether persistence is in fact slightly better at the bottom end, in terms of poor performance, rather than at the top end and whether that would then skew different ways of looking at it, but we'll pick up that debate with them. But to the extent you want to put written material - - -

MR LYONS (ACTU): Yes, that people are stickier at the bottom than the top.

MR WOODS: Yes.

MR LYONS (ACTU): We may deal with that in our written submission then if that's the particular interest. In relation to flipping - and again I had the advantage of hearing some of what AIST had to say - we remain of the view that the potential for people to be flipped out of products when they change employment, bearing in mind the increasing levels of employment churn that we have in large numbers of industries in the Australian community - is a very important issue. I might say on this matter we've had a somewhat different position than even some of the funds with which we might be associated and our position has always been closest to in fact the view adopted by APRA which is that the scope for the discounting of admin fees, if we get Super Stream right and we get electronic processing more broadly right, should be extremely limited. That tends to suggest that where there is discounting, it is done on some basis other than market cost and may in fact lead one to the inevitable conclusion that some form of cross-subsidy is occurring.

Our principal position is that you get scale from the size of the fund and that the scope for there to be significant discounting ought be reasonably limited, a view that APRA is on the public record in broad terms of sharing. So we do have a concern and we do think it should be, if you like, a headline element to be considered about whether or not the product into which people are defaulted they are entitled to remain in if and when they change employment needs to be a principal consideration.

MR WOODS: Is that not absolute?

MR LYONS (ACTU): Given what I've said overall, we think that a fund that

doesn't check that box may not tick some of the other ones either and that vesting a broad discretion with the tribunal is the most appropriate. In relation to the selection process, as I indicated, we agree with the Commission's conclusion to reject option 1, the selection process. We note that option 2 in essence reflects the current system and while we are not in any sense critics of the current system and think that people would be well enough served by its maintenance, we acknowledge the fact that you've determined to reject that. That leaves 3 and 4.

We are a supporter of some version of option 3. Indeed, option 3 reflects in broad terms, I think it's fair to say, the proposal that we put in our submission which is the drafting of some specialist capability onto the existing Fair Work Australia process. We wouldn't support the creation of a stand-alone mechanism which is option 4. We think that would be unnecessarily bureaucratic and costly when there is a specialist mechanism which already exists.

In relation to option 3, we pointed out that there already is some precedent for members of the tribunal to operate with the assistance of subject matter experts in particular areas, most notably in relation to the setting of the minimum wage. Our proposal was for very much to pick up that model. It would of course be possible to have a slightly lighter-touch version of that which would be to provide for subject matter experts drawn from a panel to be referred matters for their report to members of Fair Work Australia who are conducting the substantive process. That would be slightly less bureaucratic, if you like - it would probably have a slightly lower cost to the Commonwealth too - and involve the use of subject matter experts as required. So they could inquire into and report back to the substantive tribunal member relevant factors for the exercise of their discretion, so particularly where there may not be particular expertise of the Fair Work Australia member conducting the award review on our model, that they would be able to obtain the information in that way.

MR WOODS: You will expand on that in your written submission?

MR LYONS (ACTU): Yes, we will. It's essentially just an additional option to it.

MR WOODS: Yes, sure, understand.

MR LYONS (ACTU): Interestingly, previous iterations of industrial law did provide for members of the commission, as it then was, to refer matters to other members or registrars and other people for a report in respect of inquiries and of individual items and that seems to us in one sense not a bad model; that would enable some additional expertise to be brought to bear on the question without unnecessary cost or bureaucracy.

MR WOODS: In that, if you could just also then cover the appeals consequences, so whether it would be limited only to a judicial review of the decision of the Fair Work Australia member or whether there's appeals on matters that are referred to that member via the panel. So if you could just tidy all of that up, that would be helpful.

MR LYONS (ACTU): Certainly I will. I'm happy to say that we do support there being appellate mechanisms within Fair Work Australia from decisions of single members to full benches of Fair Work Australia because the only other alternative for people - and this was a recommendation of the Hancock review - was "Fix this," in respect to the Industrial Relations Commission in the 1980s, but prior to that, decisions of single industrial commissioners were only amenable to prerogative relief by at that point the High Court which forced anybody who thought there had been an error of law by a single commissioner acting alone to make a trip to Canberra, which was a nonsense proposition. So we've always been supporters of what was the section 45 jurisdiction of the old act and remains now appeals on questions to go to the full bench, so I think that's an eminently sensible system.

In relation to the operation of option 3, however, we do and will strenuously oppose the commission's suggestion in the draft report that there essentially be an open-slather approach as to who has standing to agitate matters before Fair Work Australia. Superannuation is an incidence of employment and it is deferred wages. It is a core industrial issue, a core workplace issue, and that informs why we think it's appropriate it's at Fair Work Australia, but it also informs why we think that there should be a limitation as to who is able to agitate the particular issues in that forum. That limitation should be those that represent employers and those that represent employees. It would be an unprecedented and in our view inappropriate departure from the framework of the industrial system to allow people to come before the workplace relations tribunal and agitate a mere commercial interest.

However, that would not of course prevent a fund which did have support from representatives of employers and employees from participation in that system and by applications being made that would see them being made as a default. But we, if you like, wish to jealously guard the status of the industrial relations system as being about workers and their employers. Frankly, it does not sit well with that system to have persons coming in and agitating commercial interests.

If I might, by way of analogy, there are a range of other corporations who may have an issue with a particular structure of an industry award because it affects their commercial interests. You can think, for example, that perhaps a company like Hoyts might have an interest in ensuring that there are more public holidays because if there are more public holidays, more persons will go to the movies. But the point is, they can't come along to the workplace relations tribunal and seek to vary modern awards to change the way public holidays operate in order to benefit their

commercial interests. They could do it as an employer, about the award in which they are involved in their capacity as an employer, but they can't do it in their broader capacity as a corporation and representing merely broader commercial interests. So we do think it's important that that limitation be made. I might say that almost nothing about the way the Fair Work Act operates or describes persons with the eligibility to make submissions to the tribunal is amenable to people attending to merely argue a commercial interest.

In respect of the employer opt-out proposal is the last matter that I wanted to deal with substantially. This is a draft recommendation that we would oppose for a number of reasons. The first and most important one is that the operation of the workplace relations safety net which is made up of modern awards and the National Employment Standards can only be abrogated from by the operation of enterprise bargaining agreements. That is the core element of the architecture of the system. It is inconsistent with that architecture to simply say on one element, and quite an important element in our submission, that employers should simply be free to substitute their own view from the view that has been set by an independent process.

I might say that if we get to the point where we've amended the way funds are specified, improved - if you like, a periodic review - improve the decision-making process associated with how those funds are named, the legitimate scope for an employer to simply substitute their view and do something else would be removed in our submission. That's coupled with the fact that the enterprise bargaining process itself, which is the mechanism that parliament has established for people to change the operation of modern awards - although enterprise agreements can alter some of the operation of the NES but they can't erode the operation of the NES, but enterprise bargaining agreements are the way that it has been set out in terms of people who wish to do things different than the minimum standards - would essentially be eroded, that framework, if you allowed people to simply substitute their own view.

We also think in broad terms that it would be very unlikely that there would be employers that would seek to take up such an option. It would be in our submission a very brave employer that saw an award, saw nominated funds and decided that it was going to embark on a process of its own, satisfy itself somehow that it would be in the best interest of the employees and do something different, potentially exposing themselves to breach of the agreement presumably, in that there would have to be some sanction associated with the exercise of that opt out, otherwise employers would be free to do frankly whatever they liked.

I might say that we've got award defaults. We have, as REST indicated, a mechanism for individual employee choice. We have an enterprise bargaining system which allows people to make the necessary alterations at a workplace level, including to this issue if they wish, and that is in our view sufficient flexibility,

particularly if we've fixed up, if you like, the front end of the system.

I did also want to just make one observation about the exchange you had about the operation of enterprise bargaining agreements. I've made this observation in a couple of other contexts before. In a very curious way, since Work Choices, the system has become less flexible. At the original introduction of enterprise bargaining, it was possible for people to have multiple awards, including subject matter awards, and it was possible to have multiple enterprise bargaining agreements. Work Choices changed all that and said, "Well, you can only ever have one agreement." Work Choices actually also said, "Once you've been covered by an agreement, you are no longer covered by an award in perpetuity," no matter what happened to that agreement. But in essence, at least one aspect of that system has been retained. You can only be covered by one enterprise bargaining agreement at one time. That's the operation of section 58 of the Fair Work Act. The unfortunate thing about that in one context is it does prevent people doing set and forget deals on individual subject matters which were not uncommon in particular in relation to superannuation and long service leave was another arrangement, particularly for national companies.

But the way the bargaining system works now is while it is nominally possible to do a superannuation-only agreement, because you could only be covered by one at once - and there's some fairly technical rules about date order and other things - it would effectively be - well, you wouldn't do that if you actually wanted to have an agreement about all the other things that you might want to have an agreement about, wages, conditions, annual leave and other things. So that's an unfortunate call-up in one sense but it has been a feature of the workplace relations system now for some time. This isn't a party political point, if you like. Both sides have done it. They have actually restricted the options for making deals at an individual workplace level, including about individual subject matters.

But I might say that an employer who I think was getting to the level of sophistication where it wanted to depart from the user default fund specified in agreements would be highly likely to be an employer that would be participating in enterprise bargaining, so there is a way of dealing with that; bearing in mind we do have now in the high 40s of collective bargaining density in the Australian economy which suggests that bargaining is very widespread - it's not just widespread at particular large employers, it's penetrating the economy more generally - and suggests that the mechanism within enterprise bargaining is sufficient to deal with any departure from the award system.

Just finally, the question that Commissioner MacRae raised about an employer covered by multiple modern awards, while that's notionally possible, I would point out that the enormous reduction in the number of awards that has occurred has

reduced the incidence of that very considerably and for very much larger numbers of employers than was historically the case, they will be covered by very small numbers of awards or one award and the days of employers needing 10, 15, 20 and 25 awards at the state and federal level in different states have mercifully moved on and the creation of the modern award system and the much more limited number of awards means that the scope for that regulatory complexity has been seriously reduced.

MR WOODS: Reduced, but not necessarily removed in total. Perhaps if we can start at the back end and then work back through your agenda. Thank you for elaborating on those issues. In talking about enterprise agreements, there are two issues there. One is, could this be an appropriate mechanism, and the second is, are there currently legislative constraints relating to it? The Commission is not bound by what is, but explores what best should be. If a consequence of that is an amendment to legislation, then we are perfectly open and quite often do recommend that legislation be amended to come up with what we consider to be a more appropriate process.

Let's deal with the issue more on its merits first and then let's explore what are some legislative or other unintended consequences of doing that. We're faced with this situation where potentially an employer - and as I mentioned to a previous participant, we're not yet flooded with employers who are begging for this to occur but we remain open to that possibility and we will go through the process - for various reasons - and one might be that even though we now only have 122 awards, there still may be members whose intersection of funds don't match and the employer, in discussion no doubt with employees, says, "Look, can we pick one default, it happens to cover most of you but not all of you," and move that way, "but we don't want to break open the whole enterprise bargaining arrangements that we've had with you, we just want to deal with this through an established mechanism," which is a discussion, a bargaining, a registration of that with Fair Work Australia.

So does it have merit in its own right, and then are there potential unintended consequences with the current legislative structure and would a change in the legislative structure deal with those?

MR LYONS (ACTU): The approach of having a stand-alone superannuation arrangement has some merit in some circumstances and is something that we, as I think we indicated, used to do from time to time. As well as the statutory prohibition on more than one agreement applying to an employer at one time, the principal reason we can't do it any more is that enterprise agreements operate under Australian law with a statutory no extra claims, no strike clause. So when you're covered by an agreement during its nominal life, you are prohibited by the statute from making additional claims on your employer. So if there was an agreement under current law that said, "This is the way your super works," and it applied for three years, it would

prevent you putting a claim on your employer about anything else. So that's essentially the reason we wouldn't be able to do it because you'd be giving up any right you had to talk to your employer about any other subject matter.

It would be easy enough to remedy that but it would be a departure from the core elements of the architecture of the system to enable people to have a separate species of agreement that dealt merely with superannuation that wasn't caught by those other matters about the effects of the operation of the Fair Work Act, but I think that would create quite a complicated carve-out that may be certainly difficult to explain to people, about the logic of it and its operation, but it would be possible without too much difficulty to do so.

MR WOODS: And whether the test, given that it's a prospective test because the actual outcome of the fund is not known at the front end, would be no worse off or better off; these again come into question in that process and it would be on the basis of probability and consideration of factors but it's not a calculable test that can be applied.

MR LYONS (ACTU): We are very strong supporters of all agreements being subject to the better off overall test that's contained within the statute. It would be a question about exactly how that would apply to a stand-alone superannuation agreement.

MR WOODS: But superannuation, to the extent it's an award now, is not calculated in that current better off overall test?

MR LYONS (ACTU): The law requires a line-by-line assessment of an enterprise bargaining agreement.

MR WOODS: And in relation to super?

MR LYONS (ACTU): That would include all provisions of the agreement, including the superannuation provisions. I accept that that's a considerably more difficulty proposition for a tribunal member to do than, for example, "What is the minimum wage? What are you paid for Saturday afternoon?" I fear, for the likely take-up rate, that it would be an unnecessarily complex mechanism that would detract from the core architecture of the enterprise bargaining system and frankly simply wouldn't be worth the time. It would be possible to do it but I think that given the collateral effects it would have on the balance of the IR system and the core policy decisions that have been made, that we've got this safety net and this bargaining system, I won't purport to speak for the minister but I would anticipate the response to that, given every other discussion I've ever had with the government about those issues, that it would be designing an unnecessarily complicated process

to deal with a problem that irregularly would arise and in any event can be dealt with in other ways, including by the normal operation of the bargaining system.

MR WOODS: So for those who already have an enterprise bargaining agreement, it would require that a particular fund be incorporated in that next agreement when next struck to be able to consolidate, and for those who don't have an enterprise agreement, you're saying that striking a single-issue agreement then precludes employees in that enterprise from then during the life of that being then able to raise other issues. So where to? What is your proposal before the Productivity Commission on how to resolve that potential issue?

MR LYONS (ACTU): Our view is that it's a notional issue; that the combined factors of we have a new process to determine what goes into awards, we have fewer awards than we used to have in any event, we have an enterprise bargaining system and we have an individual employee choice mechanism, and that those things taken together give sufficient opportunity for people to be able to deal with the matters at a workplace level and that as a consequence of that, there is no need to go and craft one more additional mechanism for people to deal with the situation. Taken overall, there is sufficient flexibility if we think of those things as the elements for the question to be dealt with. The fact that there might be frankly I suspect a handful of outliers, I don't think you can design the system around them.

I might add on the question of employers, I do recall of course that in fact probably the people that roared the loudest against the coalition's proposal in the original choice proposal that was put before the parliament which was to mandate unlimited choice and provide that it couldn't be extinguished by anything, the loudest opponents of that were actually employers who actually didn't want to go to a position of completely unlimited choice that couldn't be affected by enterprise bargaining agreement or anything else. So I doubt that you will get knocked over by employers wanting processes where they need to take particular actions at their workplace in order to deal with the question.

MR WOODS: We will explore it with the employers and their representatives. Commissioner MacRae, any questions?

MS MacRAE: This is just taking a bit more history, but we note in our report that a lot of the pre-modern federal awards did actually allow employers to choose any fund, that they didn't have to choose one listed in an award. So part of your opening statement was that was kind of unprecedented and unusual but it's not like we have had any sort of experience of it. We were able to secure a bit of data on that report but are you aware of any problems that arose out of the pre-award situation where employers could choose?

MR WOODS: And in fact now where awards are silent on super and there is choice by employers?

MR LYONS (ACTU): There was different patterns in different industries and there were arrangements that occurred for historical reasons, partly because frankly some unions were more aggressive about the superannuation issue originally than others. The key concerns that we had with the operation of those provisions, as we would with any sort of general opt-out, is that the opt-out is driven by things other than the best interests of the employees and that it's driven by, for example - and these are matters which I am personally familiar with from dealing with enterprise bargaining over many years - where financial services corporations offered employers a rolled-up package of services that include what I might term as collateral benefits, either to categories of employees or the corporation, more specifically. So I'm personally familiar with the offering of default funds to shopfloor employees with higher fees and lower insurance products than what the same commercial provider was offering to a management category of employees at the same enterprise. So in other words, there was almost a proposition put to employers, "Conscript your shopfloor employees into this reasonably low-performing high-fee fund," and there's this thing with bells and whistles over here into which management are put.

Now, that sort of thing is a reason to drive employer choice around default that is deeply inappropriate and is actually contrary to the interests of the employees. Anecdotally, that extended to the offering of rebates on insurance products and other things as default super for a large employer - that is, insurance commercial products - because it can be a reasonably lucrative book of business to write for commercial super providers under the right circumstances.

The ACTU position is to support award prescription in relation to the nomination of superannuation funds. It's been complicated in the modern award system because it was much more common, for example, in New South Wales for the old state awards to not provide a named fund or in fact to not deal with superannuation at all. That was much less common amongst traditional federal award key areas of coverage. If you look at the key critical federal awards that existed before modern awards, they were much more likely to contain a level of prescription consistent with the policy position that we've put in our written submission.

MR COSTELLO: I've got two questions. The first one is to clarify the position, the second one is to ask you how you balance it, so I'll ask them both together. Is it correct to say that the ACTU opposes the position in the draft report that in order to improve the outcome in order to ensure that members receive the optimal outcome that the process should be opened up so that any superannuation fund can apply to have the merits of its proposal considered through the industrial process? I just want

to confirm my understanding that you reject that proposal and you, I think, therefore would reinforce the current position where only funds which have the support of an industrial party who has standing can have the merits of their offer considered.

MR LYONS (ACTU): Yes.

MR WOODS: I think the words "open slather" and "mere commercial interest" gave us some guide to your - - -

MR LYONS (ACTU): Sure. I happen to have a fairly fixed view on that, commissioner, yes, you're right.

MR WOODS: The second one was really more of a balance. You opened by saying that you support - I'm not sure if it's principles based legislation but if I can use - - -

MR LYONS (ACTU): Guided discretion, I think.

MR WOODS: Yes. You gave examples where people had tried to be prescriptive and it had got in the way of good outcomes. You then went on to say that you felt we had underemphasised past performance and that you were familiar with views which said in fact that should be codified, and not in your own submission but elsewhere there is a view that past performance should be a hard-coded, therefore prescriptive guidance as to whether a fund should be included in an award or not. So I'm just wondering whether your comment that we had underemphasised it would extend - again trying to balance your preference for principles based guidance - to the codified position whereby only those funds which were relatively strong with some fixed cut-off point should be part of this process. So it's a balancing issue; I'm just keen to understand where you stand on that.

MR LYONS (ACTU): Our proposal I think in our original written submission was that essentially the tribunal would pick from amongst the top hundred performing funds which I think is a way of balancing those two things, Mr Costello, if you like, by saying you need to be a fund that is delivering in terms of returns, but inside that, recognising there are a range of other important considerations which can be balanced by a tribunal member exercising appropriate discretion.

MR COSTELLO: Thanks.

MS MacRAE: Just in relation to who has standing before the tribunal, and I understand your position there, I think from the other side of the argument there's a concern that in this particular instance, which is different from the Hoyts example you gave, the people that are making the decisions do have their own interest in

managing super funds. So it's a little bit different than, say, Hoyts saying, "Our business is to run movie theatres and we have an interest in having extra public holidays," because the industrial parties - I mean, Hoyts as an employer I suppose you could say would have a particular sort of vested interest, if you like, in that situation, but most employers wouldn't, whereas this is quite different I think. The frustration from the other side of the argument is that the people that we've got to apply to, effectively the parties that have standing, have a strong interest themselves in particular funds. So for us to get a proper hearing, what we would regard as a fair hearing, is difficult because we appreciate that these people already have quite a strong interest themselves in particular funds.

So if we were looking to try and ensure that everybody had a fair hearing, as a minimum, would you accept that one of the things you might do if you said that you weren't to extend standing would be to have the industrial parties be more overt in their decision-making process about how they might choose, assuming that you're agreeing with us; that we would go through a more formal review process than we currently do for superannuation, so every four or eight years? Do you think it would be reasonable to say at the very least you would want the industrial parties to provide some kind of public report or just a more public discussion of how they considered any applicants to an award and it wouldn't be that formal because they wouldn't have standing to do that, but to have at least demonstrated that other possibilities other than funds currently listed had been actively considered and that the sort of criteria that we've outlined or that we might be able to agree on had all been considered and that due process had been followed?

MR LYONS (ACTU): Can I start by saying it's important - and this has been lost in some of the commentary on your draft report, I might say - that we don't conflate in relation to award super the decision-maker, which is the member of the independent tribunal, and always has been; it is not ourselves and the Australian Industry Group, for example. It is the independent statutory office holder who makes the decision. I think it's unfortunate in one sense that some of your interim report has been held to be a reflection on the independence or the decision-making of the tribunal which I think is deeply unfair.

The system works on the basis that there is an adversarial system, that propositions are put to the tribunal and tested by the member themselves and by competing submissions. In general, that's a very good system. I do object to the characterisation though of unions relevantly, but I think the same applies to employer organisations, that they have an interest in supporting particular funds. I think that implies that there is some commercial interest associated with that and there is not. The mere fact that people are nominee directors to trustee boards from their organisations doesn't mean that they are inherently conflicted associated with that because in the end, there is no shareholding interest or commercial interest that flows

back to my organisation or any trade union or any employer association associated with their status as a sponsoring organisation in respect to the fund.

So I do think however underlying your question is if we have - I might approach it this way: I do accept that the system at present is at least open to the perception that it's been set and forget, that once you're in, you're in. We are content - and did so in our written submission - to endorse a situation where essentially we use the periodic reviews of modern awards which were established by the statute to ensure that there's a health check done on award super every four or eight years. We wouldn't suggest that, involving wholesale change. We do think that will improve the transparency of the system. It will ensure that a formal decision is made and submissions taken and opportunities for change to occur are raised automatically, so it can't be set and forget. Frankly, it wouldn't suggest to us that it's a particularly big task for a fund that wants to be in an award to find an employer in the country that is prepared to support their view. That's all they would need to do, find one employer. So it's not like we're setting them a task where, unless they get the support of the Ai Group or ACCI or something and they can't get in, they need an employer and that employer would have standing. So it's actually quite a low bar for that interest to be agitated, but we need some bar, otherwise the system itself in our view would be hijacked by commercial interest, as I said.

MR WOODS: Can I pursue that. Yes, it is a surprisingly low bar and we have been surprised that various funds weren't able to jump over it, but putting that aside - the hijack sort of follows, mere commercial interest and various other formulations - but if as you say it is the tribunal member who objectively makes the final decision, then I can't see how they could get hijacked in making that decision. So looking at it from their perspective, presumably the tribunal wants the clearest, best possible exposition of the relative costs and benefits of each of the options before them.

I understand there are two issues here; there is one in coming to a decision that is in the best interests of members for the purpose of superannuation and there is the general approach to IR of persons with standing before Fair Work Australia. But is there a mechanism by which all funds can equally prosecute their costs and be tested on those costs, as well as the benefits of those funds, without contravening the great body of current practice in relation to all other industrial matters? I'm just wondering if your earlier comment about a panel that makes recommendations or refers matters - a report-back was your phrase - report back to the Fair Work Australia member or members in a broader tribunal, whether such a panel could receive unfettered information and test each claim. I mean, we do that as a matter of course on a daily basis. We don't ask participants to go via some other mechanism to guess what it is they're saying and thinking, we draw them directly to us and we wouldn't countenance any other option.

MR LYONS (ACTU): I think it's a different process that you've embarked upon which is a general inquiry into public policy considerations. What the tribunal will always have before it is a requirement to make a specific decision about a specific thing, whether it's this award or this termination of employment or whatever it is. So they're exercising a specific statutory function there which requires them to bear on the relevant factors. I do think that the proposal for some subject matter expertise should allow for the broad range of considerations to end up being placed before the tribunal. It would, in the context of that, be possible for - I might note of course that in relation to tribunal proceedings that the Commonwealth has a standing rate to be able to intervene and place material before the tribunal as of right, and so it's open to the minister utilising relevant agencies to put material through the tribunal as they do from time to time. But it would be possible, as part of the overall consultation process, to have the views of APRA, for example, or others considered in respect of the overall performance of the funds that are sought to be nominated, so it in effect functions as a friend of the court with an amicus brief providing additional information that may not be provided by other contesting parties.

MR WOODS: That's only going partway though.

MR LYONS (ACTU): It is only going partway - and again not wishing to return to the point - but if a fund can't find a single employer, it is not saying much; it's not saying that they need to get the support of peak - I might add that in my capacity as a trade union official and an ACTU official with involvement in this area for a very long period of time, I have never been approached ever by a for-profit provider saying, "We have this product and we think it's appropriate for inclusion in awards." So a little bit of self-help wouldn't have killed them.

MR WOODS: All right. I think we have your views and we don't seem to be making any common progress, so we'll move on to another topic. One of our factors for consideration as currently phrased is whether government structures are, as far as legislative requirements allow, consistent with meeting the best interests of members. We are testing all of our recommendations, as we do. This is a draft. We want to make sure all of them are robust and there are no unintended consequences. Do you have a particular view on that and whether some alternative formulation - is the heart of what the concern is more about the process and performance against that process rather than structure as such and that it could be possible to have a number of different considerations of process, given the multiplicity of structures?

MR LYONS (ACTU): It is important that we don't ignore all the work that APRA does. We don't want somebody else replicating what APRA has to do in terms of the overall governance. But we would essentially refer back to - if you look at the OECD guidelines, they say that the important consideration in respect of private pensions is their accountability to members and the way it says that you get that is

you get it by representation of the beneficiaries of the fund, either directly or via nominee organisations. Curiously, it actually only says employers get a go in that if they've got ongoing obligations to contribute in the form of defined benefit schemes actually and that is, the corporation has ongoing obligations to meet benefits as and when they fall due.

So the key additional element we think is relevant in respect of governance here is to say it is important to say, well, the fund that's being used, how is that actually accountable to the members of the fund? Is there any mechanism at all for that fund to be accountable to its members? On its face, one that ensures there's member representation at a trustee level ticks that box, and one that doesn't doesn't. So we wouldn't propose that we somehow replicate the APRA process but we do think that that accountability to members is an important element of governance and should be taken account of at this level.

MR WOODS: But is it more fundamentally an issue about the governance process than it is about structure?

MR LYONS (ACTU): Our view, we support the equal representation model. We think it would be difficult to justify on its face the mandating super to be provided to a fund that did not provide any accountability to its members. That would to us be a classic example of poor governance that would be sufficient to preclude inclusion.

MR WOODS: Okay. Flipping, you make a number of points that in fact with the Super Stream reforms et cetera, the importance of scale, that the scope for discounting other than some inappropriate, as you've put it, cross-subsidisation is potentially more to the benefit of employers than employees, so that the scope for the underlying capacity to discount for administrative or scale-related issues will reduce significantly over time. Does that suggest then that you would become more prescriptive about having a band, and do you have a view on what sort of level of that band might be and whether again it's a guidance band or are you hard coating that band?

MR LYONS (ACTU): This is marginally contrary to my view about guided discretion but I do think flipping is a point that is a hard line. I accept that the government is going to allow some differential fees as a result of discounting on scale. Again I'd say that where that's to occur, it's most likely to occur in respect of quite sophisticated large employers who are almost certainly engaged in an ongoing bargaining process as well and the results of any negotiations that result in a default fund that has some ability to discount would be reflected in that way. When you're talking about the award level and given that we're dealing with persons who are disengaged by definition in one sense, in that they're being defaulted into the fund, that it is important that people are then not flipped into some other product with a

higher fee. I just think it would be setting any decision-maker an impossible task to say, "Well, some flipping is all right. As long as it's not too fee-gougy at the other end, it's all right." I think that is an issue which does lend itself to being a hard criteria.

MR WOODS: You will elaborate on that in your response to us?

MR LYONS (ACTU): Indeed.

MR WOODS: That would be helpful. Other issues?

MS MacRAE: Just a final thing - and you might have heard we did talk with AIST about it - is whether you had a view about grandfathering and should employers continue to be able to contribute to a fund even if it fell out of an award. If there was 10 listed in the award and one fell out, should an employer continue with it on the basis of, "I was contributing at a certain date," or should it be a requirement that any new contributions had to go to those funds that were now listed in the award?

MR WOODS: And in fact whether current balances should have to - - -

MR LYONS (ACTU): I mean, the existing balance system might eventually get dealt with by the multiple account provisions when we eventually get to them. Look, the legacy arrangements have got a slightly chequered history and some of the complexity, Commissioner MacRae, that you referred to about awards was actually due to the fact that you had awards being made for industries where part of the industry had occupational super of some description prior to the national wage case decision and the award of 3 per cent, and so people were allowed to continue to use complying funds, as they were at the time, even if there was a new fund specified.

I do think, given if we're moving to a system where someone makes a formal decision based on the sorts of criteria that appear likely to be recommended in your report that it wouldn't be then appropriate to allow people to continue to contribute to a fund which someone had made a deliberate decision to remove. Now, I think the way you deal with the transitional issues is to have appropriate time scales on people to implement those decisions. We're not going to be doing this every week, thank God.

MS MacRAE: Yes.

MR LYONS (ACTU): It would be on a reasonably limited time basis. You would just have a lead time on the implementation of the change to the award and you would swap over. I might say that electronic funds transfer, clearing houses and other things should make it less painful for employers than it traditionally might have

been, involving the writing of cheques and handwriting records of contribution and other things which should alleviate the transactional cost that might have historically been associated with swapping over. So hopefully all the other things we do in the system mean that we could have a much cleaner break. But I do think there would be little basis to allow someone to continue to contribute to a fund that someone had made a merits based decision was inappropriate for its purpose.

MR WOODS: And continue to manage though the legacy balances other than through choice expressed by the employee?

MR LYONS (ACTU): I'll need to check exactly how the operation of those provisions would work. We've been supporters of mechanisms to ensure that workers don't have multiple accounts. In one sense, we've had a marginally different view from time to time than funds on that question because it's a bad idea for people to have multiple superannuation accounts. So in the end, we would want to ensure the administrative mechanisms were in place to ensure that we didn't do something which created multiple accounts as of right that weren't dealt with in some way, but we might refer to that in writing.

MR WOODS: The consequence for the fund of course is very different from the consequence to an employer of who they send the money to.

MR LYONS (ACTU): Yes, it might be.

MR WOODS: Okay.

MS MacRAE: I guess just finally, and it's the same question I had for AIST, I'm just interested in your view about sanctions in relation to how their money goes in, whether there is sufficient sanction if it doesn't go to the fund that the award specifies, and if it's not an issue for you, that's fine too.

MR LYONS (ACTU): It is an issue. Again it's one where you have to disaggregate the different jurisdictions, if you like. The ATO's responsibility for the collection of unpaid super - we're longstanding critics of the low levels of resourcing that government provide the ATO to ensure that and I think the last full ATO submission suggested there was one and a half billion dollars over five years of unpaid superannuation of which they had managed to collect a couple of hundred million dollars in back pay. So that's actually the critical issue. The money that hasn't been paid to anybody is the critical issue in terms of unpaid super within the system.

Underneath that, compliance with an award is a matter for the Fair Work Ombudsman. The Fair Work Ombudsman's default position, if you like, in relation

to compliance is that they are unlikely to seek penalties against an employer for a first breach where the employer essentially fesses up when it's found and they remedy the circumstance. Other than that, the normal penalties under the Fair Work Act for breach of an award would apply, so it's up to 33,000, for instance, for a corporation.

In broad terms, I think greater resourcing in enforcement of payment of superannuation generally is a much more important issue than the level of the penalty. But fundamentally, the ATO needs greater resources to deal with the substantive issue which is super not being paid at all, regardless of what fund it goes to.

MS MacRAE: Just as a matter of fact, do you know if the Fair Work Ombudsman has ever imposed a penalty in relation to not - - -

MR LYONS (ACTU): The ombudsman can't, the Federal Court - the court - - -

MS MacRAE: Sorry, but through the - - -

MR LYONS (ACTU): To my knowledge, they haven't. The Fair Work Ombudsman meets with us and with key representatives of employers about its prosecutorial priorities, I suppose is what you would say, given it's a fairly sweeping piece of legislation, and it's not a matter they have raised with us and it's not a matter that we would be asking to be pushed up the chain of compliance matters that we think are critical.

MS MacRAE: Sure.

MR LYONS (ACTU): Which isn't to say it's not unimportant but it's not something we would be saying you want your best team on this question.

MS MacRAE: It's not the main priority.

MR LYONS (ACTU): There's plenty of other issues.

MR WOODS: Have you got any issues that you feel you would like to cover in any more depth today?

MR FISHER (ACTU): Can I ask a question in relation to the draft report?

MR WOODS: You can.

MR FISHER (ACTU): In our submission and in a number of other submissions, I

think, we made reference to the use of net return data posed by APRA to determine performance, but in your report you say that, "How performance will be measured would be highly contentious." I'm slightly bemused by that comment, given that a number of organisations had made it clear exactly how that performance would and should be measured.

MR COSTELLO: I agree on the surface that sounds like - perhaps we could answer with a statement. We share I think the view that if language in the report confuses us and it's something we have the chance to fix, but - - -

MS MacRAE: My view on that is that at the moment, there's a bit riding on the APRA data but there's not billions of dollars of funds flowing in that are relying on it and I think if suddenly the flow of funds into super funds became very reliant on that data, people would look at it much more closely and try and work out whether there were ways that they could look at to try and ensure that their fund was going to make the top 100 or whatever it was. So I think the issues that might become contested would be, "Should it be a five-year period, should it be a 10-year period? I'm a new fund, I've got no history, how do I get in?" All those issues I think would come up. So at the moment, there's a bit of market credibility relying on it but it's not the same as saying, "If you don't make the top hundred, we're not considering you for an award." If you're a couple down and you really want to get into that hundred, I just think the opportunities - or the arguments that people might get into over that could be harder.

Some people might say that rating of performance is not everything and maybe we should look at more factors, so we should look at something like the rainmaker ratings or whatever, so there might be a dispute there too about, "Is it really performance you mean or should we be looking at performance more broadly and include these other factors?" That was the sort of issue that I understood we were trying to get at in that discussion.

MR COSTELLO: Thanks, Angela. There has been some comment that again the language we've used has made it unclear between net returns and net investment returns. I'm a little bit bemused by all of that. What we consistently have argued internally is that we should always be focused on the net outcome to savers. But the point has been made, and it's been a feature of the broader review of the superannuation system 20 years in that outcome is a combination of where the people running a fund want to take those people, so a sense of their objectives and the destination, an articulation of what risk they believe is reasonable to take them there, and have they delivered on that or their expected ability to deliver on that.

It goes back to the point that you've made, and we recognise that the gross return less the costs is the net return. As a single dimension, it can neglect the risk-

taker to get there, so we've argued very much for a principles based statement which we've articulated as the primary objective and the appropriateness of the objectives of the fund and the expected ability of the trustee going forward to deliver on that. Much has been said about the extent to which how they've performed in the past is used as a guide there and I think that all of us involved in making these assessments realise that they can be very useful but it's not the only indication of the expected ability in the future to be able to do that. So we will make sure that to the extent that our language is causing confusion, we will repair that.

MR WOODS: Again, it could be useful just as an appendix to your submission, you know, a bit of a technical - "Here on page X and Y," or some other form, so it doesn't interfere with the body of your argument but just provides some guidance from a user-friendly point of view, it would help to have some clarification.

MR LYONS (ACTU): Sure. We would be marginally reluctant to use some of the commercial indexes of fund performance because I worry enough about herding and other things as it is without creating other market incentives for people to actually be too peer aware.

MR WOODS: Exactly our concern.

MR LYONS (ACTU): So we wouldn't want the entire system or trustees to feel that they couldn't do exactly what Mr Costello indicated they should be doing because they were worried about the next set of ratings that were going to be published in a newspaper.

MR WOODS: So to that extent also, if you look at the formulation of our factors for consideration, those first two, we've tried to craft them to overcome exactly that concern, that's it's not just a simple league rating, it does take risk into account, it does take the membership characteristics into account and the likelihood of achieving the relevant objectives. But again, the purpose of the draft is to expose it and if people can come up with formulations that are even more aligned with the underlying objectives, that's helpful to us. Any other questions for us?

MR LYONS (ACTU): No. Thank you for the opportunity. Sorry, perhaps I will ask one thing. You did appear to give an extension to AIST.

MR WOODS: A partial extension. Can I again encourage you to submit to us the body of your commentary in a very timely manner but if there are one or two issues where you would like to contemplate further, then a few more days would probably assist us as well as yourselves. Can I thank you for your detailed front-end submission, for your very overt willingness to pursue opportunities for reform and to look at them objectively. On that basis, it's not unsurprising that there seems to be a

lot of alignment on many issues. We don't agree on all and it will be ever thus, but it has been a process of a very clear working through the various issues, the underlying objectives and we're very grateful for your contribution.

MR LYONS (ACTU): Thank you.

MS MacRAE: Thank you.

MR WOODS: We will resume at 1.30.

(Luncheon adjournment)

MR WOODS: Thank you very much. We'll resume the hearings. Could each of you separately please state your name and the organisation you are representing.

MR SMITH (AIG): Yes, Stephen Smith, director national workplace relations of the Australian Industry Group.

MR BURN (AIG): Peter Burn, director of public policy at the Australian Industry Group.

MR WOODS: Excellent. Do you have an opening statement you wish to make?

MR SMITH (AIG): Yes, we do. We welcome the opportunity to appear at this public hearing into this inquiry into default superannuation funds in modern awards. As you would be aware, we filed a detailed written submission in April and this morning we filed a further note, setting out our broad views on the Commission's draft report.

As you are aware, we support the retention of default funds in modern awards but we are of the view that some changes are needed to the existing system, even though the existing system has delivered stability and above-average investment returns. We concur with many of the findings and recommendations in the draft report. We agree with the eight broad principles for the new system which are set out in draft recommendation 7.1, although we have a difference of view on some of the details. We also agree that the MySuper criteria provides a sound basis for the selection and ongoing assessment of default funds, together with the four additional factors which the commission has identified on pages 10 and 11 of its draft report, being, firstly, investment performance; secondly, fees charged to members; thirdly, governance and transparency and, fourthly, insurance, financial advice and administrative efficiency.

However, in our note, we have proposed three additional criteria that should be taken into account in assessing default funds; firstly, whether the fund is currently listed as a default fund in modern awards; secondly, the views of major representative bodies of employers and employees in the relevant industry and, thirdly, whether a substantial proportion of the employees in the industry or occupation covered by the modern award are members of the fund. There are reasons why we have proposed those three additional criteria we have set out in the note that we've provided.

In the draft report, the Commission has identified four options for applying the selection criteria and expressed a preference for either option 3 or option 4. For our part, we support option 3, and the reasons for that again are identified in the note that we've provided. Finally, in our note, we've expressed concern about the workability

and desirability of draft recommendations 8.2 and 8.3. We're happy to deal with any questions that the commission might have about our position.

MR WOODS: Thank you for that and thank you for your earlier submission which in fact also provided some history that we drew on as we were getting up to speed on some of the background to the issues, so we were grateful that so much of your submission dealt with past practice.

A couple of issues that we raise in our draft and that you draw attention to I wouldn't mind exploring in a bit more detail. You've identified three additional factors as you mentioned in your opening comments and the first one is whether it is currently listed as a default fund. Now, we know that the process by which Fair Work Australia and its precedent bodies, when the modern awards were being developed, used that as a criteria, but it really doesn't have a lot to do with the performance of the fund. It's just a process of drawing on - had the fund been identified in an award that was part of the consolidation of awards into the 122 modern awards, whereas what we're trying to do is break open the criteria and say, "What is in the best interests of members? Which funds should therefore be included in awards?" and to have that not only established in a new process in the next couple of years but to be reviewed periodically beyond that.

So I was just wanting to understand your rationale for that, other than that's current practice; it's just sort of interesting but not necessarily relevant. So how does that align with looking afresh every so often, whether it's four years or eight years or whatever it might be, at which funds would best deliver in the interests of members? Why do you put stock on that particular - - -

MR SMITH (AIG): We believe that it should just be one of the criteria but that it would not be desirable or workable to not have it there at all. Under the proposals in the draft report, every eight years there would be a wholesale review and every four years a lesser review. But looking at that wholesale review, if the outcome of every major review was largely another list of five to 10 funds, then that would impose a substantial compliance burden on employers who, in the main, would have been using of course the default fund arrangements that are already there. So we think it's just one of the criteria, and the fact that under the commission's proposals effectively we would be going from two criteria which Fair Work Australia has identified to a much more expansive set of criteria, it should just be one of many criteria to be taken into account.

MR WOODS: Okay. So it wouldn't be determinative. If you're already existing in an award, you wouldn't have automatic acceptance into that award in the future, particularly if that fund was patently not delivering in the best interests of members.

MR SMITH (AIG): No, certainly not. If the fund was not meeting the criteria, then it shouldn't stay there, but if the fund was meeting the criteria that was set, then we've suggested that it shouldn't be required that they apply again. They're effectively already there as a fund specified, and subject to meeting the criteria that's been set, the fund should stay there for all the reasons we've identified, including the compliance burden issue.

MR WOODS: Okay. Let's get to the burden in a minute. Presumably there would be some process by which you test whether that fund is or isn't meeting the criteria. So in a sense, although you're proposing that they need not reapply, somebody would still need to run the ruler over them and say, at least at the bottom end, "You are patently not meeting the best interests of members." So there would still have to be some process of review for those funds.

MR SMITH (AIG): Yes, and it would be the same process of review that applies to all of the funds but in terms of assessing the outcome of the review, one of the factors that should be taken into account and given some weight is whether or not they're already listed as a fund in the award.

MR WOODS: That gives it a slightly different context to how I read, albeit only recently, your latest piece of paper, but that helps. The next question though is what is the burden on - - -

MS MacRAE: Sorry, just in relation to that one - - -

MR WOODS: That's what I wanted to finish and then if we can move on.

MS MacRAE: Okay, sorry, yes.

MR WOODS: If the Super Stream changes come through and things are electronically submitted and all the rest, will that burden from your point of view reduce for employers and therefore will the weight that you need to give to that recede even further?

MR BURN (AIG): It's an interesting question, but if the purpose is to reduce the Super Stream thing is to reduce the compliance costs, then to add additional - say there's the space to add compliance costs seems a strange point because I think that it would add - if the degree of turnover of the funds was greater in the absence of the criteria we suggest, then we think there would be additional compliance costs on employers.

MR WOODS: Yes.

MR BURN (AIG): So the Super Stream argument is sort of saying, "Well, you're reducing it, therefore you" - it seems a strange argument to say you can increase it because we've already decreased it.

MR WOODS: Let me clarify. What I'm testing is you've put forward a proposition that there be a criteria which is the fund already listed and it's not egregiously misbehaving to the detriment of members, and part of your argument is based on the impact on employers of having to change funds. If that cost of changing funds reduces under the Super Stream, does the weight of that argument therefore also reduce?

MR BURN (AIG): To the extent that the costs of changing super funds is less, then the cost is less, so that's quite - - -

MR WOODS: Yes, sorry, I may not have expressed my question clearly. That's all I was trying to establish. Thank you.

MS MacRAE: Just in relation to how you would see that operate, we've made a suggestion in our report that five to 10 funds be listed in each award. Say you had 10 funds in an award and your eight-yearly review comes up and 50 funds apply, and the 10 that are already there say, "Well, we meet the criteria. None of us is really badly performing," do those 10 just get to stay then or do you say, "We might need more than 10. It's all right to have more than 10 there because we should allow some new entrants." If some of the potential new entrants then said, "They might be performing but we're performing better, we can actually demonstrate, we think, that we're doing better than those 10, so you're going to leave them there because they've got historical precedent but we think we're better," what do you do in that situation? Are you happy to increase the numbers? It just seems that part of the problem with the existing system that we've identified is that there is almost no turnover and that it doesn't seem to be freshly reviewed very often, but the scope, if we're to give this "if you're already there" sort of much weight, it seems to be you would really reduce the capacity for good performers to displace those that are good performers but maybe not the best.

MR SMITH (AIG): I don't think it would reduce it much because at the moment, there are only two criteria, the history, and the views of the industrial parties. So it's a very narrow set of criteria, whereas with this system, we have a very expansive set of criteria and all we're suggesting is that this be one on that list. We're not suggesting it be given more weight than others but to not have it there, to us, is not either workable or desirable because the reality of the situation is some of these funds have been listed in the award since the 80s and to not give any weight at all to the fact that an industry fund might have been there for all of these years just does seem a very unusual outcome.

MR BURN (AIG): The issues arises because there is a recommendation about five to 10 funds, doesn't it? So whether or not this criteria is included, the same point could easily arise, that there may well be 50 funds that satisfy the criteria and then somehow or other it's got to be culled down - - -

MS MacRAE: I guess I'd say out of the criteria then, you'd say, "All right. So the best 10 based on these criteria are X." But then if you've got this other issue, that some of them have been listed before and some of them haven't, it's hard. I take the point that there could be some disruption but the disruption really comes down to compliance costs primarily, I think. For the individual funds it can be disruptive but in some senses, we're intending that because we want them to move to the best - and I shouldn't say "performers" but the best operating funds, so this almost potentially seems to undermine some of what we're trying to achieve.

MR BURN (AIG): Yes. If what you're doing is saying - just thinking how it might operate - is that, "We've got a number of criteria and we can rank these funds from 1 to 50 and we think that compliance costs are an important consideration and ought to go into that ranking," I don't know that there's a substantially different issue raised because of that additional criteria than the criteria that is currently existing. You've still got to somehow weigh up and balance different criteria, and funds will rank differently according to those criteria. So you've still got this juggling issue, but this is the way we get the compliance cost issue into the consideration and we think that it is important.

MS MacRAE: Yes. We are very aware of the compliance costs and we have put administrative efficiency in there as one of the things that actually doesn't appear for the MySuper selection, for example, and so it was the one completely new and different thing that we recommended compared to MySuper because we were concerned about compliance. So anyway, that's useful and we can think about that a bit more.

MR WOODS: So on the issue of the administrative efficiency of the fund, do you have any view? Your most recent set of comments, as I recall, don't deal with it, but presumably you support - which is the final dot point under draft recommendation 6.3 - the administrative efficiency of a fund according to set benchmarks as one of the factors for consideration. Presumably you would support that as - - -

MR SMITH (AIG): We support it, yes, as one of them.

MR WOODS: Have you got anything more on that one?

MR COSTELLO: No. It's really this point that you raise, so I wouldn't mind just

sticking with the point we're at, because what the draft report proposes is to say that precedent has been essentially the most strong criteria for the last 20 years which determines which funds are in awards and we've said in this review that we think that the most important criteria should be making sure that under the default system, a worker joining a workplace, if they don't make a choice, should be guided into a professional assessment of a short list of funds that's not guaranteed but highly likely to deliver them a better outcome than average, in fact a materially better outcome than average.

We recognise that what this does is essentially draws a line under precedent and starts again, which is not to say that those funds that have been in awards for much of that time would not present on merit a very strong case to be judged as amongst the 10 most likely going forward to deliver a good outcome for those people, and we particularly recognise those features, as well as investment capability, around the insurance needs of that particular industry and those things do matter. So you're right to draw attention to the fact that it's a material departure. That's deliberate. It's a tension, isn't it, because on the one hand, convenience and just continuing on with a straightforward life for an employer, so they don't have to make a change, has some appeal, and I can see, particularly for your constituency.

Against that, I guess we're saying that we need to recognise the employers' experience of this system but we need to prioritise that outcome for the people whose money is being put into it. The point that Angela raised before, if we had 50 funds and, on a range of these criteria, a group decided that here was 10 which ranked higher in their evaluation criteria than others in terms of going forward and an existing fund was number 35 on that criteria, your proposal would see number 35 at least what? How would a 35th-ranked fund which had been in an award - what would you suggest this process do compared to 10 others, if it didn't make that top 10?

MR SMITH (AIG): I think it needs to be clarified, what our latest thinking is on this because in our original submission, we put the proposition that provided that a fund met an acceptable level of performance which we defined in there, then it should stay. In thinking about the commission's draft report, we've modified our thinking and our position now is when you look at the eight principles that apply to this process, including the overarching principle about the best interests of the member, we're quite comfortable with that. So this idea of precedent is only one of all of the considerations, and if the fund ranked 35th, then obviously it would be much more unlikely that that fund would remain in than if it ranked 11th, for example, where that might be given more weight.

MR BURN (AIG): It's the same issue as if a fund ranked very well on a range of criteria but 35th on governance and transparency, so does that rule it out? It is

inherent in the nature of the propositions you're putting forward.

MR WOODS: It's the balancing and the weight you give and I guess we've just been trying to test what weight you would give, so that's been helpful. Thank you. One of your other additional criteria were the views of the major representative bodies, ie, employers and employees. You've used various formulations of words, "play a significant" or "important" or "vital role", and in our draft, we're proposing that indeed their voices would be heard but all voices would be heard on the merit of their arguments, not on who it was who was putting forward the argument.

But if you could try and develop the nuancing of that line for us a little further, and there are several ways of doing this: one is that therefore they have a primary role in assessing which funds, or that Fair Work Australia must give their views more than equal weight - just how would you formulate that? If you want to, on reflection, after today's hearing, go back and tease that out further, I'd invite you to think through that as well.

MR SMITH (AIG): Regardless of what industry is considered, the major industry groups and unions in those industries, we are very much of the view that the representative bodies for that industry should have their views given substantial weight. At the end of the day we're talking about awards. Unions and employer groups since awards were first created more than a hundred years ago have been major players in the industrial relations system and we're not suggesting that again, the system stay the same. A five-member full bench of the Industrial Commission has identified that this is an important criteria. At the end of the day, we're talking about provisions of awards and the views of the industrial parties, of what those provisions should be, should be taken into account, not given undue weight. We very much support what has been said in the draft report about identifying any interests.

In the case of the Australian Industry Group, I think it would be extremely common knowledge - and we've put it I think in the first paragraph of our submission - that we have an interest in Australian Super but to the extent that organisations have an interest in any particular superannuation funds, then those interests should be open, and any views that are put should be taken on their merits, taking into account anything that might be said.

MR WOODS: So would you envisage, as we've proposed here, that any fund which wishes to be considered for an award would have standing for the purpose of that argument to approach Fair Work Australia to have its case be heard, rather than have to go through one of the industrial parties that have standing?

MR SMITH (AIG): Yes. We're not suggesting that in this review process that

only industrial organisations should have the right to apply. In fact at the moment there is the two-year review of modern awards going on, and in that process where superannuation is being considered but the tribunal has decided to do it after you hand down your report, anyone is free to make an application during the two-year review. It's not limited to the provisions of the act that apply to award variations in the ordinary course of events.

MR WOODS: Is that by determination by Fair Work Australia or is that a legislative provision that they're utilising?

MR SMITH (AIG): It's a legislative provision in the Fair Work (Transitional and Consequential) legislation where it states in that legislation that there will be a two-year review and there's nothing in those legislative provisions that in any way limit who can apply. There has been full bench proceedings with a decision a few weeks ago where they have held that, amongst many other jurisdictional issues, anyone can make application as part of the two-year review. We haven't got to the four-year review yet, but I assume that when we get to that, the same might apply.

MR WOODS: You're perfectly comfortable with that arrangement?

MR SMITH (AIG): Yes. We're not suggesting when the review of the superannuation funds come up that there should be a limit to who might apply.

MR WOODS: All right. One of your other points of argument was in relation to funds that have a membership base based in the industry, but increasingly - and you raised Australian Super - with public offer funds, that nexus - let's say between REST and hospitality or Cbus and construction - is dissipating in some of the larger public offer funds on the industry side, let alone obviously in the retail sector as well. So will that factor again over time with consolidation - I mean, if you amalgamate AGEST with Australian Super or something, you've got quite a diverse set of workforce who are party to that.

MR SMITH (AIG): The point we're making - and take the manufacturing sector, for example - when the criteria is applied to all of the funds that might seek to be listed in the manufacturing award, one of the criteria should be: how many members in the industry does it have, because it would be a very strange outcome to have 10 funds listed there if those 10 funds were really funds for the IT industry and the hospitality industry that really had no membership penetration in the manufacturing industry, so again just one of the criteria to consider.

MR WOODS: I guess we had thought that for a fund to be able to put forward a strong case that it understood that industry and that its characteristics aligned closely with the needs of the membership who would be drawn from that industry that that in

itself would be reflected in the way that the case was made by the fund and the assessment made of that case by Fair Work Australia, without needing this as yet an additional criteria. A fund that was well embedded in a particular industry and that the award covered that industry would presumably be well placed to put the best possible case that their fund is structured to meet those needs, so that in itself would have led to that conclusion without needing this on top of the - - -

MR SMITH (AIG): The thing about this particular criteria though is it's a fairly specific thing, isn't it, as opposed to a more general proposition about knowledge of the industry et cetera. So we think this is a criterion that should be there amongst all of the others, but we take what you say, that you identified the importance of the issue but are coming at it from a slightly different angle.

MR WOODS: Yes. I'd like to at some stage move on to your views on draft recommendation 8.2 which is the employers having some capacity to move outside of it, but colleague commissioners, have you got any questions before then?

MR COSTELLO: I just really reinforce the point that was made that the challenge potentially with some of the suggestions you've made is that they may serve, rather than open up the system, to quite quickly start to narrow it again. We talked about the role of precedent and the advantage of incumbency and also the concept of existing membership in the industry, we've thought about that a lot and we recognise that that would likely mean that your insurance offer would reflect your current membership and your expected future membership which would in itself guide you towards that, your ability to service those people, give them advice and provide them with other support. So all of these things which are a criteria which any fund would have to provide its credentials against would not exclude any fund which your own recommendations would reinforce for being selected but by not having them there, it does allow the field to remain open. It's a tension really and I just kind of make the point in response that one of the principles was keeping this process transparent, contestable and competitive, and we need to balance that at all times.

MR SMITH (AIG): Yes. As we identified before, say there's 120 applicants for a particular industry award, it would be a very strange outcome and from our point of view an undesirable outcome if every eight years there's a completely different list of 10 funds, because there should be some weight given to that precedent.

MR WOODS: One could envisage that the first time round in fact could be a marginally chaotic process, sorting through, but presumably the second time round, it would be only those on the margin who are just out versus those in the margin who are still in. That's where the discretion and contest would be, but you would expect the second cycle, third cycle, that this would fairly quickly establish in a more orderly manner. One has to wait and see.

Recommendation 8.2, you offer views that you don't consider that recommendation workable and you identify several reasons and they're all quite clearly explained there. Is workability the only issue, because workability suggests that, "Well, is there some other way of achieving it?" but I'd also like to test with you the desirability of what's intended by the recommendation as the first debate and then the second debate is how could such a thing, if it's found to be desirable, be workable. You have a very large membership base. You have a range of different size employers within that membership base. To what extent are your members saying that they actively want to look beyond the limitations of the funds that are listed in awards? Is there a strong demand for what's underlying in this principle or are you not receiving that sort of feedback? Where does your membership stand on that?

MR SMITH (AIG): Isn't this issue really though an issue about whether there should be default funds in awards or not, because in the way that we look at it, it's really an argument about whether there should be default funds and this inquiry seems to be premised on the fact that there should be default funds in modern awards, whereas this, to us, in looking at it, it is completely inconsistent with the idea of having default funds in modern awards. That's the issue that we've identified when it comes to workability.

Our members have said to us that they do value the default fund system and we've put that in submissions over many years because it makes things simpler, and from an administrative point of view it reduces the compliance burden. The issue that we haven't got to yet about 8.3 is also an important part of that with the grandfathering arrangements. Companies that are not using the default funds in awards are usually doing something that they have been doing for a very long time in terms of the use of other funds and the grandfathering arrangements have allowed them to continue to do that. So to us, this idea that you would have default funds in a modern award, yet you would allow an employer to pick any fund where it meets this criteria, that they have considered the factors that the Commission has identified and that the employees are no worse off, we just think that's going to lead to enormous difficulties because you're not going to really know whether the employees are worse off until years later and then it creates enormous risk for the employer, in particular, if the fund doesn't perform and then the employees and/or their unions say, "Well, it didn't meet the criteria."

MR WOODS: Okay. So that's a particular concern which you've identified there in your written documentation, but in terms of your membership, are they looking for some way of being able to - putting aside grandfathering which we'll get to in a minute - choose funds outside of the award or are you saying that your membership highly values having funds nominated in awards and as long as they choose one of

those, all is well?

MR SMITH (AIG): Peter will no doubt have a view but there are different views about this issue of course as part of the public debate about the issue of default funds but consistently our members have expressed support for the default fund system and we've maintained that policy position and we have not sensed any significant view in the opposite direction from a large group of members. The companies that are using other arrangements are often using, as I've said, the grandfathering arrangements or they have got enterprise agreements that deal with the issue of default funds or other arrangements in place.

MR BURN (AIG): In addition to our members' views, we're also mindful of a broader sort of public policy issue at play here and the potential for a conflict of interest to arise for an employer nominating a fund. I think that it's pretty common knowledge in the market that there are suggestions from financial institutions to get the employer to nominate a default fund that aligns with the bank. We have a concern around that.

If an employer nominating a default fund in this way can demonstrate that it's in the best interests of the workers and aligns with the other criteria, that's one way to sort of address I guess that conflict of interest, but we've just got issues about how that would actually work in practice. That's got us puzzled a little bit. In the draft paper, you look at option 1, which seems to be very similar to this but then you have a number of issues around option 1. This is in a sense sort of universalising option 1 - not universalising, but option 1 would be the universal case, and this ability of employers to opt out, the arguments that you've put in relation to option 1 would seem, at a quick reading, at any rate, to go against some of the arguments you've put in that.

MS MacRAE: The biggest problem we've identified with option 1, at least from my point of view, is that if you have hundreds of funds, how would employers ever choose from them? We do seem to have, at least on the strength of the argument we've had - and I have to say it hasn't been particularly strong one way or the other - but there seems to be a pretty good case that at least for the micro and smalls that they are very keen that they not be asked to choose from hundreds of funds, and I'm expecting that you would tell me that that would be your view from your membership. But for the medium size - and the large employers seem to be relatively happy with the idea that they're going to have enterprise agreements anyway, they can choose a super fund in that context if they want to in negotiation with their employees, so they have got a way of getting the sort of arrangements they want.

So the opt-out, or the employer discretion that we're offering here, was really to

see is there a group of employers who are not so small that they want someone else to make the decision for them, really take it off their plate, they don't want to deal with super, they wish they didn't have to - you know, we've heard that argument, we've heard it loud and clear, we know that there's a group of those employers - they're not so big that they want to enter into an enterprise agreement but they would like to have some sort of discretion if they don't particularly want - for whatever reason, they don't think it's a good fit for their employees. I mean, obviously the award funds that are chosen are going to be based on the averages for that award.

A medium-size employer might say, "Well, my employees actually don't fit necessarily that profile for this award. They're different and I think that my employees might have a different arrangement." One of the other reasons we had of this is if we were to remove the grandfathering arrangement, so we take away that complication, we might say for those people that can say, "We've been in this fund for the last" - however many years, "it's dropped off the award, but we can still demonstrate it's good for our employees, we want to stay with it," this would give them the opportunity to do that through the employer discretion clause, so it would be another way of dealing with that sort of grandfathering issue too, being sure though that that then would put a requirement on the employer to demonstrate that it is still in the employees' best interests, not just, "Well, it's in my interests because it's easy, because it's what I've been doing for the last 20 years."

MR BURN (AIG): I think in the draft report it's recommended that it be in the interests of the employees and that it satisfies the other criteria that are mentioned.

MS MacRAE: Yes, sure.

MR BURN (AIG): So this would be a strange thing if it would be kicked off the list in the award but then would satisfy the conditions that determine whether it is kicked off the award.

MR WOODS: Only in the sense that the award deals with averages rather than a particular configuration of employment within a reasonable-sized business. But you're saying none of your members are putting that up as something that's desirable?

MR SMITH (AIG): There will always be differences of view about any of these issues, but in terms of our position that reflects the policy structures and the views of the membership generally, our position is as we've put it. We do oppose the abolition of those grandfathering arrangements - - -

MR WOODS: Yes, we'll get to that one in a minute.

MR SMITH (AIG): - - - because if this is seen as addressing that issue, then we don't think that's the correct way to address that particular issue.

MR BURN (AIG): I also think, going back to the enterprise bargaining agreement issue, there's a fundamental difference with the employer choosing a fund unilaterally and something being worked out in an enterprise bargaining context where there are representatives on both sides showing their views. I can see that there are circumstances where this would be administratively difficult to ensure that conflict of interest was absent or to minimise conflict of interest. I think it would be very difficult.

MR WOODS: Grandfathering: I guess what I'd like to do is go to the heart of our concerns which is if a fund has not been identified as being one of those that best meets the interests of members which we've traversed in relation to other issues, then the problem with grandfathering is that it could be preserving that fund and new contributions to it and yet it hasn't ranked as one of the serious contenders of the membership's best interests. So is it a practical consideration versus a principled consideration?

MR SMITH (AIG): I think it's both because as we've identified in that note that we sent through this morning, these grandfathering arrangements have been very important since superannuation awards were first created. The Metal Industry Superannuation Award was created in 1989 and one of the important aspects of that award was anything that employers were doing prior to the operative date of that award, they could continue to do as long as the relevant complied with the legislation.

MR WOODS: Yes, still licensed and - - -

MR SMITH (AIG): So all along the way, with all of the various decisions of the tribunal, including modern awards, these grandfathering arrangements have been preserved. The grandfathering arrangement in the modern awards reflects part of this debate. It also reflects the very forceful submissions that were put by the retail funds and so on during the award modernisation process. So to abolish all of those grandfathering arrangements we think would create a lot of difficulties. Of course choice of fund is an important aspect of making sure that no-one is forced to be in a superannuation fund that they do not want to be in.

MR WOODS: No. We understand the importance of choice of fund, allowing an employee who says, "Hang on, this fund is clearly not meeting my best interests," to go to a different fund where the enterprise agreement or award allows them to make that choice. But there's still that fundamental question of principle, that if this is not one of the funds identified as best meeting the interests of members, should it be

allowed to continue to receive members' contributions and manage those funds? There's a tension there.

MR SMITH (AIG): It is one of those things that needs to be weighed up, but again from the point of view of disruption, the compliance burden et cetera, this has been a critical part of the system where there's been exemptions from effectively the default fund arrangements and this grandfathering exception has been extremely important. To abolish it we believe would go too far.

MR COSTELLO: Just slightly blurring the previous conversation into this one, picking up the point made that consistency, simplicity and continuity has value, but if on the facts it would appear there was a risk at least that a depositor, a saver, a worker could end up in a materially worse place, as Mike says, there's a tension there. So here is a question: what would you feel about the concept of having to prove under grandfathering relief that it may not be one of 10 funds - which to some extent is arbitrary anyway, it's a professional assessment, but there is no guarantee that number 11 is better than number 9 and possibly even number 15 compared to number 8 - but what would your view about potentially needing to justify under the "no worse off" or something like that that in order for any grandfathering or any continuation of a previous option that there would at least need to be a hurdle that you wouldn't knowingly continue to have contributions going into a fund that fell way short of at least roughly approximating what the future would look like for any other person?

MR SMITH (AIG): The concern that we've got about recommendation 8.2, and I guess it's the same issue here, is the vagueness of it. If the proposition is that the fund be complying with the law and complying with criteria that are black and white, then we don't have a problem. But it's really the vague nature of this idea that the person has got to be better off; that's an extremely vague notion and we think it's going to cause all sorts of problems. But if the fund wasn't complying with the relevant requirements from a regulatory point of view, then we have no problem with the fact that it shouldn't be used as a default fund or that the grandfathering arrangements shouldn't apply to it.

MR WOODS: Which is a fairly low hurdle though.

MR SMITH (AIG): It is, but we'd be happy to think through whether or not there's anything else that we might be able to come up with on that because we understand the point that you're making. I don't think before the discussion today we'd fully understood where you were coming from on that point. So in our submission that we will lodge by Friday, we will - - -

MR WOODS: To the extent that may cause you to reflect a little bit, if it travels

early into the next week, we would prefer a thoughtful answer.

MR BURN (AIG): You will definitely get a thoughtful answer.

MS MacRAE: Just to take the point that Peter was making earlier, I think there is at least some anecdotal evidence that in the past, employers didn't necessarily always choose super in the best interests of their members. There were other incentives and inducements around. So just to take that point, we're trying to remove some of those things that have been part of the history, and by the more sort of grandfathering you have in the system, the more you're allowing arrangements to stay in place that were made at a time when the regulatory environment was much less restrictive, I suppose you could say, than it is now, so that's one of the reasons. In fact when we tried to look in any detail at the grandfathering arrangements, it's difficult, because there doesn't seem to be a lot of data around that makes it very easy for you to assess them. Is it really a problem? How widespread are they? Why are people in grandfathering arrangements still? I'm sure quite a lot of it is convenience, but even the extent to which they apply is pretty opaque.

MR WOODS: In fact a research team have been at considerable pains to try and track down what these grandfathering arrangements are and it's not an easy task. If you had the complete database of grandfathering, we would gladly work with you.

MR SMITH (AIG): We'll think through this before we put in our submission but it is an interesting issue to think through, how the MySuper reforms impact on this issue because in our experience, most of the grandfathering arrangements back in the late 80s at least or many of them at least, companies had their own funds and they continued to pay into those funds. I guess over time a lot of those funds have been rolled into other arrangements, but the MySuper criteria is worth thinking about in looking at this issue of, "How could we end up with something that's a little more rigorous in that area?" but it needs a bit of thought.

MR WOODS: That would be very, very helpful to us. Other issues? Are there things you want to raise with us while you have the opportunity?

MR SMITH (AIG): Just one point, and again we'll give this some more thought, but one of the reasons why we've chosen option 3 rather than option 4 is at the end of the day, we're talking about awards and award provisions, and Fair Work Australia of course and its predecessors have been responsible for maintaining awards. Amongst all the other reasons why you might go with option 3 rather than option 4, we're not sure, even from a technical, jurisdictional, constitutional point of view that option 4 is going to be valid. There is a debate that's occurred over many years about whether or not a separate body can come up with a direction to the AIRC or Fair Work Australia or even a government that can say, "You must put in your awards what we

tell you to put in." It's an interesting debate. So to set up a completely separate organisation who tells Fair Work Australia, who has responsibility for assessing the views of parties and making a decision on award provisions, it's an interesting sort of jurisdictional, technical-type argument, but we'll give that some thought as well.

MR WOODS: That would be very helpful. I should also advise you that a participant this morning - and it will be available on the transcript of the hearings when they're published - raised the prospect of a variation on option 3, not that they were necessarily promoting it but certainly raised it - and that is that instead of constituting a panel of Fair Work Australia with experts that you have a panel that reports to one of the commissioners constituting Fair Work for the purpose of that particular award. This panel would operate within the umbrella of Fair Work Australia but would report to the commissioner rather than have the tribunal or individual commissioner as part of the panel. So it's a variation on the Minimum Wage Panel and not quite as rigorous in that integrated sense. Anyway, that's a variation on the theme that you could also consider.

MR SMITH (AIG): As we identified in our submission in April, we are attracted to the idea of the Minimum Wage Panel type model where you would have members of Fair Work Australia but you would bring in expertise, as has occurred with the Minimum Wage Panel.

MR WOODS: Our option 3 pretty much closely tracks what you were putting forward there, at least in principle 1, broad operation.

MR SMITH (AIG): Yes.

MR COSTELLO: I apologise, a question has just occurred to me.

MR WOODS: You can have a question.

MR COSTELLO: The point was also made in submissions and in discussion that really, as an argument against some of the recommendations made, particularly the point that the current system can be inaccessible to some funds who wish to have the case considered, and the point has been made that it's really not that difficult. All a fund needs to do is to find an employer to represent or present it, in other words, to provide it with standing under the current system. Do you have any thoughts on that, about the availability, the willingness, your experience of employers who would be freely willing and able to play that role?

MR SMITH (AIG): That issue is going to the restrictions in section 157 and 160 of the Fair Work Act which are the two sections which apply generally for applications to vary awards. Section 158 is linked in with that and it identifies the parties that can

apply to vary an award. Those parties, other than registered organisations, include either an employee covered by the award or an employer covered by the award.

The reason why the application which you've identified in your draft report failed, that AMP application, was because there was no suggestion in that case that AMP was employing anyone covered under that particular award. So, yes, it is the case that all funds would need to do would be to make the application in the name of an employer or an employee. But as I've said, with the two-year review of modern awards, that restriction doesn't apply anyway, so after your report is handed down and Fair Work Australia get to the issue of superannuation, even that restriction doesn't apply.

MR COSTELLO: Can I just clarify that point that you made that one of the reasons that failed was - it's a catch-22, it seems to me, and I realise this is looking back but it's just helpful to understand - that AMP, who was applying to be heard, because it didn't already have and couldn't prove that it had an employee covered at an employer workplace, and therefore given though it found an employer, it wasn't an eligible employer in that there wasn't an employee at that workplace who was already in that fund. Is that what you said or did I understand that?

MR SMITH (AIG): Yes, as I understand the decision that Smith C made in that case, it was because the applicant in that case, AMP, didn't fit any of the criteria set out in section 158, which is they are not an employer employing any employees covered by the award and it was rejected on jurisdictional grounds principally on that basis.

MR WOODS: But if they had found an employer who was willing to propose that the AMP fund be a fund in the award and that that employer had standing because it had employees covered by the award, that would have got around the jurisdictional issue?

MR SMITH (AIG): That prime jurisdictional reason for rejecting the application that Fair Work Australia relied upon would not have been there; whether or not the decision - - -

MR WOODS: It doesn't seem a very high hurdle for a fund to be able to find an employer to put forward their case and yet you're not recalling instances of funds actively chasing your members to put forward proposals before Fair Work Australia or are you just not aware of them?

MR SMITH (AIG): I guess it's all a bit academic now because that was the rationale for rejecting that application. If the application had been made in a different way, none of us would know what the outcome would have been.

MR WOODS: Quite correct.

MR SMITH (AIG): Time has moved on and now what Fair Work Australia is doing, they're saying, it seems, with any applications that are made now, they are delaying dealing with those until after your report is handed down and they're going to deal with them next year, taking into account your report.

MR WOODS: Anything from yourselves?

MR SMITH (AIG): No.

MR WOODS: Thank you for (a) your earlier submission and (b) for giving us a heads-up on matters you wanted to raise. We look forward to your submission in a very timely manner, but we would like it to be a thought-through and considered submission as well. So if you can find that right balance, that would be great.

MS MacRAE: The longer it takes, the better it has got to be.

MR WOODS: Thank you. That ends the scheduled participants for today. Is there anybody on the floor who wishes to come forward and make an unscheduled presentation? That being the case, we will adjourn and resume in Sydney tomorrow. Thank you.

AT 2.30 PM THE INQUIRY WAS ADJOURNED UNTIL
TUESDAY, 31 JULY 2012