2 Default superannuation funds in modern awards

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| Key points |
| * Australia’s superannuation system managed $1.4 trillion in assets in June 2012 (which is approximately equivalent to Australia’s GDP in 2011‑12). The total pool of assets is predicted to grow to 150 per cent of Australia’s GDP by around 2040. * Between 1996 and 2012, the number of superannuation funds regulated by the Australian Prudential Regulation Authority (APRA) decreased from 4747 to 352. Significant fund consolidation is expected to continue, but the rate at which this will take place is uncertain. Between 2000 and 2009, the number of self-managed funds doubled to over 400 000, and these funds now hold about 30 per cent of total superannuation assets. * Employers’ obligations to make superannuation contributions evolved as part of the industrial relations system. In 1992, employer contributions were extended to almost all employees by the superannuation guarantee legislation. Within this compulsory superannuation system, since 1 July 2005 most employees have had the right to choose a superannuation fund. * Of the 122 modern awards, 109 list one or more funds as default superannuation funds. One of the listed funds must be used for employees who derive their default superannuation fund in accordance with a modern award (unless ‘grandfathering’ applies or employee choice has been exercised). Relevant employees include those who are award-reliant, above-award employees, and employees covered by enterprise agreements that do not specify a default fund but refer to the award for superannuation purposes. * There are 104 default funds listed in awards, but some have merged, changed their name, or closed since they were first listed. Others are exempt public sector superannuation schemes or remain unable to be identified. Of the 66 remaining default funds, 46 are classified by APRA as industry funds, 11 are classified as retail, 6 are public sector and 3 are corporate funds. * Around $6 billion, and potentially more than $9 billion, in superannuation contributions were made to default funds in awards in 2010 for employees who derive their superannuation fund in accordance with a modern award. * Limited data and anecdotal evidence suggest that the superannuation funds listed in awards also influence the funds chosen in enterprise agreements. |
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## 2.1 Default superannuation funds as part of Australia’s superannuation system

### Default funds are part of a large and growing compulsory system

Australia has a three-pillar retirement income system involving a government‑funded and means-tested age pension, voluntary savings within the superannuation system, and compulsory superannuation (with tax concessions applying to the latter two). The focus of this report is the compulsory superannuation pillar, and in particular the default arrangements that are in place for ‘employees who derive their default superannuation fund in accordance with a modern award’ and who do not choose a fund into which their compulsory superannuation contributions are to be paid.

Assets in the superannuation industry have grown rapidly since 1992. In June 2012, total superannuation assets reached $1.4 trillion (APRA 2012f), which was approximately equivalent to Australia’s GDP in 2011-12 (ABS 2012d). This growth is expected to continue, and it has been estimated by Treasury that superannuation assets will reach 150 per cent of GDP by around 2040 (figure 2.1).

Figure 2.1 Predicted superannuation assets as a percentage of GDP

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*Source*: Gruen (2011).

Superannuation effectively became compulsory in 1992 with the introduction of the superannuation guarantee legislation (box 2.1). This guarantee now requires employers to make superannuation contributions for most employees at the rate of 9 per cent of ordinary time earnings. This rate will progressively increase to 12 per cent by 2019‑20 (DEEWR 2012b). The superannuation guarantee applies to almost all employees, except for those earning less than $450 per month (or less than $350 per month in some industries); part-time employees under 18 years of age; and employees over 70 years of age (though this age limit will increase to 75 years of age by 1 July 2013) (ATO 2012a). A maximum contribution base ($43 820 per quarter in 2012) also applies (ATO 2012c).

Within the compulsory superannuation system, since 1 July 2005 most employees have had the right to choose their fund (the main exceptions being those employed under some enterprise agreements, or other specified pre-reform agreements). In the event that an employee does not choose a fund (box 2.2), an employer must make superannuation contributions for employees who derive their default superannuation fund in accordance with a modern award into one of the default funds listed in the award (unless ‘grandfathering’ applies — see below).

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| Box 2.1 Features of the superannuation legislation |
| Three pieces of legislation provide the main basis for regulation of the superannuation industry.   * *The Superannuation Guarantee (Administration) Act 1992* (Cwlth) determines whether or not employees have choice of fund. It also sets out the calculation of the superannuation guarantee shortfall, which accrues when an employer fails to pay superannuation. * *The Superannuation Guarantee Charge Act 1992* (Cwlth) imposes a superannuation guarantee charge equal to the amount of the superannuation guarantee shortfall. * *The Superannuation Industry (Supervision) Act 1993* (Cwlth) establishes the registration and licensing processes for superannuation funds and their trustees and contains rules on accounting, audit, reporting, governance, and board structure. |
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Where the award does not direct contributions to a particular fund, or funds, employers can make superannuation contributions to any complying fund under the *Superannuation Industry (Supervision) Act 1993* (Cwlth) (the SIS Act) (ATO 2011a).

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| Box 2.2 How many employees exercise choice of fund? |
| There are no data on the incidence of choice of fund by employees who derive their superannuation fund in accordance with a modern award. More broadly, there are a variety of estimates of how many employees (employed under a range of different industrial instruments, not just awards) actively choose their superannuation fund in any given year.   * 44 per cent of employees do not take any active role in determining the fund to which their contributions are made, and a further 26 per cent select the default fund offered by the employer, which means about 70 per cent of employees are members of the default fund selected by their employer (ABS 2007). * 50 to 70 per cent of employees are members of their employer’s default fund (Colmar Brunton 2010a). * Just over 27 per cent of the 609 employees who participated in a survey commissioned by the Association of Superannuation Funds Australia actively chose their employer’s default fund, 20 per cent did not exercise choice and were placed in the employer’s default fund, and 23 per cent of employees did not have choice of fund, which means, in total, just over 70 per cent of the employees surveyed were members of the default fund selected by their employer (ASFA, sub. DR75).   Measures of whether or not a member is in the default investment option might also provide some indication of choice of fund, although a member who chooses a fund might also actively choose to be in the fund’s default investment option.   * Of those who default into their employer’s default fund, roughly 80 per cent are in the default investment option. Anecdotal evidence suggests that about 20 per cent of these employees actively chose to be there, meaning that about 60 per cent of members do not make active superannuation choices (Australian Government 2010a). * 18 per cent of employees do not accept the default investment position within their fund (Super Ratings 2006; Gallery, Gallery and McDougall 2010). * Just over 53 per cent of employees chose an investment option other than the default. This includes employees who had chosen a fund, and some of the employees who were in the default fund (ASFA, sub. DR75). |
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### Regulation of the superannuation industry

The Australian superannuation industry is highly regulated, with a number of agencies having a role (box 2.3). The Australian Prudential Regulation Authority (APRA) has the primary regulatory role, as it regulates industry, retail, corporate and some public sector funds (APRA 2005). The characteristics of each of these types of funds are, briefly:

* *industry funds* — they have traditionally drawn members from the employees of a range of employers across a single industry, and were generally established under an agreement between parties to an industrial award. The boards of these funds have an equal number of employer and employee representatives, and sometimes one or more independent directors. However, industry funds are increasingly public offer and can be joined by members of the public by their own choosing
* *retail funds* — they offer superannuation products to the public on a commercial public offer basis and are usually run by large financial institutions
* *corporate funds* — they are sponsored by one or more employers
* *public sector funds* — they have a government agency or government-owned corporation as their sponsoring entity. Although some are regulated by APRA, a number are exempt from APRA regulation. Exempt public sector superannuation schemes (EPSSSs) are subject to a heads of government agreement between the Commonwealth and State Governments under which the schemes are operated (to the extent practicable) in accordance with core legislative requirements.

Trustees of APRA-regulated funds must be licensed under the SIS Act. Each licensed trustee must comply with a number of ongoing requirements, including proper and prudent performance of their duties, compliance with fit and proper standards, and registration with APRA of each superannuation fund for which the trustee is a licensed trustee (APRA 2004). In addition, the SIS Actrequires equal numbers of employer and employee representatives on the boards of corporate funds and industry funds that are not public offer. There is also a requirement that default products offered by superannuation funds include a minimum level of life insurance.

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| Box 2.3 Regulatory arrangements for superannuation |
| The Australian Prudential Regulation Authority administers and enforces a range of prudential standards. There are several other agencies that also have responsibilities for superannuation regulation.   * The Superannuation Complaints Tribunal hears complaints relating to the decisions of trustees of superannuation funds. * Fair Work Australia regulates the industrial relations system and the listing of default funds in awards. * Failure to make compulsory superannuation contributions results in the employer being liable for a superannuation guarantee charge. This is enforced by the Australian Taxation Office (ATO). The ATO also regulates self managed superannuation funds. * Although the Fair Work Ombudsman (FWO) is responsible for the enforcement of industrial relations laws, it does not enforce the payment of superannuation. Complaints received by the FWO about non-payment of superannuation are referred to the ATO. However, an employer’s failure to pay into a default fund listed in a modern award would in theory be dealt with by the FWO, although complaints about this are rarely made. * The Australian Securities and Investments Commission licenses financial advisers, regulates corporate disclosure and has a general consumer protection role in the financial services industry, including in relation to superannuation and insurance. For example, the Australian Securities and Investments Commission is responsible for the regulation of intra-fund advice provided by superannuation funds. * The Australian Competition and Consumer Commission has a general role in ensuring competition in markets. It regulates anti-competitive conduct such as price-fixing, cartels, anti-competitive agreements and misuse of market power. It is also responsible for reviewing mergers that could substantially lessen competition. |
| *Sources*: ACCC (2008, 2012); ASIC (2012a); ATO (2011a, 2011b); FWO (2011a); SCT (2009). |
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Other than EPSSSs, self managed superannuation funds (SMSFs) are the main type of superannuation fund not regulated by APRA. SMSFs have fewer than five members, and are the largest and fastest-growing superannuation sector. From 2000 to 2009, the number of SMSFs doubled to over 400 000 funds (about 30 000 new SMSFs were established each year between 2007 and 2011, and during this period, SMSF assets grew at twice the rate of total superannuation assets). As at September 2010, the sector held over $400 billion in assets, which is about 30 per cent of assets in the entire superannuation industry (figure 2.2) (ATO 2011c, 2012e; Australian Government 2009).

Figure 2.2 Superannuation industry profile

(Number of funds, per cent share of assets), June 2012

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a Other funds, which are not regulated by APRA, comprise pooled superannuation trusts, small funds, and balance of life office statutory funds. Retirement savings providers have not been included in this figure, as they accounted for 0.1 per cent of assets, as at June 2012. Single-member approved deposit funds have also been excluded.

*Sources*: APRA (2012f) performance results based on quarterly data for superannuation funds including APRA-reporting exempt public sector superannuation schemes, pooled superannuation trusts, and retirement savings accounts.

In contrast, between 1996 and 2012, the number of APRA-regulated superannuation funds decreased from 4747 to 352. This consolidation is expected to continue in coming years, although the rate at which this will take place is uncertain. Estimates for the Cooper Review indicate that there are likely to be around 74 APRA‑regulated funds by 2035 (Australian Government 2010a).

Superannuation fund mergers can be discouraged by an unfavourable capital gains tax outcome (Towers Watson 2010) (although capital gains tax relief for superannuation funds has recently been announced — chapter 4) and encouraged by economies of scale in their operating and investment costs (Higgs and Worthington 2010; Sy and Liu 2010). However, the impact of the Stronger Super reforms (discussed later) on the economies of scale of superannuation funds and therefore on their rates of consolidation is uncertain (Deloitte 2010; Rice Warner 2010).

Although the superannuation industry has consolidated rapidly to date, total assets have generally continued to grow, increasing from $245 billion to $1.4 trillion between 1996 and 2012 (APRA 2007, 2012f).

Despite the overall size of the industry, average member balances are relatively low, and since most individuals holds multiple accounts, average account balances are even smaller (table 2.1). Many of these accounts are a consequence of changes of workplaces and are unintended — for example, the individual has not actively chosen to hold multiple accounts for the benefit of multiple insurance policies or investment diversification. The Australian Government has announced its intention to automatically consolidate some small and inactive accounts in 2014 (chapter 9).

Table 2.1 Average member superannuation assets in APRA‑regulated funds

By fund type, 2009

|  |  |  |
| --- | --- | --- |
| Type of fund | Average member balance | Average account balance |
|  | $ | $ |
| Corporate | 133 492 | 98 493 |
| Industry | 32 895 | 21 895 |
| Public sector | 100 302 | 62 456 |
| Retail | 46 710 | 24 526 |

*Source*: Estimates for the Cooper Review (Australian Government 2010b).

### Employers’ role in superannuation

In June 2011, there were more than 800 000 employers in Australia, and almost 90 per cent of these were small businesses (ABS 2012a). Excluding working proprietors,[[1]](#footnote-1) employees of small businesses (employing less than 20 employees) accounted for just under 30 per cent of private sector employment (ABS 2011a, 2012a; Farmarkis-Gamboni, Rozenbes and Yuen 2012). Small employers are more likely to rely on awards or individual arrangements, while larger employers are more likely to use collective agreements (ABS 2011b). Around 45 per cent of award‑reliant employees are employed in small businesses, 35 per cent are employed in businesses with 20 to 100 employees, and large businesses with more than 100 employees employ around 25 per cent of award-reliant employees (FWA 2012b).

Employer compliance with the superannuation guarantee is difficult to determine as the available data are limited and unreliable. The Inspector-General of Taxation has estimated that, in 2000, about five per cent of employees did not receive any of their superannuation guarantee entitlement (that is, their employers did not make the superannuation contributions they were required to make by law). Employees of small businesses, casual employees, and employees aged between 18 and 25 years were at higher risk of receiving no or insufficient superannuation contributions. This was particularly the case for employees in certain industries (arts and recreation; accommodation and food; agriculture, forestry, and fishing; and transport, postal and warehousing) (IGT 2010).

Superannuation compliance is of concern to employers due to the complexity of the legislation, the costs of administering employee choice of fund, the challenge of timing requirements for superannuation payments, and the cost of paying small amounts for casual employees (Australian Government 2006). The Council of Small Business Organisations of Australia submitted that the Stronger Super reforms ‘will not decrease costs for employers and … will increase costs in time and money for individuals who are also employers and also increase non-compliance’ (sub. 7, p. 4).

The availability of clearing houses can help reduce compliance costs for employers. The Small Business Superannuation Clearing House, administered by Medicare Australia, was introduced on 1 July 2010 for small businesses with less than 20 employees. It aims to reduce costs by allowing superannuation contributions to be paid to a single location and then distributed electronically (Treasury 2008). At the end of November 2011, over 14 000 small employers (less than 2 per cent) had signed up to the clearing house, and over $100 million in contributions had been made for just over 79 000 employees (Department of Human Services 2011). There are also private clearing houses which are used by large employers.

Clearing houses themselves are a critical component of efficient superannuation administration across larger employers. With large numbers of employees and many of these entitled to exercise choice of fund, the number of default funds which are required can be significant. Without the use of clearing houses, larger employers would be overwhelmed. (REST Industry Super, sub. 47, p. 10)

## 2.2 Australia’s industrial relations system

### Awards, agreements and individual arrangements

Currently, default superannuation fund arrangements in Australia are part of industrial awards and hence part of Australia’s industrial relations system. Understanding the nature and scope of industrial awards is therefore critical to understanding the close interaction between superannuation and the industrial relations system.

Australia’s industrial relations system has both a federal and a state jurisdiction, though it moved to a predominantly national system when the *Fair Work Act 2009*(Cwlth) reforms were introduced. In May 2010, 87 per cent of all employees were in the federal system (7.8 million employees) (ABS 2012c).

Coverage of the federal industrial relations system differs between states. The Northern Territory and the ACT have always been part of the federal system, and Victoria referred its industrial relations powers to the Commonwealth in 1996 (Business Victoria 2011). Although businesses in Queensland, New South Wales and South Australia are covered by the federal system, state and local government sector employers in these states are covered by state industrial relations legislation (FWO 2011b). In Tasmania, only local government sector employers are covered by the state industrial relations system. In Western Australia, only employees of constitutional corporations (foreign, trading or financial corporations) are covered by the federal system. All other employees in Western Australia — including state and local governments, sole traders, partnerships and trusts — are covered by the state legislation (Department of Commerce 2012). For employees not covered by the federal system, default funds could also be listed in these state industrial instruments.

Industrial instruments can be broadly grouped into three categories: awards, individual arrangements and collective agreements.

* Awards set minimum pay and conditions for employees in a particular industry or occupation. The 122 new federal awards — called ‘modern awards’ — are part of the national industrial relations system and commenced on 1 January 2010. Some entitlements from state awards are still being transitioned into the national system, and a number of federal awards made prior to 1 January 2010 covering individual enterprises and public sector employees are yet to be modernised.
* The individual arrangements allowed by the new national industrial relations systemare common law contracts, above-award payments and individual flexibility arrangements. These arrangements are not registered with Fair Work Australia (FWA), but still subject to regulation under the Fair Work Act. Some individual agreements implemented under the previous industrial relations system (such as Australian workplace agreements) are still in force but are being gradually phased out.
* Collective agreements under the new national industrial relations system are known as enterprise agreements. However, collective agreements from the previous industrial relations system (such as certified agreements) are still in force until they are replaced by a new agreement made under the Fair Work Act.

Of all the industrial instruments in force, only the new agreements introduced by the Fair Work Act (enterprise agreements and individual flexibility arrangements) are subject to the ‘better off overall’ test. This test requires that each of the employees that were covered by an award are better off overall under the new agreement than they would be under the relevant award(FWA 2012a)*.*

### Employees who derive their superannuation fund in accordance with a modern award

The Fair Work Act makes a distinction between employees who are covered by an award, and employees who are award reliant. An employee is covered by the award if they are in a group of employees expressed to be within the scope of the award. In contrast, an employee will only be award reliant if their pay and conditions are solely determined by the award, and not some other industrial instrument (Preston et al. 2012).

However, in this inquiry, the Commission is primarily concerned with employees who are subject to the default funds listed in modern awards, and refers to them as being ‘employees who derive their default superannuation fund in accordance with a modern award’. This encompasses three categories of employees.

* Award-reliant employees, who have all the terms and conditions of their employment, including their default superannuation fund, determined by the award.
* Employees who receive some above-award wages or conditions through an individual arrangement, but have the other terms and conditions of their employment, including their default superannuation fund, determined by the award. Although around 37 per cent of employees were employed under different types of individual arrangements in May 2010, it is uncertain how many of these were above-award arrangements (under which employees still rely on the award for their other terms and conditions of employment, such as superannuation) (ABS 2011b).
* Employees covered by enterprise agreements that do not specify a default fund but refer to the terms of the award for superannuation purposes. There were an estimated 115 000 collective agreements in force in May 2010, covering about 43 per cent of employees (ABS 2011b; DEEWR 2012a), but it is uncertain how many of these specified a default fund. (Employees covered by enterprise agreements that specify a default fund do not derive their superannuation provisions from an award.)
* Some employees in each of these groups may not receive superannuation because they earn less than the required minimum.

#### Profiling award-reliant employees

In May 2010, 15 per cent of employees had their pay solely determined by an award (table 2.2). This award-only category is broader than the FWA definition of award‑reliant employees, since it includes instruments other than modern awards, such as award-based transitional instruments. However, the data for award-only employees are the best available proxy for award-reliant employees. These employees received, on average, 7.8 per cent of wages paid in that year (ABS 2011b).

Table 2.2 Methods of setting pay

May 2010

|  |  |  |
| --- | --- | --- |
|  | Number of employees | Share of total |
|  | ’000 | % |
| Award only | 1 361 | 15.2 |
| Collective agreementa | 3 892 | 43.4 |
| Individual arrangementb | 3 346 | 37.3 |
| Owner manager of incorporated enterprise | 368 | 4.1 |
| **All methods of setting pay** | **8 968** | **100** |

a Includes registered and unregistered agreements. b Includes registered and unregistered arrangements.

*Source*: ABS (2011b).

Award reliance varies by industry, and tends to be lower in more highly skilled industries (Rozenbes 2010) (table 2.3).

… the distribution of award reliance for setting pay is quite focused. Over 70% of employees who are award-reliant for pay are employed in five of the 18 ANZSIC industry divisions. In descending order of importance these are accommodation and food services, retail trade, health care and social assistance, administrative and support services and manufacturing, which in May 2010 employed over 970,000 of the 1.36 million award-reliant employees identified in the survey. (ACCI, sub. 37, p. 15)

Industries that have a high proportion of award-reliant employees also tend to have a high proportion of part-time and casual employees.

The hospitality industry workforce is characterised by a higher proportion of younger employees and people working on either a casual or part time basis (such as parents with young children, people earning a second income, etc.) (Australian Hotels Association, sub. 10, p. 8)

In 2008, a casual employee was four times as likely to be award reliant compared to a permanent or fixed-term employee (Rozenbes 2010). Casual employees often work simultaneously for several employers and experience high job turnover (this might also pose a constraint to superannuation account consolidation) (Rice Warner 2007). Further, women are more likely to be award reliant than men, and typically have lower superannuation balances (Clare 2008).

Table 2.3 Percentage of award-only employees, by industry

May 2010

|  |  |  |
| --- | --- | --- |
|  | Number of employees | Share of total |
|  | ’000 | % |
| Accommodation and food services | 291.6 | 21.4 |
| Retail trade | 204.9 | 15.0 |
| Health care and social assistance | 193.6 | 14.2 |
| Administrative and support services | 161.0 | 11.8 |
| Manufacturing | 120.8 | 8.9 |
| Other services | 88.2 | 6.5 |
| Construction | 53.2 | 3.9 |
| Wholesale trade | 45.9 | 3.4 |
| Education and training | 43.1 | 3.2 |
| Rental, hiring and real estate services | 40.3 | 3.0 |
| Transport, postal and warehousing | 32.9 | 2.4 |
| Professional, scientific and technical services | 26.2 | 1.9 |
| Arts and recreation services | 24.1 | 1.8 |
| Public administration and safety | 12.8 | 0.9 |
| Information media and telecommunications | 9.2 | 0.7 |
| Financial and insurance services | 7.9 | 0.6 |
| Electricity, gas, water and waste services | 3.0 | 0.2 |
| Mining | 2.6 | 0.2 |

*Source*: ABS (2011b).

The coverage of modern awards does not correspond to the industry classifications in table 2.3 (since modern awards can cover more than one industry, or cover one or more occupations rather than a single industry). As noted by the Australian Chamber of Commerce and Industry:

The demographics of award coverage are not easy to determine and identifying coverage is made more difficult by the cross-cutting effect of occupational awards which reach across industries but do not necessarily uniquely provide award coverage for the occupations they cover … It is clear that modern awards were not made with industry coverage rules in mind, in fact, rather the reverse. (sub. DR83, pp. 5−6)

Some awards (such as the Social, Community, Home Care and Disability Services Industry Award 2010) cover a large and diverse range of industries and occupations, while others (such as the Poultry Processing Award 2010) cover a smaller, more defined group. Accordingly, the data on award-only employees by industry can only provide some indication of the distribution of award-reliant employees by industry. FWA has recently released draft mapping documents comparing modern award coverage with the industry classifications in table 2.3 as part of a long-term research project which will attempt to resolve these problems (FWA 2012c).

## 2.3 Superannuation in awards

### A brief history

Employer superannuation began in 1862 with the establishment of a defined benefit pension fund for the employees of the Bank of New South Wales. Superannuation followed this model for the next 100 years: defined benefit pension funds were established for a minority of employees, who were generally higher-paid white‑collar employees in the private sector or civil servants in the public sector (APRA 2007; Sy 2008).

Although superannuation started to become more widely available from the 1970s as a result of claims brought under industrial relations laws, two related developments in the mid-1980s resulted in superannuation clauses being included in awards.

* The first was the 1985 Prices and Incomes Accord, where an agreement was reached between the Australian Government and the Australian Council of Trade Unions (ACTU) that a 3 per cent wage increase deemed due on productivity grounds would instead be paid as superannuation.
* The second was the June 1986 National Wage Case. The ACTU gained approval from the Australian Conciliation and Arbitration Commission (ACAC) (a predecessor of FWA) for an agreement to contribute wage increases of up to 3 per cent into superannuation funds. The jurisdiction of the ACAC to make this ruling was challenged by the Australian Chamber of Manufactures and the Victorian Employers Federation. However, the High Court (1986) held that the ACAC had jurisdiction to hear this case (and cases relating to superannuation more generally) because superannuation benefits for employees was an ‘industrial matter’ as defined in the *Conciliation and Arbitration Act 1904* (Cwlth).

As a result of these developments, superannuation clauses were gradually incorporated into industrial awards as they were renegotiated. This saw superannuation coverage expand from about 40 per cent of employees in 1986 to 79 per cent in 1990 (APRA 2007). Under this system, superannuation payments could only be enforced by bringing a case before the ACAC (APRA 2007).

A significant body of case law was subsequently developed around the inclusion of default funds in pre-modern awards. For example, in the 1994 Superannuation Test Case*,* the Australian Industrial Relations Commission (AIRC) (a predecessor of FWA) held it would have regard to its previous decisions about the specification of default funds in awards.In the 1999 Building and Plumbing Award Simplificationdecision, it was determined that if the AIRC had jurisdiction (which it was later found to have), then the claim would be decided on its merits which may include the history of any superannuation provisions in the award, the circumstances of the industry covered by the award, the decisions of the AIRC relating to specification of the fund, and many of the matters referred to in the evidence of the witnesses. These matters were portability of superannuation balances, mobility of the workforce, no entry or exit fees, no commissions paid to agents of financial planners, equal representation of employer and employee representatives on the trustee board, low administration costs, member investment choice, and automatic insurance cover (United Voice, sub. DR88).

It was not until the *Workplace Relations Act 1996* (Cwlth) was introduced that legislation expressly included superannuation as an allowable matter in awards. Superannuation in awards has been affected by subsequent changes in the industrial relations regime, as noted by MLC Ltd−NAB Wealth:

… the Howard Coalition Government committed to the removal of superannuation as an ‘allowable matter’ in industrial award provisions from 2008. This would have enabled employers to choose ‘any complying fund’ with minimum insurance coverage. However, the excision of superannuation as an ‘allowable matter’ was overturned when the Rudd Labor Government came to power in 2007 instituting the Fair Work Act which expressly included superannuation as an ‘allowable matter’. (sub. 44, p. 4)

### Award modernisation and superannuation

The 122 modern awards were developed by the AIRC in the course of the most recent industrial relations reforms which resulted in theFair Work Act. In the course of this reform process, more than 1500 pre-modern federal and state awards were combined and ‘modernised’ to create the 122 modern awards. This award modernisation process involved around six months of consultation for each of the four tranches of pre-modern federal awards in order to develop the modern awards (AIRC 2009c).

Modern awards commenced on 1 January 2010. The process by which default funds were, and continue to be chosen for listing in modern awards is discussed in detail in chapter 7. Briefly, an application to vary a modern award by listing an additional default fund will be granted if:

* the fund was nominated as a default fund in an award-based transitional instrument relevant to the coverage of the modern award
* the representatives of the main parties covered by the award consent to the inclusion of the fund, or
* employers were making contributions to the fund before 12 September 2008 on behalf of employees who are now covered by the modern award.

FWA is conducting a review of modern awards in 2012, and 18 submissions to that review have requested an additional superannuation fund be listed as a default fund in a modern award (FWA 2012f) (chapter 7). FWA has indicated that applications in relation to superannuation will be dealt with between April and May 2013 (FWA 2012g).

### Default funds in modern awards

Of the 122 modern awards, 109 list a default superannuation fund or funds (figure 2.3). A list of the funds in each award was prepared by FWA in February 2012 (Parliament of Australia 2012).

The remaining 13 awards do not list a default superannuation fund — these awards cover a wide range of industries, including fire fighting, shipping, labour market services and mining. In eight of the awards that do not list a default fund, there is no reference to superannuation, although this may not necessarily mean employers covered by these awards can choose any fund — the Industry Super Network suggested these industries might be substantially covered by enterprise agreements or other statutory arrangements (sub. DR62, p. 25).

In total, there are 104 superannuation funds named as default funds in at least one modern award. Of these 104 funds, 43 are named in only one award, 47 are named in between two and nine awards, and 14 are named in ten or more awards. The fund listed most often is AustralianSuper (which appears in 69 awards).

Figure 2.3 Number of default superannuation funds listed per modern award

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*Source*: Modern awards published by FWA (2012e).

Although there are 104 funds named in awards, there are now only 66 distinct funds that can be identified on APRA’s list of current funds, as some have merged, changed their name, or closed since they were first listed. Others are EPSSSs or remain unable to be identified (APRA 2012f). Of these 66 default funds (which are about 17 per cent of the total funds regulated by APRA), APRA has classified them as follows:

* 46 industry funds (of which 13 are non-public offer funds)
* 11 retail funds (including one eligible rollover fund)
* 6 public sector funds
* 3 corporate funds.

Most of the funds listed in awards have been classified by APRA as industry funds (figure 2.4). However some funds can have characteristics of two fund types, and the emergence of new superannuation products and industry consolidation makes classification of funds into their appropriate fund types more difficult. In these circumstances, APRA classifies the fund into the type it considers most appropriate (APRA 2005).

Figure 2.4 Indicative types of funds listed as default funds in modern awards

66 identifiable fundsa, by APRA classification

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a Based on APRA-regulated superannuation funds for which data are available for 2011.

*Sources*: Productivity Commission estimates based on APRA fund-level profiles and financial performance data (APRA 2012h); Modern awards published by FWA (2012e).

Despite the lesser presence of retail funds in awards, they can still have a significant default business. For instance, AMP noted that it:

… is responsible for the management of over $60 billion in retirement and superannuation assets on behalf of nearly 4 million customers. Of these funds, approximately $20 billion in superannuation assets are directly attributable to approximately 500,000 members of a number of employer default superannuation plans. (sub. 52, p. 3)

The greater prevalence of industry funds as default funds in awards could explain why they have a higher proportion of assets in their default investment strategy, since employees who do not actively choose a superannuation fund could be expected to be less likely to actively choose an investment strategy (table 2.4).

Table 2.4 Indicative profiles of funds listed as default funds in modern awards

66 identifiable fundsa, by APRA classification

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| --- | --- | --- | --- |
|  | Members (default and non-default) (average) | Proportion of assets in the default investment strategy (average) | Assets in the default investment strategy |
|  | no. | % | $m |
| Corporate | 13 177 | 43 | 605 |
| Industry | 244 188 | 72 | 3 586 |
| Public sector | 282 296 | 49 | 7 779 |
| Retail | 392 977 | 47 | 1 612 |

a Based on APRA-regulated superannuation funds for which data were available for 2011.

*Sources*: Productivity Commission estimates based on APRA fund-level profiles and financial performance data based on annual data for superannuation funds (APRA 2012a, 2012h); Modern awards published by FWA (2012e).

However, not all superannuation contributions made under awards are made to default funds listed in awards, because of the ‘grandfathering’ clauses in all modern awards which contain superannuation provisions. These grandfathering clauses allow employers to continue to contribute to funds to which they were contributing before 12 September 2008, even though the funds in question are not listed as default funds in the modern award. Though some funds are heavily reliant on grandfathering (Transport Industry Superannuation Fund, sub. DR91), and some have been grandfathered since the late 1980s (Ai Group, sub. DR79), the reach and impact of grandfathering is unclear (chapter 7).

### Effect of default funds listed in awards on the flow of employer superannuation contributions

Default superannuation provisions in modern awards directly affect employees who derive their default superannuation fund in accordance with a modern award. As discussed earlier, this includes award-reliant employees, those who receive some above-award wages or conditions, and those covered by enterprise agreements that do not specify a default fund but refer to the award for superannuation purposes. It is estimated that at least $6 billion, and potentially more than $9 billion, in superannuation contributions were made to default funds in modern awards in 2010 for employees who derive their default superannuation fund in accordance with a modern award, as explained below.

#### Contributions for employees who derive their default superannuation fund in accordance with a modern award

There is no precise measure of the number of employees who derive their default superannuation fund in accordance with a modern award. The Australian Superannuation Funds Association estimated that ‘between 20 per cent and 30 per cent of employees are directly subject to award provisions relating to superannuation’ (sub. 31, p. 4), although Tasplan placed this figure as high as 65 per cent (sub. 6). REST Industry Super commented that ‘45 per cent of REST’s membership are party to an industrial award’ (sub. 47, p. 6).

APRA (2012a) reported that total superannuation contributions by employers were $72 billion in 2010, of which an estimated $50 billion was attributable to the 9 per cent superannuation guarantee (Clare 2010). Since the superannuation guarantee is a constant 9 per cent of ordinary time earnings received, and award‑only employees received 7.8 per cent of total average wages paid in 2010 (ABS 2011b) then, making assumptions about ordinary time earnings of these employees, they received approximately $3.9 billion in superannuation guarantee contributions in 2010 (if award-only employees are used as a proxy for award‑reliant employees). Assuming that award-reliant employees are as likely to make choices about their superannuation fund as are other employees (box 2.1), this would imply that around 75 per cent are in the default fund, which means around $3 billion in superannuation contributions were made to default funds on their behalf in 2010.

A number of employees receive above-award wages through an unregistered individual arrangement, but rely on the award for the other terms and conditions of their employment. Existing estimates suggest that roughly 15 to 30 per cent of employees are employed under above-award arrangements (Australian Fair Pay Commission 2006; Buchanan and Considine 2008). Though there are insufficient data on wages received by above-award employees to conclude how much superannuation was paid on their behalf, a lower bound can be estimated by assuming that above-award employees (who are estimated to comprise between 15 to 30 per cent of the workforce) received at least award wages. This implies around $3 billion, and possibly up to $6 billion, was paid into default superannuation funds on their behalf.

#### Influence of award default funds on enterprise agreements

Employees covered by enterprise agreements are only considered to be employees who derive their default superannuation fund in accordance with a modern award where the enterprise agreement does not specify a default fund but refers to the award for superannuation purposes.

Although the Department of Education, Employment and Workplace Relations maintains a database on some of the terms of enterprise agreements, data on the superannuation provisions of these agreements are not collected.

Further, although employees covered by enterprise agreements that specify a default fund are not employees who derive their default superannuation fund in accordance with a modern award, funds listed in awards might influence the funds chosen for inclusion in enterprise agreements.

There are no data on how funds listed in awards influence funds listed in agreements, but several inquiry participants suggested that awards can be used as a referential framework for negotiating enterprise agreements.

We consider that employers and employees would use their experience of award conditions as a basis when negotiating an enterprise agreement ... Some agreements reproduce provisions from awards, either by including relevant clauses or by cross‑reference to award provisions. Single purpose agreements dealing only with superannuation are no longer allowed, but it is possible to include existing award provisions in agreements. (Asset Super, sub. 32, pp. 1−2)

While there are no records available to the AHA, within the hotel industry it is believed the majority of enterprise agreements in the hospitality industry list Hostplus [one of the default funds listed in the relevant award]. (Australian Hotels Association, sub. 10, p. 6)

The extent to which this occurs is likely to vary across industries.

Internal research undertaken by industry super funds indicates that over 43% of enterprise agreements leave the selection of default superannuation fund to the employer. This data was collected across Australia from a range of industries. The treatment of superannuation within industrial agreements is inconsistent across industries … The limited available evidence indicates that where funds are named, at least three quarters are industry funds and the superannuation clauses found in enterprise agreements, more or less, reflect the arrangements within the underpinning award or awards. (ISN, sub. 27, p. 37)

Given the limited data available, the Commission reviewed enterprise and collective agreements in the fast food industry in order to obtain a broad indication of the influence of default funds listed in awards on the superannuation provisions contained in enterprise agreements in one sample industry. The fast food industry was chosen because the modern award covers one industry, rather than one occupation across several industries.

Of the 42 per cent of agreements that listed a default fund, more than 60 per cent listed REST Industry Super or Sunsuper — the only two default funds that are listed in the relevant award for the sector. This example suggests that default funds listed in awards are quite influential in the listing of funds in enterprise agreements, at least in this sector. However, at least for this sector, a majority of agreements do not specify any default fund at all (figure 2.5).

Figure 2.5 Superannuation funds listed in enterprise agreements in the fast food industry

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*Source*: Productivity Commission analysis based on enterprise agreements published by FWA (2012b).

### The Stronger Super reforms

While the Australian superannuation industry is undergoing a significant period of fund mergers and consolidation, which is expected to continue, the regulatory environment is also rapidly changing. This inquiry is occurring in the context of the staged introduction of a significant number of reforms to the superannuation system. From July 2013, there will be a new default superannuation product, MySuper, together with disclosure, governance and administrative reforms which are intended to make default superannuation more transparent and comparable.

#### MySuper

Following the Cooper Review (Australian Government 2010b), the Australian Government (2011a) is introducing reforms to the superannuation system that will, amongst other things:

* introduce MySuper, a new superannuation product authorised by APRA. Only funds that offer MySuper products (or EPSSSs) will be eligible to be listed as default funds in modern awards and enterprise agreements
* require trustees to develop a single diversified investment strategy for their MySuper product that specifies the investment return target over a rolling 10‑year period and the level of risk deemed appropriate (chapter 4)
* introduce rules governing the fees that can be charged for MySuper products (chapter 4)
* require equal treatment of members by giving all MySuper members:
* protection against fee subsidisation (since one employee should not be favoured over another where they have the same employer)
* the assurance that, unless they have consented no more than 30 days before the transfer occurs, MySuper members cannot have their interest replaced with another class of interest in the fund
* require all MySuper products to offer at least a minimum default level of life and total and permanent disability insurance on an opt-out basis. Superannuation funds are able to vary insurance terms and conditions between groups of members within the same default product (chapter 6)
* allow trustees to offer a ‘tailored’ MySuper product for a large employer that has more than 500 employees who will contribute to that product.

#### SuperStream

The SuperStream reforms will introduce new data and e-commerce standards for superannuation transactions (Australian Government 2010c). This will include electronic transmission of linked financial and member data using standardised formats, and the use of tax file numbers as the primary member identifier. These reforms will be phased in between July 2011 and July 2015. The Cooper Review estimated that SuperStream will save the superannuation industry about $1 billion annually (Australian Government 2010b).

#### Governance

A range of governance reforms are also being introduced as a result of the Cooper Review’s recommendations. These include requirements that trustees of a MySuper product:

* promote the financial interests of the fund members
* determine annually whether or not MySuper members are disadvantaged by the scale of the fund
* discharge their personal duties to act honestly, exercise the care, skill and diligence of a ‘prudent superannuation director’, and exercise their duties and powers in the best interests of beneficiaries.

Further, a dashboard (for both MySuper, and other superannuation products) will be developed to disclose the investment return target and the number of times the target has been achieved, average fees, and liquidity information.

APRA (2012g) is being given the power to draft binding prudential standards for the superannuation industry for the first time. The standards will cover governance, fit and proper persons, risk management, business continuity management, outsourcing, auditing, conflicts of interest, investment governance, insurance, solvency and capital requirements. These standards will commence on 1 July 2013 to coincide with the introduction of MySuper.

Additionally, improvements to governance frameworks are being developed by bodies representing various types of superannuation funds (chapter 5).

1. Employers are required to pay superannuation for most of their employees. This includes directors of a business, and family members employed by a family company or trust. However, sole traders and partners in a partnership do not have to make contributions to a superannuation fund for themselves (ATO 2011a). [↑](#footnote-ref-1)