Investment & Financial Services Association Ltd

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1 August 2008

The Hon Justice Geoffrey Giudice
President
Australian Industrial Relations Commission
Level 4, 11 Exhibition Street
MELBOURNE VIC 3001

Via email: amod@air.gov.au

Dear Justice Giudice

Re: AM42008/2 - AM2008/12 - Award Modernisation

The Investment and Financial Services Association (IFSA) welcomes the opportunity to provide input to the award modernisation process being conducted by the Australian Industrial Relations Commission (the Commission).

IFSA is a national not-for-profit organisation which represents the retail and wholesale funds management, superannuation and life insurance industries. IFSA has over 140 members who are responsible for investing over $1 trillion on behalf of more than ten million Australians. Members' compliance with IFSA Standards and Guidance Notes ensures the promotion of industry best practice.

The superannuation provisions in awards cover a range of matters, many of which are also the subject of minimum standards set out in the *Superannuation Guarantee (Administration) Act 1992* (the SGAA). This includes:

- nominating funds into which contributions should be made, where the employee does not make a choice (a default fund).
    - the SGAA requires a default fund to be a complying superannuation fund that offers minimum levels of insurance cover.
    - the SGAA requires employers to offer their employees a choice as to the superannuation fund into which compulsory superannuation contributions are paid.
- specifying the frequency of employer contributions.
    - the SGAA requires employer contributions to be made at least quarterly in arrears.

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- varying the salary on which superannuation contributions are payable.
    - the SGAA specifies that Superannuation Guarantee is payable on ordinary times earnings and is only payable where the employee earns more than $450 in a month.
    - Superannuation Guarantee is not payable to employees over the age of 70 or part-time employees under the age of 18.

IFSA recognises that the government clearly intends that superannuation continue to be an allowable matter in modern awards, notwithstanding the fact that superannuation provisions are also generally subject to minimum requirements specified in the SGAA.

IFSA's submission focuses on provisions nominating the funds into which contributions are made when an employee does not make a choice. The Commission has previously recognised that superannuation funds have a significant commercial interest in industrial relations proceedings, given these provisions direct where substantial flows of superannuation contributions are to be paid. The other superannuation matters specified in awards more directly relate to conditions of employment between employers and employees.

IFSA's objectives for modern industrial awards are twofold:

i. Ensuring modern industrial awards provide employers and employees with maximum flexibility to choose an appropriate superannuation fund and, where relevant, a fair competitive process; and

ii. Preserving the status quo where employers are already making contributions to complying superannuation funds on behalf of their employees.

Background - Default funds and industrial awards

Within particular industries, there are a range of superannuation funds nominated as default funds in awards and notional agreements preserving state awards (NAPSAs). In addition, some awards and NAPSAs do not nominate a default superannuation fund.

It is important to note that funds specified in awards come from the breadth of the superannuation industry. In this regard, there are cost effective funds across all segments of the superannuation community, both in the not-for-profit and for-profit categories. Any default arrangement that is put in place should not be anti-competitive and should not exclude legitimate complying superannuation funds from competing.

Further complexity is added for awards which were declared as common rule for Victorian employees after the referral of that States' industrial relations powers to the Commonwealth. In C2004/1831 and others, the Commission ruled that the following exception be included in superannuation clauses in awards which are declared common rule:

> "An employer who is making superannuation contributions into a complying superannuation fund, within the meaning of the *Superannuation Industry (Supervision) Act 1993 (Cth)*, on behalf of an employee covered by this

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declaration, prior to the date of effect of this declaration is exempt from any provision in the award which specifies the fund or funds into which superannuation contributions are to be paid."

Some awards contain a provision to allow superannuation contributions to be paid to 'Any Fund agreed between an employer and an employee'. It is not clear whether this provision has any effect over and above the legislative requirement that employers offer their employees a choice of superannuation fund.

Providing employers and employees with the flexibility to choose a superannuation fund

Preferred Option – remove default fund provisions from awards

Some employers and employees already operate in an environment where the award does not nominate a default fund, or have grandfathered arrangements which may differ from the award. The Commission should therefore consider whether or not modern industrial awards should nominate a particular fund (or funds) as a default fund.

IFSA recommends that modern industrial awards do not specify default superannuation funds.

The nomination of default superannuation funds in awards largely reflects the historical development of the superannuation system in Australia. Many of the superannuation products widely available at the time that compulsory employer superannuation was introduced were designed as vehicles for voluntary savings, rather than vehicles for near universal compulsory employer contributions.

There have been significant developments in the superannuation industry since that time. The industry is now characterised by a large number of providers competing for employer superannuation contributions. Specifying individual funds as default funds in awards reduces these competitive pressures to the ultimate detriment of members.

IFSA notes the concerns expressed in the submission by the Minister for Superannuation and Corporate Law regarding the underperformance of some default funds. IFSA emphasises that, while returns to members are important, superannuation funds should also be judged on other features such as insurance coverage, member services, education and access to financial advice. These are valuable benefits associated with superannuation products.

In IFSA's view, the potential for poor performance or otherwise uncompetitive product offerings emphasises the risks of providing nominated superannuation funds with a monopoly over superannuation contributions for employees covered by that award who do not choose a fund.

If the monopoly position were to prevail, in some circumstances the employer could be placed in an untenable position. For example, if the fund was placed under administration or made imprudent investments and its returns were well below what would be expected, the employer would be forced to continue contributing monies to that fund, contrary to the interest of employees.

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For these reasons, IFSA considers that awards should not specify a default fund which leads to contributions directed towards particular superannuation funds.

If the Commission considers that default fund provisions should be maintained, IFSA would propose the following alternative, more restrictive, approaches.

Other Option – specify features of default funds in awards rather than specifying a particular fund.

One option is for awards to specify a list of features that a default fund should possess, rather than nominating a particular fund. These features would be over and above those specified in the SGAA and should be consistent across all industries in which employer and employee representatives consider that the award should address default superannuation funds.

Importantly, IFSA does not consider that awards should nominate a particular fund which has these features as the default fund. Rather, employers covered by the award would be obliged to select a default fund which met the requirements (i.e. the list of features) set out in the award.

While this is not IFSA's preferred approach, it is potentially an improvement on the current system which provides nominated superannuation funds with a monopoly over superannuation contributions for employees covered by that award who do not choose a fund, subject to a few safeguards.

This approach would only be acceptable to IFSA if the features of default funds specified in awards did not artificially restrict competition, and that the award facilitated a fair and open process so that all complying funds which have these features could compete. This approach also raises the question of whether these features should be specified by the government in legislation, rather than industrial awards.

If the Commission considers it appropriate to form a panel of experts to set features for default funds, the diverse membership of IFSA should be represented on the panel. Any expert panel should have the appropriate expertise to scrutinise the wide range of superannuation products on offer and consider the appropriateness of using historical performance data to select default funds.

IFSA would be happy to provide a representative on an expert panel at no cost to the Commission.

Other Option – retain default fund provisions but ensure all awards have a flexibility clause

Another option is for awards to be restricted to providing guidance as to an appropriate default fund for employers. Award provisions should provide guidance only and not require employers to contribute to the nominated fund. An example clause is as follows:

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X. SUPERANNUATION

X.X Contributions

X.X.X Each employer will nominate an approved fund to which the employer contributions will become payable.

X.X.X An approved fund will mean any one of the following funds:

- XYZ Superannuation Fund

- An alternative complying superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993 (Cth)*

While this approach may provide a competitive advantage to superannuation funds that are nominated in awards, it will not prevent other funds from competing.

Preserving the status quo where employers are already making contributions to complying superannuation funds on behalf of their employees.

As discussed above, given some awards or NAPSAs do not name a default superannuation fund, employers whose employees are covered by these awards can be expected to be making contributions to a wide variety of superannuation funds.

Regardless of the treatment of default funds adopted in modern awards, it will be important for the Commission to ensure that the move to modern awards does not create significant disruption in the superannuation industry.

IFSA recommends that, consistent with the agreement for Victorian common rule awards (in C2004/1831 and others), a clause be included in modern awards to ensure that employers with pre-existing default fund arrangements can continue with these arrangements in to the future. The proposed clause would be:

> "An employer who is making superannuation contributions into a complying superannuation fund, within the meaning of the *Superannuation Industry (Supervision) Act 1993 (Cth)*, on behalf of an employee covered by this award, prior to the commencement this award is exempt from any provision in the award which specifies the fund or funds into which superannuation contributions are to be paid."

Should you have any questions regarding the submission, please contact myself or Daniel Caruso on 02 9299 3022.

Yours sincerely,

Richard Gilbert
Chief Executive Officer

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