



## **The Transport Industry Superannuation Fund (The T.I.S. Fund)**

### **Amendment to Response to Default Superannuation Funds in Modern Awards Productivity Commission Draft Report June 2012**

#### **Limited to:**

- Reiteration of Summary of recommendations
- Fair Work Australia Process, Documents & Awards

**26 August 2012**

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## SUMMARY OF SUBMISSIONS

The T.I.S. Fund supports the thrust of the Productivity Commission's recommendations. Its detailed comments are set out in the Schedule attached.

However, there are four main areas where the T.I.S. Fund disagrees with the draft Recommendations:

- **The T.I.S. Fund Recommends a Modified Option 4:** The T.I.S. Fund recommends a combination of Option 1 and Option 4 (referred to as Option 4A). Under Option 4A, there would be no artificial limit on the number of default funds under an award. The award clause would simply refer to a default fund list maintained by APRA. Further details about that system are set out below and in the attached schedule.

The T.I.S. Fund recommends Option 4A because:

- **Consistent with PC Reform Principles:** It is consistent with each of the Reform Principles outlined by the PC.
- **No Other Options Are As Consistent:** None of the other options is as consistent with the Reform Principles.
- **The T.I.S. Fund says the fund's history in the industry should be taken into account:** The T.I.S. Fund agrees with the criteria identified by the Productivity Commission for the selection and assessment of superannuation funds. The T.I.S. Fund recommends adding one further criterion to consider, being that fund's history and specialised benefits provided to members in the industry.

That criterion would recognise the value of funds that have established practices and products that benefit specific industries. This would meet the best interests of members while minimising regulatory burden and avoiding instability.

- **APRA should be the body that assesses board governance and transparency:** The T.I.S. Fund disagrees with draft recommendation 5.2 that the Government should consider assembling a panel of corporate governance experts and relevant regulators to assess the appropriateness of board structures of default superannuation funds.

Instead, APRA should be appointed to assess board structures because this would be less expensive and APRA has the required expertise.

- **The new system should be reviewed within 5 years of the date it is implemented:** The T.I.S. Fund disagrees with the recommendation that the new system should be reviewed in 2023. Any new system should be reviewed within 5 years of the date it is implemented to prevent the consolidation of a bad system.

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## FAIR WORK AUSTRALIA PROCESS TO VARY AWARDS

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(As requested by the Productivity Commissioners at the public hearing on 31 July 2012)

- **Variation of Award - Introduction.** As a result of ongoing discussions with, and on behalf of employer members of NatRoad, it was determined to join with NatRoad to make application to Fair Work Australia as part of the 2012 Modern Award Review process to vary two Private Transport Industry Awards. The relevant Awards being the “Road Transport and Distribution Award 2010 (RT&DA), and Road Transport (Long Distance Operations) Award 2010 (RTLDOA). The variations applied for were to specifically include the T.I.S. Fund as a further “named default superannuation fund”.

Appendix 1 - FWA Statement - Modern Awards review 27 April 2012 provides further details.

- **What was the variation and when was it lodged:** The specific variations in relation to superannuation in the two awards were lodged with Fair Work Australia on 8 March 2012. The variations to a modern award - 2012 applied for by NatRoad were:
  - Road Transport and Distribution Award 2010 - At clause 20.4, insert a further fund - “Transport Industry Superannuation Fund (TIS)”
  - Road Transport (Long Distance Operations) Award 2010 - At clause 19.4, insert a further fund as follows - “Transport Industry Superannuation Fund (TIS)”
- **Why the need for the variation:** To provide further choice, and make it easier for employers to understand, and provide a better fit for employers in the private transport industry who had:
  - been grandfathered at 1 September 2008; and
  - expressed a need to improve choice options within the two existing awards, in particular, the Long Distance Operations award, where there is currently only one “named Default Super Fund” choice outside the grandfathering clause at clause 19.4 - TWUSUPER.
- **Who can apply to vary a modern award:** Section 158 of the Fair Work Act 2009 sets out who has “standing” to make an application to vary an award.

Appendix 2 - FWA Decision 2010FWA 2475 26 March 2010 AMP Life Ltd Professional Employees Award 2010 also outlines the basis of who has “standing”.

- *Only an organisation who is entitled to represent the industrial interests of one or more employers or employees ‘industry standing’ within the designated industry can apply to vary an award through Fair Work Australia.*

*Refer Appendix 3 AIRC Decision 2 September 2009, paragraph 22, 2.6(c).*

As the largest road transport operators association in Australia representing over 1200 trucking businesses, with approximately 30,000 plus trucks on the road, ranging from owner drivers through to multinational logistics providers, NatRoad certainly meets the criteria of an organisation of ‘standing’. Members span the country with the majority operating trucks that cross State and Territory borders every day.

- Agreement between the parties: One other option is for the parties to the award to agree. Appendix 3 AIRC Statement - Award Modernisation, Superannuation, paragraph 64 contained an extract of the Commissions statement of 12 September 2008 *"We are prepared to accept a fund or funds agreed by the parties, provided of course that the fund meets the relevant legislative requirements"*
- **Who will hear the variation of a modern award:** AIRC Order 2009/95 15 December 2009. An extract of this order notes that the full bench of FWA will hear variations to modern awards, and in its directions notes that any party wishing to appose applications must write a full written submission, with submissions in reply to be provided by applicants by provided due dates.

Appendix 4 AIRC Statement - Variation of modern awards 26 June 2009 provides further details.

- **When is the variation application to be heard:** Directions have been received from FWA which advised that applications received to vary a modern award in relation to superannuation will be heard by the full bench of FWA in October/November 2012 following the issue of the Productivity Commission Inquiry's Final Report on Default Superannuation Funds in Modern Awards.

### **The History - NatRoad & historical awards, & The T.I.S. Fund**

- NatRoad and The T.I.S. Fund have been intrinsically linked since the commencement of The T.I.S. Fund in 1989. NatRoad was formed following a merger of the National Transport Federation and the Long Distance Road Transport Association. In 1989 the National Transport Federation committee and members were instrumental in assisting with the commencement, and thereafter ongoing support of The T.I.S. Fund.
- Impetus for the formation of The T.I.S. Fund was to provide further choice for default super, in particular choice which was ideologically & philosophically suited to employers and members of the National Transport Federation. The T.I.S. Fund now has 23 years experience in superannuation and in particular, with the employer and employees in the private transport sector.

In 1993, the Transport Workers' (Long Distance Drivers) Award 1993 (TWLDDA) was arranged and implemented to allow drivers to cross state and territory borders with just one set of award rules and obligations. This Federal Award was historic in being one of the few 'respondent' awards, with specific employers listed in the award. This award was varied (date 1 February 2001) and retitled Transport Workers (Long Distance Drivers) Award 2000.

Superannuation for many employers and employees in the private transport industry was covered by the Transport Workers Superannuation Consolidated Award 2004. Paragraph 40 outlines superannuation as follows:

- **40.1** Superannuation contributions shall be at the rate and in accordance with the conditions prescribed by the Transport Workers (Superannuation) Consolidated Award 2004 [AW834577]), as varied.
- **40.2** 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 date of effect of this variation (15 October 2004) is exempt from any

provision in the award which specifies the fund or funds into which superannuation contributions are to be paid.

- Many of the respondents to the TWLDDA from 1993 through to the grandfathering date 12 September 2008, and to current day, elected to use The T.I.S. Fund as their Super Fund.

Appendix 5 provides a copy of the Transport Workers' (Long Distance Drivers) Award 1993. Schedule 1 provides a list of the relevant employer respondents to the award.

Appendix 6 provides a copy of the Transport Workers Superannuation Consolidated Award 2004.

Appendix 9, AIRC Decision Award Modernisation - Stage 2 Industries 3 April 2009, paragraph 181 provides further information on private transport award modernisation post 12 September 2008.

### **Advent of Modern Awards 12 September 2008**

Historical awards were combined into a smaller number of modern awards. The following extract outlines the procedure in relation to superannuation.

- **Procedure for carrying out award modernisation process- AIRC Decision 2 Sept 2009**

(Appendix 3) - Transitional Provisions to be included in Stage 2 modern awards, in which RT&DA and RTLDA were noted. Specific items covered were how default superannuation funds was to be included, specific grandfathering date to be used, and other fundamental matters.

Extracts relating to superannuation, paragraphs 63 to 69 outline matters relating to Superannuation and the question of default funds in modern awards specifically follow which outline the thinking and decisions:

### **SUPERANNUATION**

**[63]** We turn now to deal with the model superannuation clause and in particular to the question of default funds. The model superannuation clause provides that the default fund may be one of a number of funds specified in the clause or any fund to which an employer was making contributions for the benefit of employees on 12 September 2008.

**[64]** The Commission's statement of 12 September 2008 (Appendix 7) contains the following passage:

"[29] We have drafted a model superannuation provision to be included in modern awards if those awards deal with superannuation. The clause will nominate a default fund or funds should an employee fail to exercise his or her right to nominate the fund to which employer contributions should be made. We do not think it is appropriate that the Commission conduct an independent appraisal of the investment performance of particular funds. Performance will vary from time to time and even long term historical averages may not be a reliable indicator of future performance.

*We are prepared to accept a fund or funds agreed by the parties, provided of course that the fund meets the relevant legislative requirements."*

[65] In its decision of 19 December 2008, the Commission, in commenting on the model superannuation clause, said:

“[90] The terms of the exposure draft concerning the default fund provision were the cause of a number of submissions from employer and employee interests, from superannuation funds and the superannuation industry. We have decided to allow as a default fund any fund to which the employer was making contributions for the benefit of employees on 12 September 2008. This approach is likely to minimise inconvenience for employers. While funds other than those provided for will not qualify as default funds employees may still exercise their right to choose in favour of these funds.

[66] In our view the nomination of default funds should be made on some readily ascertainable basis and one which does not lead to any disruption. For that reason it was decided to provide for named default funds as the primary basis. The secondary basis was any fund to which the employer was making contributions before 12 September 2008. That date was chosen because it was the date on which the exposure drafts of the priority modern awards were published.

*[67] A number of funds have since made applications to be included as named default funds on the basis that the fund was nominated as a default fund in an award-based transitional instrument relevant to the coverage of the modern award or on the basis that the representatives of the main parties covered by the award consent. In our view either basis would constitute a good reason for the fund being specified as a default fund in a modern award. Where such grounds exist an appropriate application could be made. We do not intend to deal with such applications, however, in this decision*

[68] Returning now to the proposal that we should change the relevant date from 12 September 2008 to 1 January 2010, and assuming the proposal could be characterised as a transitional provision, we doubt whether such a variation would go to the heart of the matter. Most funds voicing objection to the default fund provision did so on the basis that they are fundamentally opposed to any limitation on the ability of an employer to choose the default fund. Simply substituting one date for another would not remedy that complaint. Indeed, it might create a deal of disruption in the industry between the publication of this decision and 1 January 2010.

*[69] The relevant legislation provides for default funds to be included in awards. Our present view is that we should continue to provide for default funds where there is a history of award regulation of superannuation in the industry or occupation the modern award covers. It should be emphasised, however, that, self-evidently, the default fund provision only operates where the employee does not nominate a fund. The superannuation legislation enshrines the right of an employee to choose the fund into which the employer should make contributions. Consistently with the legislation the award provision does not limit an employee's right to nominate a fund. Nor does it limit the ability of superannuation funds which are not default funds to market their products to employees and employers. We have decided, on the basis of what has been put in the proceedings, not to alter the date of 12 September 2008.*

- With the advent of the 2010 Modern Awards, any employee who did not choose a superannuation fund for their contributions, or whose Employer was not already making superannuation contributions for the benefit of their employees before 12 September 2008, must use one of the Superannuation Funds nominated in RT&DA and RTLDOA.

**Specific extracts relating to default superannuation clauses from the two awards RT&DA, and RTLDOA follow:**

In the case of the Road Transport and Distribution Award 2010, clause 21.4 states: Unless, to comply with superannuation legislation, the employer is required to make the superannuation contributions provided for in clause 21.2 to another superannuation fund chosen by the employee, the employer must make the superannuation contributions provided for in clause 21.2 and pay the amount authorised under clause 21.3(a) or (b) to one of the superannuation funds or its successors:

21.4(a) provides only for the following default superannuation funds:

- a. TWUSUPER;
- b. OAMPS Super Fund;
- c. Tasplan;
- d. SunSuper;
- e. AustSafe Super; or
- f. *Any superannuation fund, to which the employer was making superannuation contributions for the benefit of its employees before 12 September 2008, provided the superannuation is an eligible choice fund.*

In the case of the Road Transport (Long Distance Operations) Award 2010, Clause 19.4 states: Unless, to comply with superannuation legislation, the employer is required to make the superannuation contributions provided for in clause 19.2 to another superannuation fund that is chosen by the employee, the employer must make the superannuation contributions provided for in clause 19.2 and pay the amount authorised under clauses 19.3(a) or (b) to one of the following superannuation funds:

- a. TWUSUPER; or
- b. *Any superannuation fund, to which the employer was making superannuation contributions for the benefit of its employees before 12 September 2008, provided the superannuation fund is an eligible choice fund.*

Appendix 69AIRC Decision Award Modernisation 3 April 2009 deals with a number of matters in the award modernisation process. In particular, matters relating to the private transport industry are dealt with between paragraphs 167 and 183. Particular reference is made to the RTLDOA in paragraph 181 "The long distance sector of this industry has been regulated federally for many years under a separate award and we accept the submission of the employers that it should continue to do so".

### **Summary**

- As outlined in our prior submissions, the Transport Industry Superannuation Fund believe the negotiation process relating to the modernisation of Award process for default superannuation funds has previously been inaccessible to them. Although being one of the main parties affected in RT&DA & RTLDOA, the interests and needs of our sponsoring employers, and members from the private transport industry in regard to superannuation were overlooked.
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- Post 12 September 2008, The T.I.S. Fund has only been able to continue to work with its existing employers or those employers and employees who choose The T.I.S. Fund as their superannuation fund, which, while possible, has made it procedurally more complex for employers.

This has been particularly significant for our employers and members who are covered by the Road Transport (Long Distance Operations) Award 2010, and who are also members of fellow community organisations, our historical partners over the last twenty years. Approval of the application to vary a modern award - “to insert The T.I.S. Fund’ in RT&DA and RTLDOA as a ‘named Default Super Fund’ will rectify this, and improve choice for private transport employers and members.



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## APPENDIX REFERENCE SCHEDULE

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1. FWA Statement - Modern awards review 27 April 2012
  2. FWA Decision 2010 FWA 2475 - Application to vary or revoke a modern award.  
AMP Life Ltd - Professional Employees Award 26 March 2010 - Matter of who has standing covered.
  3. AIRC Decision - Award modernisation - Transitional provisions & procedure 2 September 2009
  4. AIRC Statement - Variation of modern awards 26 June 2009
  5. Transport Workers' (Long Distance Drivers) Award 2000
  6. Transport Workers Superannuation Consolidation Award 2004
  7. AIRC Statement - Award modernisation 12 September 2008
  8. FWA Order - Variation of modern award - Applicant TWU Nominees Pty Limited trading as TWUSUPER 22 December 2009
  9. AIRC Decision Award modernisation - Stage 2 Industries - 3 April 2009 - Private transport industry covered from paragraph 167 through 183.
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