



AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

Making Sense of Superannuation Choice of Fund

A new regulatory obligation to be administered by Australian employers will commence from 1 July 2005. From that date, many employers will be required to offer at least some of their employees what is called 'superannuation choice of fund'. This means that employees will be able to choose where their compulsory employer occupational superannuation contributions will be paid.

Employees eligible to be given choice of fund will not be required to exercise that choice, or to change fund, but will have the legal right to do so from that date and once each twelve months thereafter. As with all new regulatory obligations it is important that employers know why it is being introduced, what is required to be done and where they can obtain assistance.

HOW THE CURRENT OBLIGATIONS DEVELOPED

Compulsory superannuation obligations on Australian employers were introduced in the mid to late 1980s by the Hawke Labor Government as part of its 'Accord' with the trade union movement. At that time, employer payments of 3 per cent of remuneration were required to be paid into funds identified by union/employer agreements, or by orders and awards of industrial relations tribunals. Very few, if any, of these arrangements gave an open choice of which fund payments could be directed to. In most cases the funds prescribed by union/employer agreements or by awards were industry funds set up or sponsored by trade unions and some employer organisations. The industrial relations system gave these funds a very large share of the compulsory employer funded superannuation market and in some cases a monopoly role in an industry or sector.

In the early 1990s the Keating Labor Government made the compulsory employer obligations apply to all employers on a legislated basis (the 'Superannuation Guarantee'), not just employers bound by industrial relations awards or union agreements. In addition, the Keating Government progressively extended the compulsory employer contribution from 3 per cent of remuneration to 9 per cent over the next decade, which is where we are now in 2005.

Critically, when it expanded the coverage of compulsory superannuation, the Keating Government did not remove award regulation of superannuation at the same time. Rather, it kept award regulation of employer obligations and added to it legislative regulation. Employers had to comply with both forms of regulation, even though one (the legislative regulation) was made by Parliament and the other (awards) was made through the industrial relations system. While the superannuation guarantee legislation allowed an employer to make payments into any fund that complied with insurance and superannuation requirements of the general law, awards and agreements made or approved by industrial relations tribunals

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L E A D I N G A U S T R A L I A N B U S I N E S S

could (and often did) direct where payments had to go. They also could specify a higher level of compulsory payments or different employee eligibility criteria, and sometimes did so.

As a result, since 1992 employers have had to comply with two sets of laws on the topic of compulsory superannuation payments – the superannuation guarantee legislation and industrial relations awards/agreements.

In 1996 the Howard Liberal-National Government was elected. It adopted three policies on this subject: that the progressive increase in employer contributions to 9 per cent would continue; that superannuation would be removed from industrial relations award regulation; and that employees would be given choice of superannuation fund.

Since that date the Australian Government has sought to remove superannuation as an ‘allowable matter’ in federal awards and thereby leave its regulation to the superannuation guarantee laws and industrial relations agreements only. Although in 1996 the Australian Democrats agreed to reconsider this proposal at a later date, it has still not been passed by the Senate.

WHAT LAWS ARE CHANGING

Federal superannuation guarantee laws are changing to introduce employee choice of fund. These changes have implications for Commonwealth and State industrial relations laws. The current Australian Government first introduced legislation to give effect to its superannuation choice of fund policy in 1997. Various Bills then spent seven years in political to-ing and fro-ing before the *Superannuation Legislation Amendment (Choice of Funds) Act 2004* was passed in June 2004, in a compromise agreement between the Government and the Australian Democrats. That compromise created a range of exemptions from choice of fund (exemptions that depend on industrial relations arrangements), stipulated minimum insurance obligations and extended certain superannuation protections to same-sex couples.

The laws that passed the Senate in June 2004 will come into operation from 1 July 2005. Government Bills to remove superannuation as an allowable matter from awards were not concurrently passed. As a result, employers approach July 2005 with the two-track obligations they have had for more than a decade – they must comply with superannuation guarantee laws and also comply with industrial relations laws. This fact alone creates complications because many awards simply do not allow for choice of fund.

The superannuation guarantee laws are the portfolio responsibility of the Commonwealth Assistant Treasurer, the Hon Mal Brough MP. They will continue to be administered and enforced by the Australian Taxation Office (ATO).

WHY THE LAWS ARE CHANGING

There are four principal reasons advanced by the Government in support of compulsory superannuation and choice of fund:

- the population is ageing and a viable national retirement income policy requires a substantial contribution in the form of personal superannuation in addition to government-funded age pensions;
- the superannuation industry needs to be more competitive and efficient and industry funds that were given special market access by the industrial relations system since the 1980s need to be exposed to more competitive forces;
- individuals need to take more interest in planning for their retirement; and
- the fund policy holder (the employee) should have a free choice to decide which fund will manage and invest their retirement savings as a matter of principle.

WHAT EMPLOYERS WILL NEED TO DO

Not every employee will be eligible to exercise choice of fund under the new superannuation guarantee laws. This means that not every employer will have to offer choice of fund to their employees, or all of their employees.

However, prior to July 2005 every employer should find out if they must offer choice of fund, and if so, to whom. They will have to offer choice of fund to any employee who is eligible under the new laws to exercise choice of fund.

In summary, the obligations on employers under the choice of fund laws are:

- to determine which employees are eligible to exercise choice of fund;
- to give each employee eligible for choice of fund a 'Standard Choice Form' within 28 days of 1 July 2005 (or 28 days of the employee commencing work), with the employer part of the form completed (*see below*);
- to wait to see if the employee exercises choice of fund by completing, signing and returning their employee part of the Standard Choice Form;
- if the employee makes a valid choice, then the employer must give effect to that choice within two months.

Completing the employer part of the Standard Choice Form requires the employer to identify into which fund the employer will be making superannuation payments, in the event that the employee does not exercise a different choice.

The fund the employer nominates on the Standard Choice Form is called the employer nominated fund, or the default fund. This fund acts as the default in the event that the employee does not exercise a different choice. The employer default fund can be (but does not have to be) the same fund as is presently used by the employer, provided it is a complying fund and it meets the minimum insurance obligations set out in regulations that were made by the government in March 2005. Those regulations also allow employers to make contributions into retirement savings accounts (RSAs).

WHAT ELIGIBLE EMPLOYEES WILL NEED TO DO

An employee who is eligible to exercise choice of fund must be provided with the Standard Choice Form by their employer, but does not have to complete the employee part of the form or exercise choice of fund. The employee is free to do nothing and thereby accept the fund specified by the employer in the Standard Choice Form or to select a different fund of their own choice.

There is no time limit on the employee to decide whether to select a different fund. However, once the employee makes a decision and properly completes and signs the Standard Choice Form and returns it to their employer, the employer must then act on that decision within two months. An eligible employee can ask their employer for a Standard Choice Form as frequently as they like, but an employer is not required to meet the request any more frequently than once in a twelve month period.

To properly complete the Standard Choice Form, the employee must provide the employer with details of the proposed fund and confirmation from the fund that it can accept payments from the employer for that employee. This last point is important for employers. In January 2005 the government made it clear that superannuation choice of fund legislation does not compel an employer to become a 'participating employer' of that fund. This means that an employee can only choose a fund which will accept contributions from their employer at the time that the employee makes their selection. For example, an employer cannot be required by an employee to participate in a fund (i.e. make payments into a fund) if the fund requires payments to be made more frequently than the law requires and the employer is not already doing so.

DECIDING IF CHOICE HAS TO BE OFFERED

The first and most crucial decision for an employer is to determine whether they employ employees (on or after 1 July 2005) who are eligible under the new laws to exercise choice of fund.

Eligibility for choice of fund is not the same as eligibility for the 9 per cent compulsory superannuation guarantee. The new choice of fund laws do not change the current 9 per cent employer obligation. The new law creates an additional category of eligibility – i.e. employees who are eligible to exercise choice about which fund their superannuation guarantee contributions are paid into.

The most significant categories of employees who are eligible to exercise choice are those employed under federal awards, and those who are simply employed under contracts of employment (that is, not under awards or industrial relations instruments).

The simplest way to determine if an employee is eligible for choice of fund is to assess whether they come within one of the exclusion categories. If not, they will be eligible for choice.

The major exclusion categories relate to employees under certain industrial relations instruments which require superannuation to be paid:

- employees employed under a State industrial award (note – this exclusion will only apply until July 2006. This issue is discussed below);
- employees employed under a State industrial agreement; and
- employees employed under a federal industrial agreement (such as an Australian Workplace Agreement (AWA) or a Certified Agreement).

It is important to note that the above exclusions only apply where the employer is making the contributions ‘under or in accordance with’ the relevant industrial instrument identified above. This means that if the State industrial award, State industrial agreement, AWA or Certified Agreement does not require the payment of superannuation contributions then the exclusion category will not apply. The employee will then be eligible to exercise choice of fund. The employer will have to offer choice.

The rationale for these exclusion categories is that Parliament did not want to impose choice of fund where employees had already exercised some collective or individual choice in superannuation through industrial relations instruments.

There are also exclusion categories for persons employed in unfunded federal public sector superannuation schemes, or where employer contributions are made into a ‘defined benefit fund’.

In addition, in January and March 2005 the Assistant Treasurer announced that a further exclusion category would be created – a Standard Choice Form would not need to be distributed where employees are already required by their employer to choose a fund as a condition of their employment. Under those proposed amendments, the employer would not have to nominate a default fund on 1 July 2005 and not be required to distribute a Standard Choice Form to employees. This exclusion would not exempt an employer from still having to meet their 9 per cent superannuation guarantee obligations.

CLASHES BETWEEN SUPERANNUATION AND INDUSTRIAL RELATIONS LAWS

As can be seen, the continued dual regulation of superannuation by the superannuation guarantee legislation and the industrial relations system creates excessive and unjustified complexity. Inevitably there will be clashes between industrial relations laws that specify a fund or funds or which limit or deny employee choice, and superannuation choice legislation which allows employee choice.

Where there are competing obligations, the basic approach that an employer should apply is that if an employee is eligible to exercise choice under superannuation guarantee laws (i.e. the employee does not fall into an excluded category) and the employee exercises a valid choice of fund, then the chosen fund will override the industrial relations obligations concerning the identity of the fund into which contributions are to be made.

EMPLOYEES UNDER STATE INDUSTRIAL RELATIONS AWARDS

Where an employee's superannuation payments are made under or in accordance with a State award, the employee is not eligible for choice. An employer wishing to offer choice to such an employee needs to exercise care and be mindful of their award obligations and any superannuation provisions in the relevant State industrial relations laws.

In March 2005 the Australian Government announced that it intended to remove the State award exclusion category from the choice legislation. It has said that the removal of the State award exclusion will not commence until July 2006.

Therefore, for the first 12 months of superannuation choice (i.e. 1 July 2005 – 30 June 2006), State award employees will be excluded from the requirement to exercise choice if their superannuation payments are made under or in accordance with the State award. Thereafter, if amending legislation is passed, incorporated employers of State award employees would have to offer choice of fund in exactly the same way that employers of federal award employees will have to from July 2005.

These amendments would have particular impact for incorporated employers and employees under State awards in Queensland, New South Wales, South Australia and Tasmania. In Victoria, the ACT and the Northern Territory federal awards only apply. In Western Australia, State legislation has required choice of fund for a number of years.

WARNINGS TO EMPLOYERS

The first and most basic warning to employers is that under these new laws, superannuation choice of fund means employee choice. It does not mean employer choice, nor the choice of any other third party. Failure to allow, or give effect to an eligible employee's right to choose is in breach of the law.

The employer's role is to give effect to (that is, pay) the 9 per cent obligation into the appropriate fund and not to influence the employee's choice. Telling an employee to change or retain fund arrangements or giving an opinion or recommendation to an employee about a fund or a type of fund is likely to be seen as giving personal financial advice to an employee. Under Commonwealth law only a licensed person can offer personal financial advice. An employer who is not licensed to give financial advice should not do so, even if asked to do so. (This point is made on the Standard Choice Form). If asked about funds the employer should refer the employee seeking advice to relevant financial or superannuation advisers.

Provided an employer complies with their obligations, the employee – not the employer – is responsible for the consequences of fund choice. The new superannuation guarantee laws specifically provide that an employer is not liable to compensate any person (such as an employee) for loss or damage arising from anything done by the employer in complying with their obligations under choice of funds laws. This protection also extends to the employer's

selection of a default fund, provided the selection complies with the choice legislation (this is also mentioned on the Standard Choice Form).

Employers also need to be very wary over being party to unlawful arrangements between their business and a superannuation provider. Regulations made in March 2005 specify only a very limited range of circumstances where a fund is permitted to supply or offer to supply goods or services to an employer (or other person) on the condition that employees will be members of the fund.

The superannuation choice of fund laws carry penalties if obligations are not complied with. These penalties are described as a 'choice shortfall' and include monetary penalties.

The enforcement of choice of fund laws is the responsibility of the ATO. Aside from its enforcement role, the ATO is commencing an information and education campaign from April 2005, including the distribution of an information kit and guide for employers. The Australian Government has announced that \$19.7 million will be spent over two years on the proposed information and education campaign.

SUPERANNUATION POLICY IS STILL UNBALANCED

The principles behind choice of fund laws have wide support within the community, but employers are understandably concerned about regulatory obligations.

It is critical that superannuation laws strike an appropriate balance with the clear recognition that regulatory burdens on employers need to be reduced to the minimum possible level.

While the new laws achieve that in part, by allowing most existing superannuation arrangements to continue as default arrangements and by allowing the collective exercise of choice, the clash of superannuation and industrial regulation still requires addressing.

That aside, many employers would still see superannuation laws as unbalanced. For example, compulsory obligations for superannuation payments (now at 9 per cent) apply solely to employers. There is no equivalent requirement on employees to invest for their own retirement. Government policies to expand the government co-contribution in the event of employee payments is a welcome measure, but still falls short of achieving a balanced approach to retirement funding.

The ACCI *Taxation Reform Blueprint*, released in November 2004, outlines a series of proposals for reform of retirement incomes policy and its taxation treatment. In particular for choice of fund it highlights that:

- business compliance costs should be minimised;
- there should be appropriate safeguards to protect employers from litigation arising out of the transition to a choice system; and
- the compliance system for business should be educative rather than punitive.



The ACCI Workplace Relations Reform Blueprint, *Modern Workplace: Modern Future*, calls for the removal of superannuation regulation from the industrial relations award system.

EMPLOYERS NEEDING ASSISTANCE

There is no doubt that many employers will need to access advice and assistance during the implementation period of the new superannuation choice of fund laws.

That advice needs to be a combination of advice about the new superannuation guarantee legislation and advice about the industrial relations arrangements under which the employer currently employs. Employers should not solely rely on information or advice from the superannuation industry or accountants on these questions.

Professional industrial relations advice is available from ACCI member employer and industry organisations and these services should be used by employers in addition to liaison with government departments, the ATO and the superannuation and finance industry.