

Aspects of Financial Planning

Choice of super fund – an employer perspective

July 2010

From 1 July 2005 more than 5 million employees have been able to choose which superannuation fund their superannuation guarantee contributions are paid into by their employer. The key features of this legislation and its impact on employees, employers and superannuation funds is examined herein.

Background

The concept of an employee being able to choose a superannuation fund into which their employer contributions are paid was debated for many years. From 1 July 2005, the *Superannuation Guarantee (Administration) Act 1992* (SGAA) was amended to compel most employers to offer 'Choice of Fund' to their employees.

Key features of choice

Employees affected

Most Australian employees (as defined as employees for Superannuation Guarantee purposes) should have been offered choice of fund from 1 July 2005. Prior to the legislation coming into effect, it was estimated that potentially over 5 million employees and 654,000 employers were to be affected by choice.

Employees can generally choose their superannuation fund if they are:

- Employed under a federal award
- Employed under a former state award (now known as a 'notional agreement preserving state award')





- Employed under another award or agreement that doesn't require superannuation support; or
- Not employed under any state award or industrial agreement.

Some Australian companies were already complying with the intention of the choice of fund legislation by offering employees a choice and were therefore not required to implement the new choice arrangements.

In most cases, employees working under certain workplace and industrial agreements will continue to have contributions paid into their nominated fund as determined by their industry or employer.

This is the case where employers are required to pay into any of the following funds:

- An employment arrangement specified under a state award or industrial agreement; or
- A fund receiving contributions in accordance with certain workplace agreements including an individual Australian Workplace Agreement (AWA) or a collective Certified Agreement (CA) made under the Workplace Relations or Industrial Relations Acts.

Employers in the above circumstances will be deemed to have complied with the choice of fund legislation if superannuation payments are made 'under or in accordance with' a particular agreement or award. This is an issue on which we recommend employers seek professional legal advice specifically in the area of industrial relations.

Some federal and state public sector employees are also excluded from choice of fund.

There are limited exceptions for employers who are contributing to a defined benefit fund on behalf of their employees. These exceptions relate to schemes that:

- Would provide employees with the same level of benefit even if the employer made the required SG contributions to an alternate fund (this is designed to prevent employees from having multiple funds);
- Are continually in surplus from 1 July 2005; or
- Have already funded maximum benefit entitlements for those employees.





Contributions affected

All employer contributions are designed to be covered under the choice of fund legislation, however only Superannuation Guarantee (SG) contributions not paid in compliance with the measures are specifically targeted for penalties.

This means that technically only SG contributions need to be paid into an employee nominated choice of fund. Other contributions (eg. voluntary employer, salary sacrifice and personal member contributions) can continue to be paid at the employer's discretion. Experience has shown however, that other types of employer contributions are being paid by the employer into a choice fund to save the employer from contributing to multiple superannuation funds.

Because the rules only operate in regard to employees under SG legislation, choice of fund does not cover self employed people. Similarly, it is not relevant to employees not covered by SG legislation; for example, those earning less than \$450 per month or those who are aged 70 or over.

Choice funds

Employees are able to nominate any complying superannuation fund or Retirement Savings Account (RSA) that is able to accept employer contributions as their 'choice fund'.

Being able to accept employer contributions means the employer must be able to make the contribution at the time of the employee nomination. Previously, employers may have been unable to contribute if the fund required the employer to become an employer sponsor (or participating employer) of the employee's chosen fund. From 1 July 2007 however, public offer funds are prevented from requiring new employers to sign participating employer agreements before accepting contributions on behalf of fund members. This measure will generally allow employees to choose to remain in a fund following a change of employer rather than having contributions paid to another fund.

Employer obligations

Standard choice form

Employers are required to provide employees with a standard choice form on which they may nominate their receiving fund. This was required to be provided by the 29 July 2005 to all existing employees as at 1 July 2005 unless choice had already been offered to an eligible employee before 1 July 2005.

Employers are now required to provide a standard choice form within 28 days of:

- An employee commencing employment





- An employee writing to request a standard choice form (only if they haven't done so in the previous 12 months)
- The employer becoming ineligible to contribute to the fund previously chosen by the employee; or
- A change in the fund the employer has nominated to contribute to because the employee had not previously chosen a fund themselves.

Employers may also provide a standard choice form at any other time. For example, an employer may choose to provide a choice form to all employees on an annual basis.

The Australian Taxation Office (ATO) designed a 'standard choice form' which imitates the requirements as prescribed under the legislation. The standard choice form effectively provides employees with two options.

- Option 1: You can stay with your employer's superannuation fund; or
- Option 2: Choose your own superannuation fund.

The ATO form provides a space for the employer to enter details of the default fund (see below) and space for the employee to enter details of their chosen fund (if they are making a choice). This form is available from Centric Wealth and can also be found on the ATO's website.

Employers have a window of up to 2 months after receiving a standard choice form to commence paying into an employee's chosen fund.

Default funds

A default fund is any fund chosen by the employer to cover instances when the employee does not nominate a choice fund. Prior to introduction of the legislation, it was expected that many employees would not make this nomination and in many cases this has held true.

Default funds provide an alternative for employers who have done everything needed to comply (ie. they have provided the standard choice form in the required number of days) and the employee has either not completed the form or has nominated a fund in which the employer is unable to make SG contributions.

In these cases, the employer is able to make contributions to any other complying superannuation fund or RSA that meets the requirement to offer a minimum level of death cover (see below).





Employers covered by relevant federal, state or territory awards that are required to offer choice of fund will generally continue to contribute to the fund specified in the award and use this as their default fund, unless the employee makes an alternate decision.

Modern awards and default superannuation funds

As part of its industrial relations reform, the Federal Government has introduced a set of 'modern awards' to replace thousands of existing awards from 1 January 2010 (unless the award contains transitional provisions). As well as covering a number of matters including wages and conditions of employment, the modern awards specify a selected range of superannuation funds, one of which an employer must use as its default superannuation fund.

Employers whose default superannuation fund commenced on or after 12 September 2008 may be affected by modern awards if they have employees covered by the new modern awards as at 1 January 2010. As a result, employers may be required to redirect superannuation contributions for employees covered by particular awards into the specific superannuation funds named in the new modern awards. However, there are several exceptions to this that may apply.

Of course, individual employees entitled to a choice of fund are still able to choose another fund under the 'choice of fund' rules. An employee's choice will mean that the modern award provisions regarding default funds do not apply.

It should be noted that only default superannuation funds commenced before 12 September 2008 are provided relief from the application of modern awards. However employees covered by modern awards as at 1 January 2010 will need to exercise 'choice' to continue to have their employer contributions paid into their current account.

Employers who want more information about modern awards and what their obligations are under them, should seek more information from Fair Work Australia (FWA) and the Australian Industrial Relations Commission (AIRC).

Insurance requirements

The regulations set out for employers the minimum level of insurance to be offered by the chosen default fund. From 1 July 2008, the default fund must provide minimum death cover on an age-based level (see below table) or at a premium of at least 50 cents per week (for those less than 56 years).





Age Range	Level of Life Insurance
Up to 19	Nil
From 20 to 34	\$50,000
From 35 to 39	\$35,000
From 40 to 44	\$20,000
From 45 to 49	\$14,000
From 50 to 55	\$7,000
56 or more	Nil

These are minimum levels of cover and of course the fund is able to offer insurance above these levels. Employees will also be able to purchase additional cover if required.

Defined benefit funds will meet the insurance requirement where the scheme provides a death benefit with a future service component that is at least equivalent to the cover outlined above.

There are some exceptions to providing the minimum level of insurance cover that may apply for employers:

- Contributions made by an employer under a Federal award
- Employers providing insurance which meets the minimum requirements outside of the superannuation system
- Employers unable to provide insurance because the fund does not offer insurance to a particular employee, for example, due to an employee's health, occupation or work hours; and
- Contributions made to a fund whose governing rules were in place on 11 March 2005 and determined that at least \$50,000 will be payable in respect of the death of an employee.

Record keeping requirements

Employers are required to keep certain records as evidence they have met their choice of fund requirements. Records include:

- Evidence that you have provided a standard choice form to eligible employees
- Details of employees who do not have to be offered choice of fund
- Receipts issued by the superannuation fund confirming you have made contributions to the employee's choice fund; and





- Confirmation that the default fund chosen meets the minimum insurance requirements.

Penalties for non-compliance

A large proportion of the choice legislation is dedicated to outlining the penalties for non-compliance imposed on employers who make 'no choice contributions'. A no choice contribution occurs when an employer makes one or more contributions to a complying fund or RSA and the contributions are not made in accordance with the choice of fund requirements. The penalty is added to the SG shortfall amount calculated for each employee.

The penalty for non-compliance is calculated in accordance with the formula:

$$= 25\% \times [\text{SG quarterly contribution not paid in compliance with choice}]$$

The actual penalty is the lesser of this amount and the maximum penalty that can be imposed for non-compliance, which is \$500 per quarter (or \$500 per notice period) per employee. As this penalty is an extension of the Superannuation Guarantee Charge (SGC), like the SGC the penalty for non-compliance is not tax deductible for the employer.

The notice period that will apply to a particular employer will be advised by the Taxation Commissioner and may represent more than one quarter. No indication of notice periods that may be granted has been provided at this stage.

Other penalties

Choice of fund legislation prohibits the trustee of a superannuation fund or an associate of the trustee from providing or withholding benefits to a person on the basis that one or more of their employees becomes a member of the fund. This is the case in most circumstances however there are a number of exemptions from this prohibition. For example, a trustee will be able to offer a clearing house service to an employer and advice or administration services.

The SGAA imposes a penalty on employers who charge employees for the cost of complying with choice. The penalty is the same that is applied for a 'no choice contribution' as outlined above.





Employee obligations

If an employee would like to participate in choice of fund, they are required to complete a standard choice form or provide a written statement nominating their chosen fund to their employer. The information required before the employer can commence contributing is prescribed in the legislation as follows:

- The employee's fund account name and membership number
- Full name of the fund and the fund's contact details
- Australian Business Number (ABN) and Superannuation Product Identification Number (SPIN), if applicable
- Evidence the fund will accept contributions
- How contributions may be made (eg. electronically or by cheque) and details necessary to make the payment; and
- A written statement that the fund is a complying fund (or if the fund is a Self Managed Superannuation Fund (SMSF) evidence from the ATO that the fund is a regulated superannuation fund).

Conclusion

Most employers by now should have determined their philosophy on choice and decided on their superannuation proposition for employees. Careful consideration should have been taken by employers in choosing their default fund and distributing standard choice forms. Employers will also need to ensure they continue complying with the legislation. Many employers may have made the decision as to whether or not to continue to sponsor their own corporate fund and/or how much involvement they will have in administering the fund.

Employees need to be cautious when selecting a choice fund and in moving their superannuation benefits from one fund to another. It is important that employees carefully consider all of the implications; including fees, investment choices, insurance options and the services provided by funds before switching from their current fund to another.





Centric Wealth Advisers Ltd may be able to be of assistance

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