
Chapter 1

Extending superannuation choice to enterprise agreements and workplace determinations

Outline of chapter

1.1 Schedule # to this Bill amends the *Superannuation Guarantee (Administration) Act 1992* to ensure employees have an opportunity to separately choose their superannuation fund for new enterprise agreements or workplace determinations that are made from 1 July 2016.

Context of amendments

1.2 An important part of Australia's superannuation system is the provision of compulsory employer contributions by employers to complying superannuation funds in respect of their employees.

1.3 Currently some employees do not have the opportunity to choose their own superannuation fund. Where an employer makes contributions under, or in accordance with, an enterprise agreement or workplace determination, employers satisfy the choice of fund requirements in the SGAA. These agreements or determinations may specify a given superannuation fund, or a number of superannuation funds, that an employer may contribute to for the benefit of the employee.

Summary of new law

1.4 The amendments will enable employees covered under enterprise agreements and workplace determinations that are made from 1 July 2016 to choose their own superannuation fund.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Compulsory employer superannuation contributions to a fund under, or in accordance with, a workplace determination or an enterprise agreement made before 1 July 2016 will comply with the choice of fund requirements.	Compulsory employer superannuation contributions to a fund under, or in accordance with, a workplace determination or an enterprise agreement comply with the choice of fund requirements.
An employee will be able to choose their own superannuation fund where they are employed under a workplace determination or enterprise agreement that is made from 1 July 2016. Where there is no chosen fund for an employee, an employer that continues to make compulsory contributions for an employee with the same fund, in accordance with the previous workplace determination or enterprise agreement will comply with the choice of fund requirements.	Employees of employers that make compulsory employer superannuation contributions to a fund under, or in accordance with, a workplace determination or an enterprise agreement, may not be able to choose their own superannuation fund.
An employer will not have an increase in the superannuation guarantee shortfall in a given quarter, for an employee that is member of a defined benefit scheme, where the employee's benefit in the defined benefit scheme would not be affected if compulsory superannuation contributions were made to another fund.	An employer may have an increase in the superannuation guarantee shortfall in a given quarter, for an employee that is member of a defined benefit scheme, in the case where the employee's benefit in the defined benefit scheme would not be affected if compulsory superannuation contributions were made to another fund.

Detailed explanation of new law

Existing arrangements

1.5 Part 3A of the SGAA sets out the choice of fund requirements that employers must comply with to avoid penalties in the form of increased superannuation guarantee charges. These requirements include offering employees a choice of superannuation fund and providing them with a standard choice form in particular circumstances.

1.6 Division 2 of Part 3A of the SGAA outlines when contributions made by an employer satisfy the choice of fund requirements. Under

subsection 32C(1) of the SGAA contributions made to a chosen fund for an employee or to certain unfunded public sectors schemes satisfy the choice of fund requirements. Subsection 32C(2) of the SGAA sets out requirements for contributions to satisfy the choice of fund requirements where there is no chosen fund and those contributions are made to a default fund. The remaining subsections in 32C of the SGAA set out other circumstances where contributions made to a fund are in compliance with the choice of fund requirements.

1.7 Specifically, subsection 32C(6) of the SGAA provides that a contribution is made in compliance with the choice of fund requirements if the contribution, or a part of the contribution, is made under, or in accordance with, certain specified industrial agreements, awards, a workplace determination or an enterprise agreement.

1.8 If an employer makes contributions that do not comply with the choice of fund requirements the employer will have an increased superannuation guarantee shortfall for the quarter. This increases the employer's liability to superannuation guarantee charge which is paid to the Commissioner in respect of an employee. Contributions made to a defined benefit scheme do not attract an increase in superannuation guarantee shortfall where, for a given quarter, the scheme is in surplus or the employee concerned has accrued their maximum benefit in the scheme.

1.9 Division 6 of Part 3A of the SGAA outlines employer obligations to provide standard choice forms to employees. Section 32N of the SGAA generally requires that an employer provide a standard choice form to an employee within 28 days of each of the following:

- the employee commencing employment;
- the employee receiving a written request from an employee;
- the employer becoming aware of a chosen fund ceasing to be available for contributions; or
- the employer changing default fund arrangements.

Defined benefit schemes

1.10 Division 4 of Part 3A of the SGAA sets out a process to be followed when an employee is choosing a fund. Subsection 32F(3) of the SGAA ensures that employees who are members of certain defined benefit schemes cannot choose another fund. These are schemes where a member's retirement, resignation or retrenchment benefit in the fund

would remain unchanged if the employer made contributions to another fund under the choice of fund arrangements.

1.11 Section 32NA of the SGAA sets out situations where an employer does not have to provide an employee with a standard choice form, including where contributions are made to an unfunded public sector scheme and for some members of defined benefit schemes. An employer is not required to give an employee who is a member of a defined benefit scheme a standard choice form where:

- the scheme is in surplus;
- the employee has accrued their maximum benefit in the scheme; or
- the employee's benefits in the scheme will remain the same if the employer makes contributions to another fund for the employee.

Extending choice of fund

1.12 Schedule # of the Bill amends subsection 32C(6) of the SGAA to limit the circumstances in which an employer can satisfy the choice of fund requirements by contributing to a superannuation fund in accordance with a workplace determination or enterprise agreement to cases where that determination or agreement was made before 1 July 2016.

1.13 Where a workplace determination or enterprise agreement is made on or after 1 July 2016, an employer will need to allow employees to choose their own superannuation fund (unless other circumstances exempt the employer from doing so).

1.14 This will require the employer to give a standard choice form to an employee in the circumstances set out in section 32N of the SGAA, including on commencement of employment and on written request from an employee. The employee will then be able to choose a fund for their compulsory superannuation contributions. An employer will also be required to act on a written notice from an employee to choose a fund in accordance with Division 4 of Part 3A of the SGAA.

1.15 Where an employee does not choose their own superannuation fund, an employer will be able to continue to make compulsory superannuation contributions to the same fund that the employer contributed to for the employee under or in accordance with a workplace determination or enterprise agreement, made before 1 July 2016. An employer will also be able to specify this fund as a default fund in a standard choice form provided on request to the employee.

1.16 Schedule # of the Bill recognises a further case where there is no increase in the quarterly superannuation guarantee shortfall for an employer who makes contributions in respect of an employee who is a member of a defined benefit scheme. This exclusion will apply where an employee cannot choose a fund under Division 4 of Part 3A of the SGAA because their retirement, resignation or retrenchment benefit in a defined benefit scheme would not be affected if compulsory contributions were made to another fund. This will ensure that employers cannot be penalised for failing to technically comply with the choice provisions, if there is no chosen fund for an employee, notwithstanding that the employee concerned is unable to choose a fund under subsection 32F(3) of the SGAA.

Application of amendments

1.17 Under the *Fair Work Act 2009* (FWA), an enterprise agreement is made when a majority of employees vote to approve the agreement. An enterprise agreement does not operate until at least seven days after the agreement is approved by the Fair Work Commission (FWC).

1.18 An enterprise agreement applies if it is in operation and covers the employee and employer. The consequences of an enterprise agreement applying to an employee and employer are that it imposes obligations on the parties and gives them entitlements. In the time between when an enterprise agreement is made and when it applies, employment rights and obligations are governed by the existing agreement or instrument.

1.19 A workplace determination is made by the FWC and operates from the day on which it is made. The FWA applies to a workplace determination that is in operation as if it were an enterprise agreement that is in operation (with some exceptions).

1.20 The amendments made by Schedule # to extend choice of fund apply to enterprise agreements and workplace determinations made from 1 July 2016. However, because of the operation of the FWA, employees and employers will continue to be governed by their existing enterprise agreement or workplace determination until the new enterprise agreement or workplace determination that is made from 1 July 2016 begins to apply.

1.21 This means that the amendments made by Schedule # to extend choice of fund will apply to enterprise agreements and workplace determinations that are made and apply, for the purposes of the FWA, from 1 July 2016.