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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

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SUPERANNUATION LEGISLATION AMENDMENT (CHOICE OF  
SUPERANNUATION FUNDS) BILL 2005

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EXPLANATORY MEMORANDUM

(Circulated by authority of the  
Treasurer, the Hon Peter Costello MP)



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## ***Table of contents***

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Glossary .....	1
General outline and financial impact .....	3
Chapter 1      Choice of superannuation funds .....	5
Chapter 2      Retirement savings accounts .....	13
Index .....	15



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# ***Glossary***

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The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
ASIC	Australian Securities and Investment Commission
Commissioner	Commissioner of Taxation



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# ***General outline and financial impact***

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## **Choice of superannuation funds**

Schedule 1 amends the *Small Superannuation Accounts Act 1995*, the *Superannuation Guarantee (Administration) Act 1992* and the *Superannuation Industry (Supervision) Act 1993* to:

- impose a penalty on employers who recoup from employees the costs from complying with their choice of fund requirements
- specify circumstances where an employer does not have to provide employees with a standard choice form
- clarify a number of matters, including the test for whether a defined benefit fund is in surplus, the obligation on the employer to contribute to the fund specified as the default fund on the standard choice form, that a fund chosen by an employee prior to 1 July 2005 is taken to be a chosen fund, and also a clarification of the penalty provisions
- specify that the Australian Securities and Investment Commission will administer the ‘no employer kick back’ provision in the *Superannuation Industry (Supervision) Act 1993*
- allow the Superannuation Holding Accounts Special Account to be an eligible choice fund for employers until 30 June 2006
- close the Superannuation Holding Accounts Special Account to new employer deposits from 1 July 2006.

***Date of effect:*** Items 1 and 4 commence on 1 July 2005. Items 2 and 3 and 5 to 14 commence immediately after the commencement of Schedule 1 of the *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004*.

***Proposal announced:*** These measures were announced in the Minister for Revenue and Assistant Treasurer’s Press Release No. 003 of 19 January 2005 and Press Release No. 016 of 14 March 2005.

***Financial impact:*** Allowing employers to use the Superannuation Holding Accounts Special Account to meet their choice of fund obligations until 30 June 2006 will result in a non-tax revenue loss estimated at \$1 million.

***Compliance cost impact:*** Nil.

## **Retirement savings accounts**

Schedule 2 amends the *Retirement Savings Accounts Act 1997* to add a regulation making power to the ‘no employer kick back’ provision.

***Date of effect:*** 1 July 2005.

***Proposal announced:*** This measure was announced in the Minister for Revenue and Assistant Treasurer’s Press Release No. 016 of 14 March 2005.

***Financial impact:*** Nil.

***Compliance cost impact:*** Nil.



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# Chapter 1

## Choice of superannuation funds

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### Outline of chapter

1.1 Schedule 1 amends the *Small Superannuation Accounts Act 1995*, the *Superannuation Guarantee (Administration) Act 1992* and the *Superannuation Industry (Supervision) Act 1993* to:

- impose a penalty on employers who recoup from employees the costs from complying with their choice of fund requirements
- specify circumstances where an employer does not have to provide employees with a standard choice form
- clarify a number of matters, including the test for whether a defined benefit fund is in surplus, the obligation on the employer to contribute to the fund specified as the default fund on the standard choice form, that ‘choice of fund’ offered by employers before 1 July 2005 is consistent with the ‘choice’ legislation, and also a clarification of the penalty provisions
- specify that the Australian Securities and Investment Commission (ASIC) will administer the ‘no employer kick back’ provision in the *Superannuation Industry (Supervision) Act 1993*
- allow the Superannuation Holding Accounts Special Account to be an eligible choice fund for employers until 30 June 2006
- close the Superannuation Holding Accounts Special Account to new employer deposits from 1 July 2006.

## **Context of amendments**

1.2 The *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004* received Royal Assent on 30 June 2004. The *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004* amended the *Superannuation Guarantee (Administration) Act 1992* to enable many employees to choose the superannuation fund or retirement savings account to which their employer makes compulsory superannuation guarantee contributions on their behalf.

## **Summary of new law**

1.3 Employers will be able to use the Superannuation Holding Accounts Special Account to meet their choice of fund obligations until 30 June 2006. The Superannuation Holding Accounts Special Account will be closed to new employer deposits from 1 July 2006, meaning employers will have to contribute to a superannuation fund or retirement savings account to meet their superannuation guarantee obligations.

1.4 Employers will be penalised for recouping from employees the costs associated with complying with their choice of fund requirements.

1.5 A fund that has been chosen by an employee prior to 1 July 2005 will be considered a chosen fund for the purposes of the *Superannuation Guarantee (Administration) Act 1992*.

1.6 There will be additional circumstances where an employer does not have to provide an employee with a standard choice form.

1.7 A number of matters will be clarified, including the test for whether a defined benefit fund is in surplus, the obligation on the employer to contribute to the fund specified as the default fund on the standard choice form, and clarification of the penalty provisions.

1.8 ASIC will administer the 'no employer kick back' provision in the *Superannuation Industry (Supervision) Act 1993*.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Employers will be able to use the Superannuation Holding Accounts Special Account until 30 June 2006 to meet their choice of fund obligations if an employee does not choose a fund.	Superannuation Holding Accounts Special Account cannot be used by employers to meet their choice of fund obligations if an employee does not choose a fund.
From 1 July 2006, the Superannuation Holding Accounts Special Account will be closed to new employer deposits.	Employers may contribute to the Superannuation Holding Accounts Special Account to meet their <i>Superannuation Guarantee (Administration) Act 1992</i> obligations.

## Detailed explanation of new law

### Use of Superannuation Holding Accounts Special Account

1.9 The Australian Taxation Office administers an account, known as the Superannuation Holding Accounts Special Account, that allows employers to meet their obligations under the *Superannuation Guarantee (Administration) Act 1992* by depositing money on behalf of their employees in the Superannuation Holding Accounts Special Account.

1.10 The *Superannuation Guarantee (Administration) Act 1992* does not specify the Superannuation Holding Accounts Special Account as an eligible choice fund. As such, employers can not use the Superannuation Holding Accounts Special Account to meet their choice of fund obligations. The definitions of an ‘eligible choice fund’ [Schedule 1, item 7] and a ‘fund’ [Schedule 1, item 8] in the *Superannuation Guarantee (Administration) Act 1992* are amended to include the Superannuation Holding Accounts Special Account until 30 June 2006. Therefore, if an employee does not choose a fund, employers may contribute to the Superannuation Holding Accounts Special Account up until this time.

1.11 Employers will not be able to make new deposits on behalf of employees to the Superannuation Holding Accounts Special Account from 1 July 2006. The *Small Superannuation Accounts Act 1995* is amended to close the Superannuation Holding Accounts Special Account to new employer deposits from 1 July 2006 [Schedule 1, item 1]. The *Superannuation Guarantee (Administration) Act 1992* is amended to say that employer contributions to the Superannuation Holding Accounts Special Account from 1 July 2006 will not allow an employer to meet

their obligations under the *Superannuation Guarantee (Administration) Act 1992* [Schedule 1, item 4]. To meet their superannuation guarantee obligations after 1 July 2006, employers will have to contribute to a superannuation fund or retirement savings account.

### **Charging employees for implementing choice**

1.12 An employer may not recoup part or all of the costs associated with complying with Part 3A of the *Superannuation Guarantee (Administration) Act 1992* by directly charging an employee or directly imposing a cost on an employee. If an employer takes such an action, the contribution made on behalf of an employee will be considered not to have complied with the choice of fund requirements. The employer's individual superannuation guarantee shortfall for the employee for the quarter will be increased in accordance with section 19 of the *Superannuation Guarantee (Administration) Act 1992*. [Schedule 1, item 6]

1.13 This provision does not apply to circumstances where an employee is left financially disadvantaged as a result of their choice of fund decision when the cause is not related to any actions of the employer. For example, if the fund chosen by the employee increases its fees.

### **Choice made prior to 1 July 2005**

1.14 Many employers may have offered their employees a choice of fund prior to 1 July 2005. If an employee exercised their choice prior to 1 July 2005, the fund chosen is deemed to be the chosen fund for the purposes of the legislation. However, if the employer placed restrictions on the choice of funds available to the employee other than those contained in section 32G of the *Superannuation Guarantee (Administration) Act 1992*, any fund chosen prior to 1 July 2005 will not be considered a chosen fund. [Schedule 1, item 9]

### **Exclusions from the requirement to provide employees with a standard choice form**

1.15 Section 32NA of the *Superannuation Guarantee (Administration) Act 1992* provides circumstances where an employer does not have to provide an employee with a standard choice form. These amendments specify additional circumstances when an employer is not required to provide an employee with a standard choice form. [Schedule 1, item 11]

1.16 An employer is not required to provide a standard choice form:

- by 29 July 2005, to an existing employee, where the employee chose a fund prior to 1 July 2005, and that fund is

taken to be the chosen fund. However, if the employee requests a standard choice form after 1 July 2005 the employer must provide the employee with a form within 28 days. Also, if there ceases to be a chosen fund for the employee the employer must provide a standard choice form to the employee.

- if an employee is not eligible to choose a fund. An employer that has an employee who is a member of an unfunded public sector scheme (except a Commonwealth employee who is a member of the Commonwealth Superannuation Scheme or Public Sector Superannuation) does not have to offer the employee choice. An employer does not have to provide a choice of fund to employees that are covered by the circumstances in subsection 20(2) (defined benefit scheme is in surplus) or 20(3) (member has accrued a maximum benefit) of the *Superannuation Guarantee (Administration) Act 1992* or the circumstances in subsection 32F(3) of the *Superannuation Guarantee (Administration) Act 1992*.
- if an employee leaves employment before the time the employer is required to give the employee a standard choice form
- if, as a condition of employment an employee must choose a fund to which the employer will make superannuation contributions on their behalf. This exemption only applies where all employees of the employer have always done this, and the employer does not have an arrangement to make contributions other than to a fund chosen by an employee in the event that an employee failed or refused to choose a fund. Once an employer contributes to a fund (including the Superannuation Holding Accounts Special Account) other than one chosen by an employee, or even makes arrangements to do so, the employer can no longer benefit from this exemption. The employer would have to give its employees a standard choice form which nominates that fund. If an employee fails or refuses to choose a fund, the employer must make contributions to a fund to avoid incurring an superannuation guarantee shortfall. This provision does not exempt the employer from its superannuation guarantee obligations if an employee does not choose a fund.

### **Defined benefit fund in surplus**

1.17 One of the requirements for a defined benefit fund to be considered to be in surplus is for an actuary to provide a certificate stating that, in their opinion, at all times for the relevant period, the assets of the fund are, and will be, equal to or greater than 110 per cent of the fund's liabilities.

1.18 However, it will be extremely difficult for an actuary to certify that this condition holds and will continue to hold at all times during a quarter. Therefore, where an actuary certifies that there is a high probability that the assets of the fund are, and will be, equal to or greater than 110 per cent of the fund's liabilities, the fund will be taken to be in surplus. For this purpose, a high probability is to be interpreted as a probability of at least 70 per cent. The Institute of Actuaries of Australia has been asked to provide guidance to actuaries on the preparation of these certificates. *[Schedule 1, item 3]*

### **Contributions if an employee does not make a choice**

1.19 If an employee does not make a choice, an employer complies with the *Superannuation Guarantee (Administration) Act 1992* if they contribute to a fund that is an eligible choice fund that complies with the insurance requirements in the regulations. This fund should be the fund specified on the standard choice form as the fund the employer will make contributions to if an employee does not make a choice, or the fund that will be specified on the standard choice form once the employer provides the employee with the standard choice form in accordance with section 32N of the *Superannuation Guarantee (Administration) Act 1992*. *[Schedule 1, item 5]*

1.20 However, circumstances may exist where an employer specifies a fund on the standard choice form that turns out to be a fund that the employer cannot contribute to on behalf of an employee and the employer realises this before a contribution is made to the fund. To avoid a situation where an employer would incur either a superannuation guarantee penalty or a choice of fund penalty, an employer may contribute to an alternative fund to the one specified on the standard choice form as long as the employer provides the employee with a standard choice form within 28 days of the employer becoming aware of the problem. *[Schedule 1, items 5 and 10]*

1.21 This provision does not prevent an employer changing voluntarily the fund to which it has been contributing to on behalf of an employee that has not chosen a fund.

## Penalty provisions

1.22 The penalty regime for employers that do not comply with their choice of fund obligations is set out in sections 19 and 19A of the *Superannuation Guarantee (Administration) Act 1992*. Subsection 19(2E) allows the Commissioner of Taxation (Commissioner) to reduce the amount of an increase imposed by subsection 19(2A) or (2B) in an employer's individual guarantee shortfall for an employee. Section 19A caps the size of any penalty imposed by subsections 19(2A) and (2B) to \$500 per employee per notice period. The intention of the legislation is that any decision by the Commissioner to reduce the shortfall is to take place after the shortfall had been capped at \$500, if such capping was necessary. The amendment ensures that this is clear. [Schedule 1, item 2]

1.23 For example, an employer's individual guarantee shortfall for a notice period is calculated to be \$850. If the Commissioner applied a 10 per cent reduction to this figure it would reduce the penalty to \$765. Applying the cap would reduce it to \$500. However, the intention is for the cap to be applied first, reducing the penalty from \$850 to \$500, then the Commissioner would apply the 10 per cent reduction to the \$500, reducing the penalty to \$450.

## No employer kick back rule

1.24 The *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004* inserted a 'no employer kick back' rule in Part 7 of the *Superannuation Industry (Supervision) Act 1993* (section 68A) based on the existing provision in the *Retirement Savings Accounts Act 1997*. At present, section 6 of the *Superannuation Industry (Supervision) Act 1993* gives the Australian Prudential Regulation Authority responsibility for administering Part 7, except for section 64A and matters that relate to self managed superannuation funds. The amendment makes ASIC the agency responsible for administering the no employer kick back rule, as it does under the *Retirement Savings Accounts Act 1997*. [Schedule 1, items 12 to 14]





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## **Chapter 2**

### ***Retirement savings accounts***

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#### **Outline of chapter**

2.1 Schedule 2 amends the *Retirement Savings Accounts Act 1997* to add a regulation making power to the ‘no employer kick back’ provision.

#### **Context of amendments**

2.2 The *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004* inserted a ‘no employer kick back’ rule in the *Superannuation Industry (Supervision) Act 1993* based on the existing provision in the *Retirement Savings Accounts Act 1997*. A regulation making power was included in the *Superannuation Industry (Supervision) Act 1993* provision, allowing exemptions to the rule to be made. Similar exemptions should be allowed for retirement savings account providers as for superannuation fund trustees.

#### **Summary of new law**

2.3 A regulation making power will be added to the ‘no employer kick back’ provision in the *Retirement Savings Accounts Act 1997*. This will enable exemptions to be made for retirement savings account providers or associates of retirement savings account providers from the requirement in the legislation to not supply or offer to supply goods or services to an employer on the condition that one or more of their employees holds a retirement savings account with the provider.

#### **Comparison of key features of new law and current law**

<i>New law</i>	<i>Current law</i>
Section 78 of the <i>Retirement Savings Accounts Act 1997</i> will allow regulations to be made to exempt providers from the provision.	Section 78 of the <i>Retirement Savings Accounts Act 1997</i> does not allow regulations to be made to exempt providers from the provision.

## **Detailed explanation of new law**

2.4 A regulation making power will be added to subsections 78(1) [*Schedule 2, item 1*] and 78(2) [*Schedule 2, item 2*] of the *Retirement Savings Accounts Act 1997* to enable exemptions to be made to prescribe certain exemptions to the general rule. This will make section 78 of the *Retirement Savings Accounts Act 1997* consistent with section 68A of the *Superannuation Industry (Supervision) Act 1993*.

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# ***Index***

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## **Schedule 1: Choice of superannuation funds**

<i>Bill reference</i>	<i>Paragraph number</i>
Item 1	1.11
Item 2	1.22
Item 3	1.18
Item 4	1.11
Item 5	1.19, 1.20
Item 6	1.12
Item 7	1.10
Item 8	1.10
Item 9	1.14
Item 10	1.20
Item 11	1.15
Items 12 to 14	1.24

## **Schedule 2: Retirement savings accounts**

<i>Bill reference</i>	<i>Paragraph number</i>
Item 1	2.4
Item 2	2.4