TREASURY LAWS AMENDMENT (YOUR SUPERANNUATION, YOUR CHOICE) BILL 2019

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for Housing and Assistant Treasurer, the Hon Michael Sukkar MP)
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# Glossary

The following abbreviations and acronyms are used throughout this Explanatory Memorandum.

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<thead>
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<th>Abbreviation</th>
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<td>Bill</td>
<td>Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019</td>
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<td>SGAA 1992</td>
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General outline and financial impact

Choice of fund for workplace determinations and enterprise agreements

This Bill reintroduces amendments to the SGAA 1992 that were previously introduced into the 45th Parliament on 14 September 2017 through Schedule 1 to the Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017.

The amendments ensure employees under workplace determinations or enterprise agreements have an opportunity to choose the superannuation fund for their compulsory employer contributions.

**Date of effect:** This measure applies to new workplace determinations and enterprise agreements made on or after 1 July 2020.

**Proposal announced:** This measure was announced on 20 October 2015 in the Government’s response to the Financial System Inquiry.

**Financial impact:** Nil.

**Human rights implications:** This Bill does not raise any human rights issue. See *Statement of Compatibility with Human Rights* — Chapter 2, paragraphs 2.1 to 2.4.

**Compliance cost impact:** Low.

Summary of regulation impact statement

The following summary is for the regulation impact statement that was published for this measure when it was introduced through Schedule 1 to the Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017.¹

To prevent retrospective application, this Bill revises the original start date considered by Option 2 to 1 July 2020.

¹ The full regulation impact statement can be accessed online through the Australian Parliament House website: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fbill%2Fr5975%22
Regulation impact on business

**Impact:** Total annual average regulatory cost is $5.646 million; $2.245 million for business and superannuation funds and $3.401 million for individuals.

**Main points:**

- Some workers cannot choose the superannuation fund into which their compulsory employer superannuation is paid. This puts them out-of-step with the majority of workers and prevents them making key decisions around their retirement savings, can result in the payment of unnecessary fees and insurance premiums, and can reduce competition between superannuation funds.

- Choice of fund for compulsory contributions can be restricted by some employers under Commonwealth legislation. Without Government action individuals under certain collective agreements will continue to face restricted choice of fund.

- Three options were considered.
  - Maintain the status quo (Option 1)
  - Extend choice to employees under new enterprise agreements and workplace determinations (Option 2)
  - Extend choice to all employees under existing and new enterprise agreements and workplace determinations, and employers must offer a choice of fund form to all existing employees (Option 3)

- Treasury undertook public consultation (for 6 weeks) on draft legislation and explanatory material for Option 2.

- Option 2 is considered the best option because it extends choice in a meaningful way while minimising compliance costs for employers.

- Legislative amendments are required to implement Option 2. The associated obligations on industry are an established part of the superannuation regime and can be readily made. There are multiple official Government-Industry working groups for participants in the superannuation industry to communicate any issues with the implementation of the policy. The Australian Taxation Office also provides guidance on compliance with superannuation obligations.
Chapter 1
Choice of fund for workplace determinations and enterprise agreements

Outline of chapter

1.1 This Bill reintroduces amendments to the SGAA 1992 that were previously introduced into the 45th Parliament on 14 September 2017 through Schedule 1 to the Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017.

1.2 The amendments ensure employees under new workplace determinations or enterprise agreements have an opportunity to choose the superannuation fund for their compulsory employer contributions.

1.3 All legislative references in this chapter are to the SGAA 1992 unless otherwise indicated.

Context of amendments

1.4 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.

1.5 Currently some employees do not have the right 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 1992. 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.

1.6 Lack of choice of fund for all workers disadvantages some Australians and contributes to employees having multiple superannuation accounts and paying multiple sets of fees and insurance premiums, which can reduce their retirement income. It also leads to member disengagement with their superannuation.

1.7 The Productivity Commission in its final report on Superannuation: Assessing Efficiency and Competitiveness found that legislative change to remove the current choice of fund restrictions was needed.
Summary of new law

1.8 This Bill amends the SGAA 1992 to ensure employees under workplace determinations or enterprise agreements have the right to choose their superannuation fund. This applies only to new workplace determinations and enterprise agreements made on or after 1 July 2020.

1.9 Given the importance of compulsory superannuation contributions to individuals' retirement incomes, individuals should be able to decide where their compulsory superannuation goes.

1.10 Expanding choice of fund will also reduce the need for multiple accounts involving multiple fees and insurance premiums, which can erode retirement savings.

1.11 Giving more employees choice of fund also aims to promote member engagement and reduce fees through increased competition.

1.12 The Government announced this on 20 October 2015 in its response to the Financial System Inquiry.

Comparison of key features of new law and current law

<table>
<thead>
<tr>
<th>New law</th>
<th>Current law</th>
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<tr>
<td>Compulsory employer superannuation contributions to a fund under, or in accordance with, a workplace determination or enterprise agreement made before 1 July 2020 will comply with the choice of fund requirements.</td>
<td>Compulsory employer superannuation contributions to a fund under, or in accordance with, a workplace determination or enterprise agreement comply with the choice of fund requirements.</td>
</tr>
<tr>
<td>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 on or after 1 July 2020. New employees to whom such a determination or agreement applies must be provided with a standard choice form and if there is no chosen fund for a new employee the default fund arrangements apply. An employer does not have to provide existing employees with a form unless requested once a new determination or agreement is made. Where there is no chosen fund for an existing</td>
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<tr>
<td>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.</td>
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Choice of fund for workplace determinations and enterprise agreements

<table>
<thead>
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<th>New law</th>
<th>Current law</th>
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<tr>
<td>employee, an employer that continues to make compulsory contributions for that employee with the same fund, in accordance with the previous determination or agreement, will comply with the choice of fund requirements.</td>
<td>Notional contributions for an employee in relation to a defined benefit scheme will not cause an employer to have an increase in their superannuation guarantee shortfall if the employee’s benefit in the scheme would not be affected by the employer making contributions to another fund.</td>
</tr>
<tr>
<td>Notional contributions for an employee in relation to a defined benefit scheme may cause an employer to have an increase in their superannuation guarantee shortfall even if the employee’s benefit in the scheme would not be affected by the employer making contributions to another fund.</td>
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Detailed explanation of new law

Existing arrangements for choice of fund

1.13 Part 3A 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.

1.14 Division 2 of Part 3A outlines when contributions made by an employer satisfy the choice of fund requirements. Under subsection 32C(1), contributions made to a chosen fund for an employee or to certain unfunded public sector schemes satisfy the choice of fund requirements. Subsection 32C(2) sets out contributions that 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 section 32C set out other circumstances where contributions made to a fund are in compliance with the choice of fund requirements.

1.15 Specifically, subsection 32C(6) 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.

1.16 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 under either
subsection 19(2A) or (2B). This increases the employer’s liability to superannuation guarantee charge which is paid to the Commissioner of Taxation 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.

1.17 Division 6 of Part 3A outlines employer obligations to provide standard choice forms to employees. Section 32N 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 employer 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.

1.18 Section 32NA sets out the circumstances when an employer does not need to provide a standard choice form, including if the employer is making contributions of a kind mentioned in subsections 32C(3) to (9) for the benefit of the employee.

**Defined benefit schemes**

1.19 Division 4 of Part 3A sets out a process to be followed when an employee is choosing a fund. Subsection 32F(3) ensures that employees who are existing 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.

1.20 According to subsections 32NA(7), (8) and (9), an employer is not required to give an employee who is an existing member of a defined benefit scheme a standard choice form where:

- the scheme is in surplus and subsection 20(2) is satisfied;
- the employee has accrued their maximum benefit in the scheme and subsection 20(3) is satisfied; or
- the employee’s benefits in the scheme will remain the same if the employer makes contributions to another fund for the employee.

1.21 These provisions effectively deny choice of fund to certain existing employees who are members of defined benefit schemes. Employers who do not provide choice according to these provisions can be relieved from an increase in their superannuation guarantee shortfall under subsection 19(2B) if section 20 applies.
1.22 Section 20 applies to an employer where the employee is a member of a defined benefit scheme and either subsection 20(2) or (3) is satisfied. Subsection 20(2) is satisfied if the employee has been a member of the defined benefit fund since before 1 July 2005 and the fund is in surplus. Subsection 20(3) is satisfied if the member has accrued their maximum benefit in the fund. Subsections 20(2) and (3) mirror subsections 32NA(7) and (8), however, section 20 does not contain an equivalent to subsection 32NA(9).

**Extending choice of fund**

1.23 This Bill amends subsection 32C(6) to limit the circumstances in which an employer can satisfy the choice of fund requirements by contributing to a superannuation fund under, or in accordance with, a workplace determination or enterprise agreement to where that determination or agreement was made before 1 July 2020.

1.24 Where a workplace determination or enterprise agreement is made on or after 1 July 2020, an employer will need to allow employees to choose their own superannuation fund (unless other circumstances exempt the employer from doing so). [Schedule 1, items 5 and 6, paragraphs 32C(6)(g) and (h)]

1.25 This will require the employer to give a standard choice form to an employee in the circumstances set out in section 32N, including on commencement of employment and on written request from an employee. A new employee will be able to choose a fund for their compulsory superannuation contributions. If a new employee does not choose a fund, the employer must contribute to the fund that is specified in the standard choice form provided in accordance with the default fund provisions in subsection 32C(2).

1.26 Existing employees will not need to be given a standard choice form where a workplace determination or enterprise agreement is made on or after 1 July 2020. However, they will be able to request a choice of fund form from their employer and the employer will be required to act on this request in accordance with Division 4 of Part 3A.

1.27 Where an existing employee does not choose their own superannuation fund, the employer will be able to continue to make compulsory superannuation contributions to the same fund that the employer previously contributed to for the employee under, or in accordance with a workplace determination or enterprise agreement made before 1 July 2020. An employer will also be able to specify this fund as a default fund in a standard choice form provided on request to the existing employee. [Schedule 1, item 7, subsection 32C(6AA)]

1.28 This Bill does not make any changes to the default fund provisions.
1.29 Where a workplace determination or enterprise agreement made on or after 1 July 2020 includes a term that restricts choice (for example, if the determination or agreement was made without appreciating the changes made by this Bill), such a term will not be enforceable under section 32Z to the extent that the employer instead makes contributions to an employee’s chosen fund. Examples of terms which restrict choice include terms that specify the name of the fund to which the employer must contribute, or terms that list several funds the employer must choose between to make contributions to.

1.30 The amendments to the choice of fund requirements also apply to employers who make contributions to defined benefit schemes on behalf of their employees who are members. The exemptions from providing choice to employees who are existing members of certain defined benefit schemes continue to apply. Existing employees who are not defined benefit members and who become newly eligible to join a defined benefit scheme do not need to be given a standard choice form unless requested (or another subsection of section 32N applies). New employees who are not existing defined benefit members but who are eligible to join a defined benefit scheme must be given a standard choice form within 28 days of commencing employment. Once an employee is a member of a defined benefit scheme the exemptions from the choice of fund requirements will apply where relevant.

1.31 The amendments to the choice of fund requirements only apply to workplace determinations or enterprise agreements made on or after 1 July 2020. They do not apply to workplace determinations or enterprise agreements made before that day. Enterprise agreements that are made before 1 July 2020, but which apply after that day, will not be affected by these amendments. When a determination or agreement is ‘made’ and ‘applies’ is determined in accordance with the Fair Work Act 2009.

1.32 The consequences of a workplace determination or enterprise agreement applying to an employee and employer are that the determination or agreement imposes obligations on the parties and gives them entitlements. Subsection 32C(6) provides that a contribution made under, or in accordance with certain specified industrial instruments complies with the choice of fund requirements. For a contribution to be made ‘under, or in accordance with’ a listed industrial instrument it must apply for the purposes of the Fair Work Act 2009.

1.33 The terms ‘workplace determination’ and ‘enterprise agreement’ have the same meaning they have in the Fair Work Act 2009. Whether a determination or agreement is ‘made’ and ‘applies’ is determined in accordance with the Fair Work Act 2009.

1.34 A workplace determination is made by the Fair Work Commission and operates from the day on which it is made. The Fair Work Act 2009 applies to a workplace determination that is in operation as
if it were an enterprise agreement that is in operation (with some exceptions). This means that a workplace determination will also apply to an employee, employer or employee organisation once it is in operation and covers the employee, employer or organisation.

1.35 An enterprise agreement is made when a majority of employees vote to approve the agreement. However, the enterprise agreement does not operate until at least seven days after the agreement is approved by the Fair Work Commission. An enterprise agreement applies to an employee, employer or employee organisation if it is in operation and covers the employee, employer or organisation.

1.36 In the time between when an enterprise agreement is made and when it applies, employment rights and obligations are governed by the existing agreement. This means that during this period, an employer should continue to make contributions in accordance with the existing agreement that applies to the employee and employer.

**Defined benefit scheme exemption from increased shortfall**

1.37 The amendments made by this Bill recognise 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 applies when the employee’s benefit from the scheme on retirement, resignation or retrenchment would not be affected by their employer making contributions for their benefit 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). [Schedule 1, items 1 to 4, paragraph 19(2B)(c), section 20, subsection 20(1) and subsection 20(3A)]

1.38 This is a technical amendment to clarify that employers do not have an increased individual superannuation guarantee shortfall under subsection 19(2B) where the employer has not given an employee a choice of fund form in accordance with subsection 32NA(9).
Chapter 2
Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Choice of fund for workplace determinations and enterprise agreements

2.1 This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview

2.2 This Bill amends the Superannuation Guarantee (Administration) Act 1992 to ensure employees under new workplace determinations or enterprise agreements have an opportunity to choose the superannuation fund for their compulsory employer contributions.

Human rights implications

2.3 This Bill does not engage any of the applicable rights or freedoms.

Conclusion

2.4 This Bill is compatible with human rights as it does not raise any human rights issues.