Senate Economics Committee

Inquiry into the Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2005

Submission by Australian Administration Services Pty Ltd

20th June 2005

Australian Administration Services ("AAS") appreciates the opportunity to make a submission to this inquiry.

AAS is one of Australia's largest providers of administration and customer services to the industry and corporate superannuation market. We currently provide these services to over 3.5 million members and 165,000 employers.

1) Superannuation Holding Accounts Special Account

Under the proposed amendments employers will be able to use the Superannuation Holding Accounts Special Account ("SHASA") until 30th June 2006 to meet their choice of fund obligations.

We query why this is the case.

The Superannuation Guarantee legislation has been in place since 1992. The Superannuation Holdings Account Reserve, the forerunner to SHASA, was established to provide for circumstances where an employer could not find a superannuation fund prepared to accept contributions in respect of its employee.

It is difficult to understand how it can continue to be contended that an employer is unable to find a superannuation fund prepared to accept contributions on behalf of employees. There are any number of superannuation funds and Retirement Savings Accounts ("RSA"s) which are able to accept contributions from employers for employees.

Obviously the administration of the SHASA diverts resources within the Australian Taxation Office.

Of even greater import, however, from the employees' perspective is that the SHASA does not credit any earnings from the investment of the money contributed to the benefit of the employees' individual interest in the account – all that the employee is entitled to receive is the sum of the capital amounts contributed, irrespective of the period within the SHASA.

Recommendation: - That this amendment not proceed and that employers will not be able to use the SHASA to meet their choice of funds obligations but instead must contribute to a superannuation fund or RSA.

2) Contributions if an employee does not make a choice Proposed new paragraph 32C(2)(ba)

Currently sub-section 32C(2) effectively provides that, if an employee does not make a choice, an employer complies with the choice requirements if they contribute to *any* fund which is an eligible choice fund complying with the insurance requirements in the regulations. It does not require the contributions to be made to the fund nominated on the Standard Choice Form under section 32P.

The writer identified this anomaly in a submission to Treasury dated 30th November 2004 and we are pleased to see that the proposed insertion of new paragraph (ba) purports to ensure that the fund should be the fund specified on the Standard Choice Form.

The drafting of the proposed paragraph (ba) is, however, a little unclear.

The proposed new sub-paragraph (ba)(i) is drafted as follows: -

> *"(ba) the fund either:*
>
> *A) is specified under section 32P in the standard choice form provided as the fund to which the employer will contribute for the benefit of the employee if the employee does not make a choice or will be so specified within the time specified in section 32N for the provision of a standard choice form to the employee; or"*

The concept of "the fund … specified … in the standard choice form provided" is readily apparent. On the other hand, while we appreciate the intent, "the fund … [which] … **will be so specified** within the time specified in section 32N" is less than clear.

Recommendation – That the second occurrence of the word “specified” be amended to the word “provided”.

The proposed new sub-paragraph (ba)(ii) is drafted as follows: -

> *B) “if the employer has not contributed, and cannot contribute, to a fund (the **first employer fund**) that was so specified or that was purportedly so specified—will be so specified within 28 days of the employer becoming aware that the employer cannot contribute to the first employer fund; and”*

Firstly, the requirement that the employer “has not contributed” to the first employer fund is too restrictive. In circumstances where, for example, the first employer fund had been an eligible choice fund (to which the employer had contributed) but the employer has become aware that it has ceased to be an eligible choice fund, or where the employer had contributed in the mistaken belief that it were an eligible choice fund, the employer would be precluded from relying on this sub-paragraph.

Secondly – it is not readily apparent what it means to “purportedly specify” a first employer fund in a Standard Choice Form – either a fund is specified or it is not. It may not have been specified correctly but that is another matter.

Recommendation: - That the words “has been contributed” and “or that was purportedly so specified” be deleted.

Finally, the requirement that the fund “will be so specified within 28 days of the employer becoming aware that the employer **cannot contribute** to the first employer fund” (emphasis added”) is too restrictive. This sub-paragraph also needs to provide for the circumstances where the employer has become aware that the fund has ceased to be an eligible choice fund.

Recommendation: - That the words “or that the fund has ceased to be an eligible choice fund for that employee” be inserted at the end of sub-paragraph(ba)(ii).

Alternate recommendation: -That, instead of draft paragraph (ba) being inserted into sub-section 32C(2) as proposed, an approach whereby a cross-reference to the fund specified in the Standard Choice Form provided in accordance with section 32N be adopted.

3)

Choice made prior to 1st July 2005
Proposed new sub - section 32F(1A)

The EM at page 8 states that: -

> *"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" (emphasis added).*

Proposed new sub-section 32F(1A) states as follows: -

> *"(1A) If:*
>
> *(a) an employer has offered an employee a choice of fund before 1 July 2005; and*
>
> *(b) the employee has chosen a fund in accordance with the choice of funds that is offered; and*
>
> *(c) the limitations on that choice are consistent with section 32G or, if the choice was made before the commencement of that section, would have been consistent with section 32G if the section had been in force at the time the choice was made;*
>
> *then, for the purposes of this Part, any fund chosen by the employee is taken to be the chosen fund for the employee with effect from:*
>
> *(d) 1 July 2005; or*
>
> *(e) a date that is 2 months after the fund is so chosen (unless the employer determines an earlier time after 1 July 2005 but within that 2 months);*
>
> *whichever last occurs".*

Firstly, the EM states that this sub-section is to apply in circumstances where the employee has **exercised their choice prior to 1st July 2005**. Unfortunately, the only temporal restriction in proposed new sub-section 32F(1A) is that in paragraph (a) - that the **employer has offered** an employee a choice of fund **before 1st July 2005**.

This is further confused by the fact that paragraph (c) acknowledges that the choice may have been made after the date of commencement of section 32G – 1st July 2005.

Paragraph (c) also refers to "**if** the **choice** was made before the commencement of … section [32G] … [limitations being] consistent with section 32G if the section had been in force at the time the **choice** was made" as an additional possibility to the **choice** having been made after the commencement of section 32G.

Also, paragraph (e) provides that any such fund chosen in response to an offer by the employer made prior to 1 July 2005 is taken to be the chosen fund with effect from 1st July 2005 or "*a date … 2 months after the fund is so chosen … whichever last occurs"* without the imposition of any end-date. Effectively, as this is open-ended, this could extend indefinitely into the future, although pragmatically there may be a natural limit. Is this what was intended?

We note at this point that proposed new sub-section 32NA(3) refers to circumstances whereby an employer is not required to give an employee a standard choice form if the employee has chosen a fund **before 1 July 2005.**

Finally, paragraph (c) merely states that "*the limitations on that choice **are consistent** with section 32G".* Unfortunately section 32G as enacted only serves to place limits on the funds which may be **chosen by an employee** (namely that it must be an eligible choice fund and one to which the employer can make contributions) – it does not purport to deal with the funds which an **employer offers** on their Standard Choice Form. Accordingly, it is difficult to construe the meaning of limitations in the employer's offer being consistent with section 32G.

Recommendation: - That, as it does not reflect the policy intent outlined in the EM, proposed new sub-section 32F(1A) be re-drafted.

4) Exclusions from the Requirement to Provide Employees with a Standard Choice Form

A) Proposed new sub-sections 32NA(3)

An employer is not required to give a standard choice form if the employee has chosen a fund before 1 July 2005 and the fund so chosen is to be taken, in accordance with subsection 32F(1A), to be the chosen fund for that employee.

We note the difficulties outlined above with sub-section 32F(1A) and that these will need to be resolved for this sub-section to have full effect.

B) Proposed new sub-sections 32NA(4), (7), (8) and (9)

Under proposed new sub-section 32NA(4) an employer will not be required to give a standard choice form if the employee:

(a) is a member of an unfunded public sector scheme; and
(b) is not a Commonwealth employee who is a member of the CSS \ PSS.

Similarly, under proposed new sub-sections 32NA(7), 32NA(8) and 32NA(9)an employer will not be required to give a standard choice form if the employee is a defined benefit member who is not eligible for choice.

These were notable omissions from section 32NA, identified by the writer in a submission to Treasury dated 30th November 2004, and we commend their inclusion.

C) Proposed new sub-section 32NA(6)

An employer is not required to give an employee a standard choice form if

(a) it is a condition of the employment of that employee that the employee choose a fund from funds that include all funds that are eligible choice funds for the employer at the time the choice is made; and

(b) the employer does not have an arrangement to pay contributions to a fund for the benefit of an employee in the event that the employee failed or refused to choose a fund.

We find this a little anomalous on two fronts: -

- there is an existing exemption under sub-section 32NA(1) with respect to employees who have already selected a fund which would be suitable for this purpose; and
- we query the appropriateness of an employer "not [being able to] have an arrangement to pay contributions to a fund for the benefit of an employee in the event the employee failed or refused to choose a fund" given, as the EM correctly points out, that "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".

Should you have any queries with respect to this, please do not hesitate to contact the writer.

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