

The Senate

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Select Committee on Superannuation

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Provisions of the Superannuation Legislation  
Amendment (Choice of Superannuation Funds)  
Bill 2002

November 2002

Commonwealth of Australia

ISBN 0 642 71198 4

This report was printed by the Senate Printing Unit, Parliament House, Canberra,  
ACT 2600.

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## **Terms of Reference**

On 21 August 2002 the provisions of the following bills were referred to the Select Committee on Superannuation for inquiry and report on 26 September 2002:

- Superannuation (Government Co-contribution for Low Income Earners) Bill 2002
- Superannuation Legislation Amendment Bill
- Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002

On 26 September 2002, the Committee reported on the first two bills.

On 19 September 2002 the Committee sought and was granted an extension of time to present its report on the Choice of Superannuation Funds Bill to 16 October 2002.

On the 16 October 2002, the Committee sought and was granted an extension of time to present its report on the Choice of Superannuation Funds Bill to 12 November 2002.



## **List of Abbreviations**

ABA	Australian Bankers' Association
ABS	Australian Bureau of Statistics
ACA	Australian Consumers' Association
ACCC	Australian Competition and Consumer Commission
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AIG	Australian Industry Group
AIRC	Australian Industrial Relations Commission
AIST	Australian Institute of Superannuation Trustees
APRA	Australian Prudential Regulation Authority
ASFA	Association of Superannuation Funds of Australia
ASIC	Australian Securities and Investments Commission
ATO	Australian Taxation Office
AWA	Australian Workplace Agreement
Cbus	Construction and Building Unions Superannuation
CPA	Certified Practising Accountants
CSA	Corporate Super Association
CSS	Commonwealth Superannuation Scheme
EM	Explanatory Memorandum
FPA	Financial Planning Association
IFSA	Investment and Financial Services Association
Mercer	Mercer Human Resource Consulting
MTAA	Motor Trades Association of Australia

NFF	National Farmers' Federation
OMC	Ongoing Management Charge
RSA	Retirement Savings Account
RS&R Award	Repair, Services and Retail Award
PSS	Public Sector Superannuation
UNSW	University of New South Wales
SG	Superannuation Guarantee
SOS	Society of Superannuants



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## Preface

The Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002 is designed to provide employees with choice as to where their superannuation guarantee contributions paid by their employer are directed. The Government believes that providing individual employees with choice will increase competition, efficiency and performance in the superannuation industry, and other things being equal, will ultimately result in reduced fees and charges for individual employees.

The Government has attempted to introduce choice of superannuation fund on two previous occasions, in 1997 and 1998, but it was unsuccessful, with the 1998 bill negated in the Senate at the second reading stage in August 2001. However, the current Bill differs from the original 1997 Bill in key respects, in that it aims to:

- provide for unlimited choice for employees when choosing funds;
- make available to employees a standard choice form to assist them when choosing between funds;
- provide for the default fund to be selected by reference to a current employee's current fund, and where the employee is a new employee, by reference in the first instance to the relevant Commonwealth or Territory award;
- prescribe minimum levels of insurance in respect of death that the default funds must offer members in order to comply; and
- provide a different and more flexible penalty regime, within a strict liability framework.

During the inquiry, the Committee received evidence from a broad range of parties, including consumer groups, superannuation funds and associations, financial industry organisations, professional financial and human resource organisations, peak employer and employee groups, and government departments. Given the short time frame for the receipt of evidence, the Committee commends participants for the high standard of submissions and oral evidence provided.

The Committee notes that while the majority of evidence supported either the proposed Bill or the principle of choice, most witnesses drew attention to a number of issues which would need to be addressed prior to the successful implementation of choice in Australia. In addition, the Committee notes that concerns have been raised about the constitutionality of the proposed penalty regime.

A key issue associated with choice is portability of superannuation benefits. During the inquiry, the Government released a consultation paper on portability. Under the proposed arrangements, portability would relate to the balance of existing funds at 1 July 2004, while choice would relate to contributions made after 1 July 2004.

The Committee acknowledges and supports the principle of choice, with adequate protections, and the right of individuals to be involved with the selection of their

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superannuation funds. However, the Committee believes that there are a number of issues in the Bill which the Government will need to reconsider or clarify, including the proposed arrangements for:

- the default fund;
- defined benefit schemes;
- death and invalidity insurance;
- death benefits;
- the compliance burden on businesses;
- the impact of fees and charges; and
- the level and nature of employer fines, following receipt of advice on their constitutionality.

The Committee also notes that for choice of fund to be successfully introduced in Australia, other issues not directly related to the provisions of the Bill also need to be addressed. Noting that an education campaign is planned, these include:

- improving the existing consumer protection regime by enhancing the current disclosure provisions, including adopting a standardised disclosure regime, which has been consumer comprehension tested, and establishing a special financial advisory unit within ASIC to provide guidance to consumers contemplating the choice of a superannuation fund; and
- clarifying the proposed details of the arrangements for portability.

All members of the Committee recommend the Government examine the issues raised by the Committee in this report and Government members of the Committee recommend that the Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002 be passed.

**Senator John Watson**  
**Committee Chair**







# Chapter One

## Introduction

### Introduction

1.1 In addition to providing information on the referral of the Bill to the Committee and the conduct of the Committee's inquiry, this chapter also provides information on:

- the purpose of the Bill; and
- background information on the two previous attempts to introduce choice of fund at the federal level in Australia.

### Referral of the Bill to the Committee

1.2 The provisions of Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002 (the Choice Bill) were referred to the Committee on 21 August 2002, for inquiry and report by 26 September 2002. This followed the recommendation of the Senate Selection of Bills Committee in Report No 6 of 2002.

1.3 In recommending that the Choice Bill be referred to the Committee, the Selection of Bills Committee noted:

The Bill proposes a substantial change to the existing regulated superannuation industry and in its current form may result in vastly different retirement incomes for many Australians. The claims made in the Explanatory Memorandum to the Bill must be tested against evidence to the contrary.

1.4 On 19 September 2002, the Senate extended the reporting date for the inquiry from 26 September 2002 to 16 October 2002. On 16 October a further extension was granted until 12 November 2002.

### Conduct of the inquiry

1.5 The Committee advertised the inquiry in *The Australian* on Wednesday 28 August 2002, inviting interested persons to make submissions. It should be noted that at the same time as the Committee was considering the Choice Bill, it was also considering two other bills relating to the proposed Government co-contribution and the surcharge. The evidence on the three bills was taken concurrently.

1.6 In addition, the Committee was also partway through a much more broader inquiry into superannuation and standards of living in retirement, during which the issue of choice had also been raised.<sup>1</sup>

1.7 Although the inquiry into the Choice Bill was conducted over a short period, the Committee received a number of submissions and other material in connection with the Bill. However, the short timeframe was criticised by some interested parties as prohibiting the completion of a detailed submission. In some cases personal submissions were made as individuals were not able to gain formal organisational clearance before lodging submissions. The Committee acknowledges the concerns of the industry at the tight time frame for preparing submissions. A list of all submissions received on the three bills is at **Appendix 1**.

1.8 The Committee held initial hearings in Melbourne on 2 and 3 September, with further hearings held in Canberra on 11 and 19 September 2002. A list of those who gave evidence on the three bills is at **Appendix 2**. A list of documents tabled at the hearings is at **Appendix 3**.

## **Purpose of the Bill**

1.9 Currently employers must pay their employees' Superannuation Guarantee (SG) contributions into the fund determined by the relevant award or industrial agreement. In the absence of an award or agreement, the employer may determine the fund. The policy objective of the Choice Bill 2002 is to provide employees with choice as to which complying superannuation fund or Retirement Savings Account (RSA) receives SG contributions made on their behalf by their employer. The Government believes that providing individual employees with choice will increase competition and efficiency in the superannuation industry, leading to improved returns on superannuation savings and placing downward pressure on fund administration charges.

1.10 Proposing an unlimited choice of fund regime, the Choice Bill 2002 includes the following proposed provisions:

- a) An employer is required to provide an employee with a standard choice form within 28 days of the commencement of their employment or at the employee's request, although there may be only one such request every 12 months. The employer must also indicate at that time the default fund if the employee does not indicate a choice of funds;
- b) The employee may indicate on the standard choice form the fund to which they would like their SG contributions to be made. They must do so within 28 days of receiving the form;

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1 The terms of reference for the Committee's inquiry into superannuation and standards of living in retirement were announced on 14 March 2002, with the report now due to be presented on 10 December 2002.

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- c) If the employee fails to choose an eligible fund within the specified time (28 days), the employer is required to contribute to the default fund;
  - d) Employers may be served a contravention notice and be subject to financial penalties if they fail to give effect to valid employee choices; and
  - e) Choice will be subject to the terms of workplace agreements which provide employees with a choice of superannuation fund for their employer contributions.

1.11 The measures proposed in the Choice Bill are intended to commence from 1 July 2004. Employers will be required to provide superannuation support in compliance with the choice of fund provisions from this date on.

1.12 An outline of the main provisions of the Choice Bill are at **Appendix 4**.

1.13 The Government has attempted to introduce choice of superannuation fund on two previous occasions, in 1997 and 1998, but was unsuccessful. The Choice Bill is similar to the 1998 Bill in key respects in that it:

- maintains employees' unlimited choice;
- maintains the selection of the default fund by first using the fund nominated in the relevant industrial award; and
- makes available to employees a standard choice form to assist in choosing between funds.

1.14 A notable change in the current Bill, however, is the inclusion of a strict liability penalty regime for non-compliance by employers with the provisions of the Bill. Proposed sections 32T and 32U outline offences which attract penalties of up to 60 units for each individual offence where an employer fails to provide an employee with a standard choice form, or fails to contribute to a fund or an RSA that is a complying fund. Under the 1998 Bill, the penalty regime was tied to the SG system, which meant that an employer not providing choice would have been penalised in the same manner as an employer not making the SG contribution.

1.15 The Bill does not allow changes to Commonwealth legislation to provide equal treatment for same-sex couples in relation to superannuation, despite this being an obstacle to the passage of the previous Bill.

1.16 In the 2002-2003 Budget, the Government allocated \$28.7 million over four years for the implementation of choice, including an extensive education campaign to be run by the Australian Taxation Office (ATO) to inform employees and employers of their rights and obligations in relation to choice of superannuation fund. The ATO's education program is expected to include new pamphlets directed specifically at impact groups (eg. employers and employees), together with use of the ATO's existing Internet facilities and telephone help lines.

1.17 Related to the measures proposed in the Choice Bill is the issue of portability of superannuation benefits, that is, the right of members to move existing benefits between superannuation entities. During the inquiry, the Government released a consultation paper on portability of superannuation benefits. Under the proposed arrangements, portability would relate to the balance of existing funds at 1 July 2004, while choice would relate to contributions made after 1 July 2004.<sup>2</sup>

## **Background to the Bill**

1.18 Generally speaking, there are two types of funds operating in Australia to which superannuation contributions can be made: not-for-profit funds – industry, corporate and government funds (where surpluses are paid to the members of the fund); and profit funds - retail funds offered by the banks and life insurance agencies (where profits are paid to shareholders).

1.19 Australian employees currently receive compulsory employer paid superannuation contributions either under an industrial award (federal or state) or under the SG scheme. Under award superannuation, the fund to which contributions are made is specified in the award. Under the SG scheme, superannuation contributions must be made to any complying fund, provided it is certified under the *Superannuation Industry (Supervision) Act 1993* by the Australian Prudential Regulation Authority (APRA).

1.20 The development of this twin system of industrial and legislated superannuation dates back to the inclusion of superannuation in awards in 1986, when the High Court ruled that the Conciliation and Arbitration Commission as it then was (the current Australian Industrial Relations Commission) had jurisdiction in the superannuation industry. By 1992, up to 70 per cent of the workforce was covered by award superannuation. However, to ensure provision of superannuation to employees not covered by awards, and to strengthen compliance, the Government of the day decided to legislate for minimum standards of employer sponsored superannuation in 1992. By legislating a timetable for increasing the rate of SG contributions to nine per cent by 1 July 2002, the Government expected to achieve its objectives of increasing retirement incomes, increasing national savings and reducing reliance on the pension.

1.21 However, the SG legislation is silent on issues such as choice of fund, which until now has remained to be determined by employees and employers in the workplace relations context. Accordingly, there is currently no legislated choice of superannuation fund at the federal level whereby employees may determine to which fund their superannuation contributions are made.

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2 *Committee Hansard*, 19 September 2002, p. 318, 333.

1.22 An outline of the Government's earlier attempts to introduce choice of fund follows.<sup>3</sup>

### ***The Coalition's 1996 election commitment***

1.23 Prior to the 1996 election, the Coalition made the following promise on choice of superannuation fund:

Awards will be required to offer workers a choice of up to five funds including employer, industry, personal and RSAs. Additional funds may be used with the employer's concurrence. Workplace agreements would include similar choice arrangements.<sup>4</sup>

1.24 Additional details of the Government's choice of fund proposal were announced in the 1997-98 Budget:

- Employers would be required to offer employees a limited choice of a minimum of five complying funds or RSAs, including an industry fund where one existed, a public offer fund, a RSA, a RSA provided by the institution receiving the employee's pay (if the institution offers RSAs) and an in-house superannuation fund (if it exists);
- If the employee did not make a choice of fund within 28 days, the employer could nominate the fund to which they would contribute on the employee's behalf;
- The Commonwealth legislation implementing choice of fund would override Federal awards relating to superannuation but not State awards due to constitutional restrictions;
- The Commonwealth legislation implementing choice of fund would not override workplace agreements made under the *Workplace Relations Act 1996*; and
- The Commonwealth legislation implementing choice of fund would not apply to unfunded government schemes.

1.25 Following the release of this policy, there was considerable concern among employers regarding their potential liability if they failed to provide sufficient or accurate information to their employees under the limited choice option, or if the funds they selected to offer to employees performed badly. As a result, the then Assistant Treasurer announced the following major changes to the policy in a Press Release dated 25 November 1997:

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3 This section is largely drawn from Department of the Parliamentary Library, *Bills Digest No 31 2002-2003: Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002*.

4 *Super for all – Security and Flexibility in Retirement: The Federal Coalition's Superannuation and Retirement Incomes Policy*, February 1996, p. 3.

- The introduction of an unlimited employee choice option in addition to the limited choice option;
- A reduction in the required number of fund choices that employers had to offer their employees under the limited choice option from five to four (the requirement that employers had to offer an RSA from the institution that received the employee's pay, where such an RSA existed, was removed); and
- Employers would not be liable for poor financial returns where they had complied with the requirement giving employees choice of fund.

### ***Taxation Laws Amendment Bill (No 7) 1997***

1.26 Following its 1996 election commitment, the Government attempted to implement its choice of superannuation fund proposal through the Taxation Laws Amendment Bill (No 7) 1997, introduced into the House of Representatives on 4 December 1997. On 13 May the proposal was introduced into the Senate as Taxation Laws Amendment Bill (No 3) 1998.

1.27 Importantly, the provisions of the Bill included the so-called limited choice option. Under this option, employers would have been required to offer four or five complying superannuation funds to their employees, from which the employees could then choose.

1.28 The former Senate Select Committee on Superannuation examined the Taxation Laws Amendment Bill (No 7) 1997 as part of a subsequent inquiry into choice of funds. In its report of March 1998, *Choice of Fund*,<sup>5</sup> various members of the Committee raised the a number of implementation issues, including:

- a) The need for education of consumers and employers;
- b) The need for adequate disclosure of comparable information about funds;
- c) The cost to employers of implementing choice;
- d) Different federal/state applications of choice of fund; and
- e) The adequacy of consumer safeguards, including the need for arbitration of any disputes.

1.29 To enable the passage of the other taxation measures in Taxation Laws Amendment Bill (No 3) 1998, the choice of fund measures were removed from the bill in the Senate and re-introduced in a stand-alone bill, the Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 1998.

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5 Senate Select Committee on Superannuation, *Choice of Fund*, 28<sup>th</sup> Report, (Canberra, March 2002).

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## ***Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 1998***

1.30 The Government re-introduced choice of fund legislation on 12 November 1998 in the Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 1998.

1.31 Importantly, the Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 1998 adopted the so-called unlimited choice of fund option, rather than the limited choice option adopted in the 1997 Bill. This Bill:

- changed the default fund arrangements. Under the previous 1997 Bill, employers could choose a default fund for new employees. Under the 1998 Bill, for new employees or on-going employees whose default fund had ceased by virtue of section 32KA, the default fund would be the Commonwealth or Territory industrial award fund for the employee, or if there was no such award, the ‘majority fund’. If neither was available, the default fund was to be any eligible default fund selected by the employer;
- made available to employees a standard form to assist in choosing between funds; and
- provided the Australian Securities and Investments Commission (ASIC) with regulatory authority in relation to Part 3 of Schedule 1.

1.32 The provisions of the Bill were considered at a round table hearing hosted by the Senate Select Committee on Superannuation and Financial Services in December 1999. Some of the notable conclusions from evidence received at the hearing were:

- a) Unlimited choice of fund is the most appropriate method of offering choice;
- b) Informed choice requires disclosure and education prior to choice being offered;
- c) The default fund should be the federal award, or if no award applies, the ‘majority fund’ in the workplace; and
- d) Prudential supervision and consumer protection measures are required to address issues of commission based selling.

1.33 The Senate debated the Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 1998 on 8 August 2001. The Bill was defeated.

***Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002***

1.34 During the 2001 election campaign, the Government again committed itself to choice of superannuation funds in its superannuation policy statement, *A Better Superannuation System*.<sup>6</sup> In turn, the Government introduced the Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002 into the House of Representatives on 27 June 2002. This is the third attempt by the Government to introduce choice of fund.

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6 The Liberal Party of Australia, *A Better Superannuation System*, 5 November 2001.