Chapter Five

Other Implementation Issues

Introduction

5.1 This chapter examines a number of other implementation issues, in addition to those discussed in the previous chapter, which were raised during the Committee's inquiry into the Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002:

- the impact of the Bill on defined benefit schemes;
- the interaction of the Bill with AWAs and certified agreements;
- the collection of arrears;
- the provisions of the standard choice form; and
- the commencement date of the Bill.

Defined benefit schemes

5.2 The Committee understands that the Government's intention is that defined benefit funds should fall under the provisions of the Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002, with the exception of unfunded Commonwealth schemes (including the CSS and PSS schemes). However, employers will not have to offer choice where they have met their SG obligations and are on a contributions holiday (in effect employers are ahead in their contributions), and where they meet the following criteria under proposed section 32V(2) of the Bill:

a) An actuary has provided a certificate in accordance with the regulations under the *Superannuation Industry (Supervision) Act 1993* stating that the employer is not required to make contributions for the quarter and there has been such a certificate covering all times since 1 January 2004; and

b) An actuary has provided a certificate stating that, in the actuary's opinion, at all times from 1 July 2004 until the end of the quarter, the assets of the scheme are, and will be, equal to or greater that 110 per cent of the greater of the scheme's liabilities in respect of vested benefits and the scheme's accrued actuarial liabilities; and

c) The actuarial certificate has been provided no earlier than 15 months before the end of the last quarter.

5.3 In addition, under proposed section 32V(3), an employer does not have to offer choice to an employee who has reached their accrued maximum benefit.

5.4 In evidence to the Committee on 19 September 2002, Mr Thomas indicated that it is up to the individual actuary to make a judgement whether a scheme meets the above requirements, taking into account factors such as market conditions and expected changes in scheme membership. Mr Thomas also indicated that following the passage of the Bill, the Government would consult further with the Institute of Actuaries with a view to issuing guideline on the new certificate requirements.[1]

5.5 The Committee also raised with Mr Thomas the cost of seeking an actuarial certificate. In response, Mr Thomas noted that the costs involved in assessing whether a particular scheme meets the relevant requirements would vary depending on the financial position of the scheme. For example, it would be less costly to assess a scheme whose assets were far in excess of the requirements.[2]

5.6 Given that choice is not available to all members of a defined benefit fund under the Bill, and that choice can be satisfied where a fund is nominated in an AWA or certified agreement, the Committee notes that where defined benefit fund members do have a choice, there are difficulties in determining the balance of their fund. The withdrawal benefit of defined benefit schemes can usually only be calculated at the point of retirement. Accordingly, it is very difficult to advise a member of a defined benefit scheme who is thinking of moving to an accumulation fund of the advantages and disadvantages of such a move.

5.7 In its written submission, AIST argued that where an employee leaves a defined benefit scheme, they should be required to acknowledge in writing that they are leaving a guaranteed benefit scheme, which is underwritten by the employer, and moving to an accumulation fund where they (the employee) bear the risks.[3]

5.8 The Committee notes that the possible departure of employees from defined benefit funds under the choice regime creates possible concerns for the ongoing viability of those funds. That said, the Committee notes that defined benefit funds currently face more serious difficulties in relation to actuarial adequacy standards than those posed by a choice environment.[4]

5.9 The Committee also notes that the ACCI raised a number of 'special problems' with the inclusion of defined benefit funds in the proposed legislation. These included the potential for:

- an increase in labour costs for employers where there is a contributions holiday because the fund is cashed up;
- the difficulties of providing advice about the consequences of leaving defined benefit schemes; and

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1 *Committee Hansard*, 19 September 2002, pp. 344-345.

2 *Committee Hansard*, 19 September 2002, p. 344.

3 *Submission* 29, AIST, p. 2.

4 *Committee Hansard*, 11 September 2002, p. 236.

- possible problems with the viability of these funds when members leave.[5]

5.10 Accordingly, the ACCI recommended exempting defined benefit schemes from the proposed legislation.

Proposed section 32G(3)

5.11 Proposed section 32G(3) of the Bill states:

> A fund cannot become a chosen fund for an employee under this section if, immediately before the employee gave the written notice to the employer, either
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> (a) a defined benefit superannuation scheme of which the employee was a defined benefit member was a chosen fund for the employee, or
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> (b) there was no chosen fund for the employee and the default fund for the employee was a defined benefit superannuation scheme of which the employee was a defined benefit member.

5.12 The Committee Chair, Senator Watson, raised his concern that under proposed section 32G(3), an employee could not opt out of a defined benefit scheme which they had chosen.[6]

5.13 In response, Mr Boneham from the Treasury indicated that proposed Division 4 of the Bill, which includes proposed sections 32F and 32G, provides two options for employees to choose a new fund. One is to go through a formal choice process under proposed section 32F using a standard choice form. The other is to make a choice under proposed section 32G. However, through the inclusion of the words 'under this section' in proposed section 32G(3), employees in defined benefit schemes cannot use proposed section 32G to make a choice but must instead use proposed section 32F to make a formal choice.

5.14 In turn, Mr Boneham indicated that the purpose of placing this restriction on the choice of employees in defined benefit schemes is to ensure that they understand that they are moving from a defined benefit scheme to an accumulation scheme.[7]

5.15 Mr Thomas from the Treasury further argued that although the wording of the proposed sections 32F and 32G of Division 4 may be confusing to non-lawyers, the majority of employers will be getting their information from information documents provided by the ATO.[8]

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5 *Submission* 38, ACCI, p. 1.

6 *Committee Hansard*, 19 September 2002, p. 328.

7 *Committee Hansard*, 19 September 2002, p. 328.

8 *Committee Hansard*, 19 September 2002, p. 330.

AWAs and certified agreements

5.16 As previously noted, proposed sections 32C of the Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002 provides that SG contributions under an Australian Workplace Agreement (AWA) or certified agreement made under the *Workplace Relations Act 1996* or the *Industrial Relations Act 1988* satisfy the choice of fund requirement.

5.17 In its written submission, the AIG supported recognition of AWAs and certified agreements as satisfying choice, on the basis that they are negotiated at the workplace between the employer and the employee/employees/unions.[9] However, a number of parties such as the MTAA Superannuation Fund[10] and the ACTU[11] argued that the appropriate mechanism for implementing choice is the industrial system, and that it was contradictory for the legislation to significantly reduce the role of awards in fund selection while allowing some industrial instruments (that is, AWAs and certified agreements), to override choice. The SOS argued that AWAs and certified agreements should not override choice.[12]

5.18 For example, the MTAA Superannuation Fund argued that it is inconsistent that AWAs and certified agreements override the choice of fund requirements, yet existing awards, which are also a product of the industrial relations process, do not. Accordingly, the MTAA Superannuation Fund argued that choice of fund should be introduced via the industrial relations system.[13]

5.19 Similarly, the ACTU noted that the Full Bench of the AIRC has varied a number of awards as part of the award simplification process to include the option for employers and employees to negotiate their own fund agreements.[14] Ms Rubinstein from the ACTU developed this point in evidence to the Committee on 3 September 2002:

> We believe that that is the best protection for employees. The reality is that there has not been a case of superannuation failure, a fund that APRA has found has not met its obligation in a proper way, where there has been either union appointed member representatives or effective directly elected employee representatives—that is, not chosen by management and effectively snowed by them.[15]

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9 *Submission* 9, AIG, p. 2.

10 *Submission* 11, MTAA Super Fund, pp. 4-5, 14.

11 *Submission* 5, ACTU, pp. 5-6.

12 *Submission* 4, SOS, p. 1.

13 *Submission* 11, MTAA Super Fund, pp. 4-5, 14.

14 *Submission* 5, ACTU, pp. 5-6.

15 *Committee Hansard*, 3 September 2002, p. 124.

5.20 The Committee raised the exclusion of AWAs and certified agreements from the choice provisions with representatives of the Treasury during the hearing on 11 September 2002. Mr Thomas indicated that AWAs and certified agreements are excluded on the basis that in the process of negotiating these agreements, employees and employers may have already discussed superannuation provisions, thereby giving effect to choice.[16]

5.21 By contrast to these parties, ACCI advocated in its written submission the removal of superannuation obligations entirely from the industrial award system. ACCI noted that at present, employees are required to meet a dual regulatory regime - one stream of regulatory obligation (the SG legislation) that is neutral as to choice of fund, and the other (industrial awards) that is prescriptive as to fund selection.[17]

5.22 Finally, on another issue, the Committee notes that in the hearing on 3 September 2002, Mr Cerche from CSA argued that currently many employers are contributing more than nine per cent under award provisions. He argued that many employers contribute an additional three per cent productivity component that was made available under award superannuation during the 1980s prior to the introduction of the SG charge. In addition, Mr Cerche argued that many employers contributing to corporate funds under awards also meet administration and insurance costs, making the effective contribution in the order of 13½ per cent. Mr Cerche argued that under the Bill, unscrupulous employers could take the opportunity to drop back their contributions to nine per cent.[18]

Collection of arrears

5.23 In evidence before the Committee on 2 September 2002, Ms Butera and Mr Noble from Cbus argued that choice of fund in Australia would lead to an increase in the likelihood that funds will not actively pursue arrear payments from employers.[19] As stated by Mr Noble:

> Cbus takes a very proactive approach to the collection of arrears. Our industry is such a changing industry that we believe we need to collect superannuation as and when the income is earned. But we know that other superannuation providers do not have our approach and that if you have an environment where we are collecting superannuation arrears but we are the only ones collecting arrears, other employers will start to get the message that if they are paying in to other funds they are not going to have anyone chasing them up.[20]

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16 *Committee Hansard*, 11 September 2002, p. 282.

17 *Submission* 25, ACCI, p. 7.

18 *Committee Hansard*, 3 September 2002, pp. 117-119.

19 *Submission* 16, Cbus, p. 11. *Committee Hansard*, 2 September 2002, p. 46.

20 *Committee Hansard*, 2 September 2002, p. 51.

5.24 Given this concern, Mr Noble from Cbus strongly advocated additional resources for the ATO to actively target and approach employers who do not meet their superannuation obligations so as to ensure that employees do not lose their superannuation entitlements. [21]

The standard choice form

5.25 In its written submission, AIST argued that the standard choice form should include a list of checkpoints to assist employees to research their decisions properly. Those checkpoints should include a comparison of fees, whether funds provide disability and death benefits, the cost to the employee of changing to a new fund, and whether a fund is for profit or not for profit.[22] Ms Dyson from the AIST reiterated this evidence in hearings.[23]

5.26 In response, Mr Thomas from the Treasury indicated in evidence on 19 September 2002 that the standard choice form will be developed in consultation with industry and consumers, and will be available well before the choice regime commences.[24]

Commencement date

5.27 In its written submission, the NFF indicated its belief that the 18-month delay before commencement of the Bill on 1 July 2004 is sufficient for all parties to be prepared, on the proviso that the Government invests additional funds in its education program.

5.28 By contrast, in its written submission, ASFA argued that the Bill should not commence until 12 months after the implementation of provisions to replace the OMC. As a result, ASFA argued that 1 July 2004 is the earliest the choice of funds regime could commence.[25]

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21 *Committee Hansard*, 2 September 2002, p. 52.

22 *Submission* 29, AIST, p. 1.

23 *Committee Hansard*, 3 September 2002, p. 170.

24 *Committee Hansard*, 19 September 2002, p. 339.

25 *Submission* 17, ASFA, p. 4.