Chapter Six

Employers

Introduction

6.1 During the inquiry, witnesses broadly acknowledged that the implementation of the Bill may lead to additional costs for employers. This chapter examines the:

- impact of the implementation of choice on employers' costs;
- concerns in relation to the potential fines for employers for failing to comply with the provisions of the Bill, including the constitutionality of the proposed fines; and
- the legal liability of employers under the Bill.

Employer costs

6.2 An estimated 654,000 employers will be subject to choice; 500,000 of whom will not be covered by workplace agreements. The Explanatory Memorandum (EM) to the Choice Bill notes that the provision of choice of funds under the Bill will place additional administrative work on employers. Initial costs to employers are estimated at $27 million, with additional ongoing costs of $18 million per annum. These costings are based on an estimate of three hours initially to comply and two hours thereafter.

6.3 However, in its written submission, Mercer argued that these estimates dramatically underestimate the real costs. Mercer cited ABS statistics that there were 566,500 employing businesses in Australia in 1998-99. Using this figure, the estimate cost of $27 million in the first year translates to an average cost for each business for implementing choice of $47.66. Mercer stated:

> Even if we assume that only half of these businesses will incur any costs, the average estimated cost per business is less than $100. In other words, perhaps enough for half an hour of advice from the local accountant but with nothing left for implementation, determining default fund, changing systems, preparing necessary forms etc etc.[1]

6.4 ACCI also noted in its written submission that the costs of compliance suggested in the EM to the Bill 'appear to be a real stab in the dark', and to be an underestimate of the real cost impact.[2]

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1 *Submission* 20, Mercer, p. 5. See also *Committee Hansard*, 2 September 2002, p. 99.

2 *Submission* 25, ACCI, p. 11.

6.5 In calculating the real impact that the Choice Bill is likely to have on employers, parties giving evidence to the Committee pointed to a range of considerations.

6.6 First, it was argued that employers under the choice model proposed in the Bill will need to be involved in educating their employees about choice. In its written submission, CPA Australia cited member feedback to the effect that average employers who offer choice currently spend between ten minutes and half an hour per month per employee in education measures.[3]

6.7 Second, Cbus suggested in its written submission that employers will face additional administrative costs. In this regard, employers will have additional responsibilities forwarding and collecting standard choice forms, confirming that chosen funds are complying superannuation funds, registering an employee with a superannuation fund, and selecting the default fund where a choice is not made.[4] The high level of employee mobility in certain industries will only increase these high compliance costs.

6.8 Third, employers will be required to make contributions to a greater number of funds, entailing additional financial costs.[5] In their written submission, Mr Engelhardt and Mr Stephens cited the example of a major employer in WA that currently must meet the requirements of 45 different funds under WA's choice of fund legislation, together with the cost of transfers (including electronic transfers).[6]

6.9 Cbus also cited an example of an employer with 20 employees, who goes from making contributions to 1 fund to 10 funds. Cbus argued that this represents an additional 108 cheques per year, an increase in transaction fees with the Commonwealth Bank of $59.40 a year. In addition, the employer would need to complete 10 separate remittance advices and post 10 different envelopes at a cost of $48.60 a year. As at June 2002, only 6.28 per cent of Cbus employers made contributions for their employees via electronic commerce.[7]

6.10 Given these additional costs, parties such as the AIG expressed concern at the impact of the Bill on Australian industry's international competitiveness.[8] The Committee also notes evidence from Ms Harris from the NFF suggesting that the compliance burden of fund choice is likely to be particularly hard for small businesses.[9]

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3 *Submission* 10, CPA, p. 3.

4 *Submission* 16, Cbus, p. 4.

5 *Committee Hansard*, 2 September 2002, p. 80.

6 *Submission* 12, Mr Stevens & Mr Engelhardt, p. 2.

7 *Submission* 16, Cbus, pp. 4-5.

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

9 *Committee Hansard*, 11 September 2002, p. 205.

6.11 In response to these concerns, however, the NFF argued that any increase in costs will be limited by the use of the unlimited choice scheme under the Bill. At the same time, the NFF accepted that any increase in costs is outweighed by the importance of allowing an employee to determine which fund they want to go into. This position was reiterated by Ms Harris in the hearing on 11 September 2002:

> At the end of the day, the position was it is an ability of the employee to determine which fund they want to go into and they are not hampered or restricted to one particular fund. That is our concern and that in the long term should in some respects outweigh the issue of cost.[10]

6.12 That said, Ms Harris acknowledged the concern of the NFF that the compliance burden may be harder for small businesses and farmers that perhaps do not employ a payroll officer.[11]

6.13 The Committee also notes the evidence of Mr Rosario from Westscheme that the fund has attempted to limit the compliance burden on employers by no longer requiring application forms to join the fund. Westscheme simply deems employees to be a member of the fund where the employer gives them the employee's name and address. In that instance, Westscheme simply writes to the employee's home address to give them information on the fund.[12]

E-commerce

6.14 In its written submission, the NFF suggested that any increase in cost to employers from the Choice Bill may also be limited by the introduction of standard provisions of e-commerce between employers and superannuation funds, allowing the seamless transfer of money electronically.[13] Similarly, Mr McNaught from Connect Internet Solutions Pty Ltd argued that under a choice environment:

> Payroll and accounting software as well as payroll bureaus will move quickly to support processing of superannuation to multiple fund recipients.[14]

6.15 In his written submission, Mr McNaught noted that currently the majority of employers still predominantly process their SG transactions using paper and cheque.[15] Similarly, Ms Butera noted in the hearing on 2 September 2002 that at June 2002, the

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10 *Committee Hansard*, 11 September 2002, p. 202.

11 *Committee Hansard*, 11 September 2002, p. 205.

12 *Committee Hansard*, 2 September 2002, p. 57.

13 *Submission* 1, NFF, p. 11.

14 *Submission* 45, Connect Internet Solutions Pty Ltd, p. 5.

15 *Submission* 45, Connect Internet Solutions Pty Ltd, p. 3.

percentage of Cbus employers who made SG contributions for their employees via electronic commerce was only 6.28 per cent.[16]

6.16 However, Mr McNaught raised a concern that the development of electronic services in the superannuation industry may not occur satisfactorily in a laissez-faire environment as providers rush to capture a share of the industry market, creating tens if not hundreds of transfer channels. Accordingly, he argued that the government should develop in conjunction with the private sector a common electronic trading platform for the transfer of superannuation funds:[17]

> Failure by the Government to address processing needs attached to the introduction of choice of fund will result in a confused market response that inevitably will add time and cost burdens to employers and funds. Ultimately this will adversely influence the end cost of administration that superannuants will be made to bear.[18]

6.17 The Committee acknowledges this suggestion, although it also notes evidence from Mr Bissaker from IFSA that the industry is probably a year to 18 months from seamless movement of money and information between funds.[19]

6.18 Despite this projection, the Committee notes that electronic transfers are already a reality for some. In its submission, the Commonwealth Bank drew attention to a service called Commonwealth eSelect. According to the Bank, this service enables employers to authorise a single payment covering all individual employee payments to any complying superannuation fund in Australia. The Bank advised that today it is providing this service to 1,000 employers in respect of 32,000 employees.[20]

6.19 While noting that this service has assisted some employers, the Committee also notes that a survey of employers using the eSelect shows that 82 per cent also use the Commonwealth as their business bank and that 75 per cent use the Commonwealth as their default fund for employees. The survey provided detailed examples of employers where most or all employees became members of the Commonwealth fund following the move to eSelect. In the words of one employer: '90 per cent of our staff fell into the CBA'.[21] As noted by the survey authors (Ross Cameron and Associates) this supports the view that:

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16 *Committee Hansard*, 2 September 2002, p. 45.

17 *Submission* 45, Connect Internet Solutions Pty Ltd, p. 5.

18 *Submission* 45, Connect Internet Solutions Pty Ltd, p. 6.

19 *Committee Hansard*, 11 September 2002, p. 240.

20 *Submission* 33, CBA.

21 *Submission* 33, CBA, Attachment, p. 20.

> NetSuper also serves as a business acquisition tool, with many of the businesses surveyed appearing to switch their super to the Commonwealth, or more particularly, making the Commonwealth their new 'default' fund.[22]

Clearing houses

6.20 In evidence to the Committee on 2 September 2002, Mr Rosario from Westscheme indicated that Westscheme offered employers a clearing house under the WA choice regime, whereby Westscheme acts on behalf of the employer to re-direct SG contributions made by the employer to the fund of the employee's choice. Mr Rosario also indicated that many fund clearing-houses in WA require separate cheques for each employee, even though they may have a number of employees with the same employer in the fund.[23]

6.21 In evidence on 11 September 2002, Mr Thomas from the Treasury cited the development of clearing-houses as possibly limiting costs to employers.[24] In evidence on 19 September 2002, Mr Thomas indicated that Westscheme costs employers approximately $1.50 per employee per transfer to another fund.[25]

6.22 The Committee acknowledges this evidence, although it notes that even for a small business of 20 employees, $1.50 per employee per month translates into a cost of over $300 a year.[26]

Employer fines

6.23 Proposed sections 32T and 32U of the Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002 outline offences which attract penalties for failure by employers to comply with the choice of fund regime. The maximum penalty is 60 penalty units ($6,600).[27]

6.24 In its written submission to the inquiry, Mercer noted that the penalties for breaches of the choice regime are extreme, and 'are far beyond that which would be considered reasonable in respect of the breaches such as failing to give a standard choice form to an employee within 28 days' and that 'the imposition of such penalties is draconian and unnecessary.'[28]

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22 *Submission* 33, CBA, Attachment, p. 11.

23 *Committee Hansard*, 2 September 2002, p. 58.

24 *Committee Hansard*, 11 September 2002, p. 285.

25 *Committee Hansard*, 19 September 2002, p. 315.

26 *Committee Hansard*, 19 September 2002, p. 315.

27 *Committee Hansard*, 19 September 2002, p. 335.

28 *Submission* 20, Mercer, p. 4.

6.25 In this regard, Mercer noted that for some employees, it may be difficult to determine whether they are covered by a federal or state award, and that this could result in potential unintentional breaches of the choice requirements.[29]

6.26 ACCI also argued that the Bill takes a quite inappropriate penal approach to employer compliance. It noted that failure by employers to comply with the choice regime is punishable by fines of up to 60 penalty units, whereas under the decade old SG legislation, the penalty for failure to comply is an additional 25 per cent payment over and above the SG payment:

> Under the scheme of the SG Legislation, introduced by the then Keating government, it was statutory policy that there would be no penalties imposed under the SG Legislation (SGL) where an employer failed to meet an industrial award-based obligation. SGL penalties would only apply where there was a failure to meet SGL obligations. The 2002 Choice Bill alters this framework in a fundamental way – applying for the first time SGL penalties for a failure to meet industrial award requirements (via the default fund provisions).[30]

6.27 In its written submission, IFSA also suggested that it is totally inappropriate that the Bill seeks to apply criminal penalties through superannuation law to industrial issues, and that such penal provisions such should remain within industrial law.[31] In evidence, Mr Bissaker from IFSA reiterated this position.[32]

6.28 Given these concerns, Ms Harris from the NFF argued in evidence to the Committee on 11 September 2002 that the penalty provisions of the Bill should be amended. She suggested that the ATO should be allowed to issue warning notices prior to the imposition of strict penalties, and that there should be a moratorium on the penalty provisions for at least 12 months after the introduction of choice.[33] Ms Harris acknowledged that without such an amendment, the NFF would have to reconsider its support for the Bill.[34]

6.29 The Committee raised the employer penalty provisions with officials from the Treasury in the hearing on 11 September 2002. Mr Thomas indicated that the penalty provisions were changed from those in the previous Bill – the Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 1998 – because of the inflexibility of the previous regime. Under the previous Bill, the ATO would have been obliged to penalise individual employers regardless of whether they had made an innocent mistake. Mr Thomas argued that the new regime gives the ATO the

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29 *Submission* 20, Mercer, p. 6.

30 *Submission* 25, ACCI, p. 13.

31 *Submission* 36, IFSA, p. 4.

32 *Committee Hansard*, 11 September 2002, p. 232.

33 *Committee Hansard*, 11 September 2002, p. 196.

34 *Committee Hansard*, 11 September 2002, p. 205.

flexibility to negotiate practices with employers to ensure that they comply with the choice of fund regime. Accordingly, he suggested that the regime would result in substantially fewer penalties.[35]

6.30 In response, however, the Committee noted a worst-case scenario under which an employer had a large number of staff in respect of whom the employer was in breach. Should the ATO decide to take the employer to court, rather than pursuing education programs with the employer, the employer could be determined to be in breach with respect of each individual employee.[36] Accordingly, an employer with 10,000 employees in respect of whom the employer was in breach could potentially face a fine of $66 million.[37]

6.31 In response, Mr Boneham from the Treasury argued that such a fine would be highly unlikely. It would require the ATO to decide to pursue the matter on the basis that the employer refused to comply, and the courts would have to decide to impose the maximum penalty in respect of each and every worker. However, Mr Boneham noted that under the old regime, the penalty would have been a mandatory $1 million, with no discretion at all on the part of the ATO.[38]

Constitutionality

6.32 The Committee also notes that, in its written submission, CSA indicated its belief that proposed section 32T and 32U of the Bill imposing fines on employers are unconstitutional, on the basis that they go beyond the taxation power of the Commonwealth.[39]

6.33 In response to this issue, Mr Thomas from the Treasury indicated in evidence on 11 September 2002 that the Treasury is currently seeking further legal advice.[40] In further evidence to the Committee on 19 September 2002, Mr Thomas declined to indicate whether the Government had received that advice, on the basis that it is an internal government matter.[41]

Employer liability

6.34 As noted in Chapter One, the Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002 allows for unlimited choice of fund. This is in contrast to the previous Taxation Laws Amendment Bill (No 7) 1997.

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35 *Committee Hansard*, 11 September 2002, p. 283.

36 *Committee Hansard*, 11 September 2002, p. 284.

37 *Committee Hansard*, 19 September 2002, p. 336.

38 *Committee Hansard*, 19 September 2002, p. 335.

39 *Submission* 13, CSA, p. 4.

40 *Committee Hansard*, 11 September 2002, p. 286.

41 *Committee Hansard*, 19 September 202, p. 321.

6.35 In its written submission, the NFF noted that unlimited choice removes the onus from the employer in selecting funds for choice, thereby removing any potential legal liability from the employer. Under the limited choice model, an employer could select four or five funds to offer to his or her employees that subsequently perform poorly, possibly leaving him or her open to litigation. In the NFF's opinion, this advantage of unlimited choice clearly outweighed any potential additional administrative burden on employers from employees selecting a broad range of funds.[42]

6.36 However, in its written submission, the MTAA Superannuation Fund raised doubts whether even the proposed unlimited choice arrangements would ensure that employers are not subject to any legal recourse or liability from any choice of fund that is made by an employee. The Fund argued that it is unclear on constitutional grounds whether the Bill can exempt employers from their common law duty of care.[43] Similarly, in its written submission, Quadrant Superannuation noted that:

> The position of the employer from a liability perspective will be precarious at best and unsustainable at worst. The employment costs and obligations that already exist are onerous.[44]

6.37 In response to this issue, Mr Boneham from the Treasury indicated that proposed section 32ZA of the Bill provides that employers are not liable for damages if they abide by the provisions of the Bill.[45] Proposed section 32ZA states:

> An employer is not liable to compensate any person for damage arising from anything done by the employer in complying with this part.

6.38 The Committee notes that this proposed section protects employers where they offer choice, and pay to any chosen fund or a default fund if there is no choice. However, it does not protect them if they go outside the terms of the Bill. For example, employers would not be protected if they provided advice to employees about what fund they should invest in.[46]

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42 *Submission* 1, NFF, p. 10.

43 *Submission* 11, MTAA Super Fund, p. 13.

44 *Submission* 14, Quadrant Superannuation, p. 2.

45 *Committee Hansard*, 19 September 2002, pp. 340-341.

46 *Committee Hansard*, 19 September 2002, p. 341.