Chapter Two

Portability and Choice

Introduction

2.1 This chapter examines:

a) The ability of fund members under the regulations to roll over/transfer funds out of an active superannuation account, and claims that this effectively constitutes choice of superannuation by the back-door;

b) Whether the portability regulations can operate independently of choice; and

c) Arguments that the portability regulations should have been considered by Parliament concurrently with choice of fund legislation.

Roll over/transfer out of an active account

2.2 The principal concern expressed by parties in response to the draft regulations was that they would mandate the right of superannuation fund members to roll over/transfer their superannuation savings out of an active account (ie one still receiving employer sponsored SG contributions) into an inactive account.

2.3 The Committee notes that ASFA,[1] IFF,[2] AIG,[3] AAS,[4] Watson Wyatt,[5] CPA Australia,[6] the Corporate Super Association,[7] the Institute of Chartered Accountants in Australia[8] and the ACA[9] all argued this point in their written submissions. In effect, giving fund members the right to roll over/transfer funds out of an active account

---

1 *Submission* 2, ASFA, p. 3.

2 *Submission* 4, IFF, p. 3.

3 *Submission* 5, AIG, p. 2

4 *Submission* 18, AAS, p. 3.

5 *Submission* 12, Watson Wyatt, p. 1.

6 *Submission* 13, CPA, p. 1.

7 *Submission* 9, Corporate Super Association, p. 4.

8 *Submission* 22, The Institute of Chartered Accountants in Australia, p. 2.

9 *Submission* 32, ACA, p. 2.

would essentially constitute *de facto* choice - introducing choice of fund under the guise of portability. The Law Council of Australia expressed the matter in this way:

> The portability regime as set out in the Draft Regulations could result in a situation where amounts are contributed by an employer one day and then moved to another superannuation fund the next. In effect, this would amount to choice of fund by the member when, as the Senate Select Committee is aware, choice of fund legislation has not been passed by Parliament.[10]

2.4 The Committee notes that similar concerns were expressed in hearings by Mr Jeffrey from Watson Wyatt,[11] Mr Watson from MTAA Super,[12] Ms Galbraith from Superpartners,[13] Ms Rubinstein from the ACTU,[14] Mr Silk from IFF,[15] Mr Riordan from the Law Council of Australia[16] and Dr Anderson from ASFA. Dr Anderson expressed the matter this way:

> Portability without choice could become a backdoor version of choice: the employer pays contributions into a fund and the employee systematically channels them into a different fund.[17]

2.5 To address their concerns that the draft portability regulations would effectively implement *de-facto* choice, parties such as Superpartners[18] and the ACTU[19] argued that the draft regulations should be amended to remove the ability of fund members to roll over/transfer funds out of an active account. Alternatively, in its written submission, SOS argued that portability should not apply where employers are continuing to contribute to an active account, unless 50 per cent of employees in the designated fund vote otherwise.[20]

2.6 The Committee notes in this regard the evidence of Mr Ward from Mercer in the hearing on 1 August 2003 that an appropriate measure of whether an account is active or inactive would be whether the fund had received any contributions in the last

10 *Submission* 20, Law Council of Australia, p. 5.

11 *Committee Hansard*, 31 July 2003, p. 35.

12 *Committee Hansard*, 31 July 2003, p. 10.

13 *Committee Hansard*, 1 August 2003, p. 16.

14 *Committee Hansard*, 1 August 2003, p. 46.

15 *Committee Hansard*, 1 August 2003, p. 2.

16 *Committee Hansard*, 13 August 2003, p. 3.

17 *Committee Hansard*, 31 July 2003, p. 14.

18 *Submission* 8, Superpartners, pp. 1-2.

19 *Submission* 10, ACTU, p. 2.

20 *Submission* 19, SOS, p. 1.

12 months. This would be sufficient time to pick up some cyclical casual jobs such as fruit picking.[21]

2.7 The Committee notes that in the gazetted regulations, the Government amended the draft regulations so that trustees will only be required to affect one roll over/transfer per year for each member of a fund, although they will be free to offer more regular roll overs/transfers if they wish.

2.8 In the Committee's hearings, a number of parties welcomed this restriction on roll overs/transfers, although they nevertheless highlighted that fund members are still allowed one transfer a year out of an active account into an inactive account, which still effectively amounts to choice of fund. For example, Mr Jeffrey from Watson Wyatt commented:

> … I think it is a sensible move. I recognise that it reduces the flexibility of choice, but you have got a tension there between full flexibility and addressing the behavioural issues you referred to before. So it sounds sensible to put on a cap of once a year. But still you have got choice. It is one year, but then every one year you roll over money. You still have fund choice, just with a slightly longer lag … [22]

2.9 Similarly, Mr Silk from IFF observed in the hearing on 1 August 2003:

> The change to a limit of one per year is an improvement, but represents an incremental improvement rather than a fundamental beneficial change to the regulations as originally proposed. That change does not address the fact that the regulations overall still represent choice of fund without the safeguards that we say should go with such a system.[23]

2.10 The Committee also note, however, the point of Mr Ward from Mercer in the hearing on 1 August 2003 that the restriction on roll overs/transfers out of an active account is welcome, but to limit roll overs/transfers out of inactive accounts, thereby effectively hampering account consolidation, is not welcome.[24]

2.11 The Committee raised this issue of portability out of active accounts with Mr Murray from Treasury in the hearing on 13 August 2003. In response, Mr Murray stated:

---

21 *Committee Hansard*, 1 August 2003, p. 30.

22 *Committee Hansard*, 31 July 2003, p. 39.

23 *Committee Hansard*, 1 August 2003, p. 3.

24 *Committee Hansard*, 1 August 2003, p. 27.

> I do not think portability is choice of fund. Portability allows you to move your existing benefits from your fund, as opposed to determining where your future contributions will go.[25]

2.12 The Committee also notes the evidence of Mr Riordan of the Law Council of Australia that while many corporate funds require employer's consent before an employee can roll over/transfer the balance of a active account, many industry superannuation funds no longer place any restrictions on the roll over/transfer of member's active accounts.[26]

The independence of portability and choice?

2.13 Following on from the concerns raised above, a number of parties to the inquiry also argued that the portability regulations should not operate independently of choice legislation.

2.14 For example, ASFA argued in its written submission that the Government has directly associated portability with choice in its general policy statement, *Heading in the Right Direction – Securing Australia's Future* and its pre-election statement on superannuation, *A Better Superannuation System*. In addition, ASFA noted that the Government directly linked the twin policies in the 2002 Budget Papers. ASFA strongly supported this linkage:

> ASFA believes that where employees avail themselves of the opportunity to choose the fund into which future mandated employer contributions are to be paid, they should also be given the opportunity to move their existing benefits into that fund of choice. Portability is viewed as complementing choice, not a method of delivering choice.[27]

2.15 Similar positions were also expressed by CPA Australia,[28] IAA,[29] SOS,[30] AAS[31] and the FPA[32] in their written submissions. Indeed, Mercer argued that there are more complexities in relation to the introduction of portability than the introduction of choice, and that therefore Mercer would not be concerned if portability was introduced after choice, subject to the resolution of various practical issues.[33]

---

25 *Committee Hansard*, 13 August 2003, p. 16.

26 *Committee Hansard*, 13 August 2003, p. 3.

27 *Submission* 2, ASFA, p. 3.

28 *Submission* 13, CPA, p. 1.

29 *Submission* 15, IAA, p. 5.

30 *Submission* 19, SOS, p. 1.

31 *Submission* 18, AAS, p. 1.

32 *Submission* 24, FPA, p. 3.

33 *Submission* 17, Mercer, p. 2.

2.16 The Committee notes, however, that in evidence to the Committee on 31 July 2003, Mr Gilbert from IFSA argued that portability can proceed without choice.[34]

2.17 This position was reiterated by Mr Murray from Treasury in the hearing on 13 August 2003:

> I think the government sees the portability policy as being able to stand alone and apart from the choice of fund policy. They see it as bringing in benefits on its own. It is complementary to choice—and that is correct—but it can also stand on its own.[35]

Legislative scrutiny of portability and choice

2.18 Following on from debate about the independent operation of portability and choice, a number of parties argued that the portability regulations should have been presented to the parliament for consideration concurrently with choice legislation, and not before.

2.19 For example, MTAA Super argued that there has been general speculation in the superannuation industry and at previous hearings of this Committee that portability is less controversial than choice. However, MTAA Super disputed this suggestion. MTAA Super argued that the key reason that portability has not been as keenly scrutinised and debated to date is because the majority of the industry stakeholders has always believed that choice and portability would be introduced together and could be considered concurrently.[36]

2.20 Accordingly, MTAA Super strongly advocated that the issues of portability and choice should be considered jointly by the Parliament. MTAA Super continued:

> This would allow the Parliament to better understand and judge the effectiveness of the existing options and mechanisms already available to fund members and their employer-sponsors in respect of the transfer of superannuation between funds rather than having the currently proposed choice of fund and portability prescription imposed which may overly and unnecessarily add to the already complex web of superannuation regulation in Australia.[37]

2.21 Similarly, the Corporate Super Association also suggested that, since choice of fund for prospective contributions is subject to such significant community debate,

---

34 *Committee Hansard*, 31 July 2003, p. 27.

35 *Committee Hansard*, 13 August 2003, p. 15.

36 *Submission* 6, MTAA Super, p. 6.

37 *Submission* 6, MTAA Super, p. 5.

it would be an abuse of the regulation making power to introduce a broader form of choice without subjecting the proposals to full Parliamentary process.[38]

2.22 Again, the Committee notes that this evidence was strongly reiterated in hearings. For example, Mr Jeffrey from Watson Wyatt stated:

> Our overriding concern with the draft portability regulations is that they, effectively, introduce choice of fund before the primary choice of fund legislation has been passed. We believe it is inappropriate for these regulations to be passed before the choice of fund legislation is passed.[39]

2.23 Similarly, Mr Silk from IFF stated in the hearing on 2 August 2003:

> … the portability provisions and the choice of fund provisions should be considered together as part of the same package. They both relate to the circumstances in which a member can transfer their superannuation from one fund to another. It is quite absurd, in our submission, to have the regulatory provisions governing the transfer of previous contributions to be different from those governing the transfer of future contributions.[40]

2.24 Similar concerns were expressed in hearings by Mr Watson from MTAA Super,[41] Mr Korchinski from AAS,[42] Mr Hristodoulidis from the FPA,[43] Capt Woods from SOS,[44] Ms Galbraith from Superpartners,[45] Mr Ward from Mercer,[46] Mr Shallue from IAA,[47] Ms Rubinstein from the ACTU[48] and Ms Kelleher from CPA Australia.[49]

Revisions to choice legislation

2.25 The Committee notes that on 25 May 2003, the Assistant Treasurer, Senator Coonan, outlined in a media release amendments to the Government's choice model as proposed in the Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 2002. The Government plans to introduce revised choice legislation in the spring sittings of Parliament.

---

38 *Submission* 9, Corporate Super Association, p. 4.

39 *Committee Hansard*, 31 July 2003, p. 35.

40 *Committee Hansard*, 1 August 2003, p. 2.

41 *Committee Hansard*, 31 July 2003, pp. 3-4.

42 *Committee Hansard*, 31 July 2003, p. 52.

43 *Committee Hansard*, 31 July 2003, p. 60.

44 *Committee Hansard*, 31 July 2003, p. 69.

45 *Committee Hansard*, 1 August 2003, p. 12.

46 *Committee Hansard*, 1 August 2003, p. 26.

47 *Committee Hansard*, 1 August 2003, p. 39.

48 *Committee Hansard*, 1 August 2003, p. 46.

49 *Committee Hansard*, 1 August 2003, p. 51.

2.26 The changes to the choice model, as outlined by the Assistant Treasurer in her media release on 25 May, are reproduced in Table 2.1 over. The proposed commencement date for choice remains 1 July 2004.

Table 2.1: Revisions to the Government's Choice of Funds Model

	2002 Choice Bill	Proposed Arrangement
Default funds	The default fund rules require an employer to go through a maximum of three steps: - If the employee is covered by an award, the default fund is a fund nominated in that award. - If an award does not exist, the default fund is the majority fund (ie. the fund that the majority of employees are members). - If there is no majority fund, the employer can choose any complying fund.	Retain the status quo. Employers will choose a complying fund into which superannuation guarantee contributions will be paid if there is no chosen fund.
Penalty provision	A maximum penalty of $6,600 per breach following ATO prosecution action.	A maximum penalty of $500 per breach. The Commissioner of Taxation has the discretion to reduce the penalty (including to nil) depending on individual circumstances.
Employee information	Employers can request account information from the employee about a chosen fund.	Employers do not have to accept a chosen fund if the employee does not provide relevant account information.
Choice process	Employee can choose a fund under a formal process - employer must provide a standard choice form within 28 days; - employees have 28 days to choose a fund. Employee can have an individual written agreement (where employer has discretion to reject the choice).	Only one process. Employer required to provide a standard choice form before 29 July 2004 for existing employees and within 28 days of when the employee commences employment, or on request. 28 day restriction on choosing a fund has been deleted. Employee can choose a fund at any time provided they have not exercised choice in the previous 12 months.