

# Client Bulletin

## Choice of Superannuation Fund

April 2005

### *Are you ready for Choice of Superannuation Fund?*

The Federal Government has enacted legislation which will allow employees, in certain circumstances, to choose the Superannuation Fund into which their superannuation guarantee contributions (9%) will be paid.

### *When will this change occur?*

The legislation is effective from 1 July 2005. Current employees who have choice must be given a Standard Choice Form before 29 July 2005. Employers will receive copies of the form in a mail out from the ATO in April, along with a comprehensive information booklet to help them meet their choice obligations.

For employees commencing employment after 1 July 2005, who have choice, the employer must give them a Standard Choice Form within 28 days of them commencing employment unless within that time the employee has already advised the employer of their chosen fund.

### *Which Employees have choice?*

Broadly speaking employees covered by Awards and Agreements of State Industrial Tribunals and those covered by Federal Certified Agreements and Australian Workplace Agreements ("AWAs") which prescribe the Superannuation Fund(s) into which contributions are to be paid **do not** have choice. However, employees covered by a Federal Award which prescribes the Fund into which superannuation contributions are to be paid **do** have choice.

Award free employees, such as Managerial staff have choice. However, employers will need to ensure that, even though these employees are classified as managers by the organisation, an award does not apply.

The choice of fund legislation as it currently stands does not apply to employees covered by State Awards. However, the Federal Government has signalled its intention to introduce an amendment to the legislation to allow the Commonwealth to override State Awards in respect of superannuation from 1 July 2006.

### *Fundamental matters for Employers to check*

Employers will need to be aware of the various industrial instruments that apply to their employees. They could be covered by one Award, Federal or State, but it is more likely, for most employers, that there will be more than one and possibly a number of industrial instruments applying either all State or all Federal or a combination of both.

Each industrial instrument that applies to an employer has to be checked to ascertain whether or not the choice of fund legislation is applicable.

So it is important for employers to scrutinise the Awards/Agreements/AWAs that cover their employees to ascertain firstly, is there a Superannuation Clause in the relevant Award/Agreement/AWA and secondly, if there is does the Superannuation clause specify the fund(s) into which superannuation contributions are to be paid. Thirdly, if the award is a federal award then choice of fund **applies**. Fourthly, if a fund(s) is specified in a State Award or Agreement or a Federal Certified Agreement or an AWA then choice of fund **does not** apply. Fifthly, if no superannuation fund is specified in a State Award or Agreement or a Federal Certified Agreement or an AWA then choice of fund **does** apply.

**CARROLL  
& O'DEA**  
LAWYERS

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19TH LEVEL, ST JAMES CENTRE  
111 ELIZABETH STREET  
SYDNEY NSW 2000

GPO BOX 7105  
SYDNEY NSW 2001  
DX: 183 SYDNEY

TELEPHONE: 02 9291 7100  
FAX: 02 9221 1117  
www.codea.com.au

## ***Can it be made easier for an employer by offering choice of fund to all employees?***

Some employers might think it simpler to offer all employees choice of fund rather than checking every industrial instrument that applies to its various employees and (maybe) making an error or missing something.

Unfortunately, this option is not available. If some employees are not eligible for choice (because of the industrial instrument that applies to them), giving them choice could result in a breach of the law by the employer.

## ***What does the employer need to do if an employee does exercise choice of fund?***

It is important to note that an employee's choice of fund can only be effective if the following conditions are met:

- n An employer gives the employee a Standard Choice Form and the employee gives Notice to the employer of the superannuation fund into which payments are to be made;
- n Before the completion of the specified time (28 days) in which the employer is required to give the employee a Standard Choice Form, the employee has already given written notice to the employer of their choice of fund; and
- n The fund chosen is a complying fund and the employer has received written evidence that the fund will accept contributions from the employer on behalf of the employee. (NB. Employers are urged to check with the Fund managers to ensure that the fund is a complying fund and will accept contributions from them.)

## ***Default Fund***

In the event that an employee (who has choice of fund) does not choose a fund into which superannuation contributions are to be paid, then the employer must nominate a "default fund" for this purpose:

n A default fund is the fund specified in the employee's Federal Award or if the Federal Award does not apply it is a complying fund chosen by the employer.

n If the Federal Award does not nominate a particular fund the employer is required to choose a default fund.

n If the Federal Award nominates a number of funds, the employer is required to choose one of the listed funds as the default funds.

Employers should be aware that the legislation includes a safeguard provision whereby it is an offence for a superannuation fund trustee or associate to induce or pressure an employer to require one or more of their employees to become members of a fund. Making inducements or applying pressure to an employer in an effort to become the employer's default fund is also prohibited.

## ***Important points to remember in relation to Choice of Fund***

1. Identify if you are required to offer Choice of Fund to your employees. If your employees are covered by a Federal Certified Agreement or an AWA or a State Award or Agreement which specifies the Fund(s) into which their superannuation guarantee contributions are to be paid then choice of fund is not available.
2. Supply a "Standard Choice Form" and information to be supplied by the ATO to your existing employees, who have the right of choice, by 29 July 2005. New employees commencing employment after 1 July 2005 are to be supplied with the above within 28 days of commencing employment.

## *Important points to remember in relation to Choice of Fund cont'd*

3. In the event that an employee does not choose an eligible choice fund then payments are to be made to the default fund.
4. Make sure you choose a default fund, which in the case of employees covered by a Federal Award is one of the Fund's specified in the Award. If the award does not specify a fund then the employer is able to nominate the fund into which the superannuation contributions are to be paid, provided of course that the fund chosen is a complying fund.
5. Ensure that your payroll and other systems are able to cope with making regular payments to multiple funds.
6. Keep informed as to your obligations under the Choice of Fund legislation by visiting the ATO website at [www.ato.gov.au](http://www.ato.gov.au).
7. The Standard Choice Form and a comprehensive information booklet will be mailed to all employers by the ATO during April 2005.

Finally Carroll & O'Dea is well versed in the Choice of Fund legislation and is available to assist employers by providing advice on any aspect of the legislation affecting employers. Please contact our Peter Punch, Mick Sheils or Belinda Fisher in this regard.

Carroll and O'Dea has been a leading Firm in the Industrial Relations Law for Generations.

Our current team headed by Peter Punch and Gerard Phillips are carrying on this rich tradition.

We provide these services to a wide variety of clients in industries ranging from construction to disability services.

Carroll & O'Dea lawyers have represented clients in many important and major cases including recent landmark decisions on occupational health and safety, liability discrimination by reason of family responsibilities and discrimination on basis of maternity leave.

Peter and Gerard head a team of experienced industrial lawyers assisted by our Industrial Relations consultant Michael Shiels, a former and well respected Industrial Relations Commissioner.

### **Key Contacts**

#### **Peter Punch**

Partner  
Phone 02 9291 7177  
[ppunch@codea.com.au](mailto:ppunch@codea.com.au)



#### **Mick Shiels**

Consultant  
Phone 02 9291 7100  
[mshiels@codea.com.au](mailto:mshiels@codea.com.au)



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