



## CHOICE OF FUND AND SMSFs

From 1 July 2005, most employers will be required to offer their employees choice of superannuation fund. The choice regime will only apply to superannuation guarantee ('SG') contributions.

Employees will be able to have their SG contributions paid to a fund of their choice, including a self managed superannuation fund ('SMSF').

Employees Covered	Employees Not Covered (Exemptions)*
<ul style="list-style-type: none"> <li>➤ Employees for whom SG contributions are made (unless they fall under an exemption); and</li> <li>➤ From 1 July 2006, new Australian government employees and members of the Public Sector Superannuation Scheme accumulation plan.</li> </ul>	<ul style="list-style-type: none"> <li>➤ Employees for whom contributions are made:               <ol style="list-style-type: none"> <li>1. under or in accordance with certain Australian Workplace Agreements, federal certified agreements or State industrial awards;</li> <li>2. to unfunded public arrangements;</li> <li>3. under a prescribed law (eg, public sector schemes); and</li> <li>4. under or in accordance with an agreement in force under the <i>Employee Relations Act 1992</i> (Vic) and continues to be in force.</li> </ol> </li> </ul> <p>* Note, this is an inclusive, not an exhaustive list.</p>

### Standard choice form

Employers will need to provide their employees with a standard choice form. Generally, a choice form will need to be given to existing employees by 28 July 2005, to new employees within 28 days of commencing work and within 28 days of a request (unless a standard choice form has been provided to the employee in the last 12 months).

### How can an employee exercise choice?

Employees can only exercise choice once every 12 months by giving their employer written notice of the details of their chosen fund. An employer must effect a choice request within two months.

The ATO's draft standard choice form requires members of SMSFs to attach a letter from the ATO confirming that their SMSF is a complying fund. Professional bodies are seeking to have this onerous requirement dispensed with.

### When can an employer refuse to accept an employee's chosen fund?

An employer may refuse to accept the fund chosen by an employee if the fund cannot accept contributions from the employer. One example is where the trust deed requires the employer to become a 'participating employer' (ie, agree to be bound by the terms of the deed) before it will accept contributions.

Members of SMSFs should review their deed to ensure it does not require an employer to become a participating employer who is bound by the terms of the deed. Note, unintended in-house asset issues may arise if the fund is an employer sponsored fund. In our opinion, it is generally preferable for deeds not to require contributing employers to become participating employers.

### What is a default fund?

Employers will need to select a default fund if an employee does not make a choice. The default fund will need to offer a minimum level of death cover insurance.

## Substantial Penalties

Substantial penalties apply to employers who do not comply with the choice rules. A penalty of \$500 per employee applies per quarter or notice period. An employer with 10 employees, eg, could potentially be hit with a \$5,000 penalty per quarter or \$20,000 p.a.

## Financial Advice

Employers cannot provide financial advice unless they hold an Australian Financial Services Licence ('AFSL'), so they will need to exercise extreme caution. Merely advising an employee of more appropriate choices may constitute the provision of financial advice. Advisers who do not hold an AFSL also need to be careful. Certain 'recognised' accountants only have limited relief if they provide financial product advice in relation to SMSFs (but not other funds).

## Conclusions

Employers should review their current systems and procedures for any changes that need to be made. Many contracts of employment and HR policies will need to be revised. Likewise, members of SMSFs should review their deeds to ensure they do not require a contributing employer to become a participating employer or contain onerous obligations for employers. Note the draft choice regulations still have to be finalised.



## Choice of Fund Checklist

Date	Action
<b>Choice starts on 1 July 2005, so before 1 July 2005:</b>	<ul style="list-style-type: none"><li>➤ Examine employee and contractor arrangements to determine who is covered by choice and revise agreements as required;</li><li>➤ Review payroll systems as to ability to deal with contributions to multiple funds;</li><li>➤ Select a default fund with the prescribed level of life insurance; and</li><li>➤ Review ATO's choice form and customise as required.</li></ul>
<b>By 28 July 2005:</b>	<ul style="list-style-type: none"><li>➤ Give existing employees (as at 1 July 2005) a standard choice form.</li></ul>
<b>Within 28 days:</b>	<ul style="list-style-type: none"><li>➤ Give a standard choice form to an employee within 28 days of:<ol style="list-style-type: none"><li>1. commencing employment;</li><li>2. a request (unless a request has been made within the previous 12 months);</li><li>3. becoming aware contributions cannot be made to a chosen fund; or</li><li>4. changing a default fund.</li></ol></li></ul>
<b>28 September 2005 and onwards:</b>	<ul style="list-style-type: none"><li>➤ Effect employee's fund choice within two months of receipt of an employee's completed notice.</li><li>➤ If employee does not choose a fund, make contributions to the fund specified under the employees federal award or the default fund.</li></ul>

We will be covering the choice of fund regime at the next DBA Network Seminar on 18 March 2005. This seminar will also cover other SMSF and estate planning topics. Please refer to our website for further information.

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