



Explanatory Statement

Superannuation Guarantee (Administration) – Choice of Fund – Written Guidelines for the Reduction of an Increase in an Employer’s Individual Superannuation Guarantee Shortfall Determination 2021

General outline of instrument

1. This instrument is made under subsection 21(1) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA) and replaces *Superannuation Guarantee (Administration) Act 1992 – Written Guidelines for the Reduction of an Increase in an Employer’s Individual Superannuation Guarantee Shortfall* registered on 15 June 2006 (F2006L01821).
2. This instrument sets out revised written guidelines the Commissioner of Taxation (the Commissioner) must have regard to when deciding whether or not to reduce the amount of the increase in an employer’s individual superannuation guarantee shortfall (the choice shortfall) for an employee for a quarter under subsection 19(2E) of the *Superannuation Guarantee (Administration) Act 1992*.
3. The instrument is a legislative instrument for the purposes of the *Legislation Act 2003* (LA).
4. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Date of effect

5. This instrument commences on 1 November 2021.

What is the effect of this instrument

6. Subsections 19(2A) and 19(2B) of the SGAA give rise to an increase on the amount of an employer’s individual superannuation guarantee shortfall for a quarter where the employer makes contributions to a superannuation fund or retirement savings account but does not comply with the choice of fund requirements. This is known as the choice shortfall.
7. Subsection 19(2E) of the SGAA provides that the Commissioner may reduce the choice shortfall in full or in part.
8. Section 21 of the SGAA specifies that the Commissioner must develop written guidelines that he or she must have regard to when deciding whether or not to make a decision to reduce the choice shortfall.
9. This instrument provides the revised written guidelines (general guidelines) the Commissioner must have regard to when making a decision under subsection 19(2E) of the SGAA.
10. This instrument also provides transitional arrangements from 1 November 2021 to 31 October 2022 whereby the Commissioner can reduce the choice shortfall to nil if it is the employer’s

first occasion of non-compliance with the stapled fund requirements and that non-compliance was due to the employer's lack of knowledge of those requirements.

11. The general guidelines will apply when the Commissioner considers any reduction of the choice shortfall for the existing choice requirements or for any non-compliance with stapled fund requirements after the first instance of non-compliance, and from 1 November 2022.

Compliance cost assessment

12. There will be no additional regulatory impacts for both implementation and ongoing compliance costs from this instrument. The legislative instrument is minor or machinery in nature.

Background

13. The choice of fund requirements, which took effect from 1 July 2005, form part of the SGAA.

14. Prior to 1 November 2021, where an employee did not choose a superannuation fund, an employer could make contributions to the employer's nominated default fund for the benefit of that employee in compliance with the choice of fund provisions. Those employers should continue to contribute under their current arrangements for existing employees that commenced prior to 1 November 2021, unless those employees want to make a choice of fund.

15. From 1 November 2021, the choice of fund requirements are amended to limit the creation of multiple superannuation accounts for employees who do not choose a superannuation fund when they start a new job.

16. For employees commencing employment from 1 November 2021, that do not choose a fund and the contributions are not covered by the exemptions in subsections 32C(3) to (9) of the SGAA, an employer can comply with the choice of fund requirements by requesting from the Commissioner, details of the employee's existing stapled fund and making superannuation contributions to that stapled fund on behalf of the employee.

17. If the Commissioner informs the employer that there is no stapled fund for the new employee, the employer may contribute to their nominated default fund, or a fund in accordance with a workplace determination or enterprise agreement made before 1 January 2021, for the benefit of the new employee.

Consultation

18. Subsection 17(1) of the LA requires, before the making of a determination, that the Commissioner is satisfied that appropriate and reasonably practicable consultation has been undertaken.

19. Broad consultation was undertaken on the draft determination and draft explanatory statement. These documents were published on the ATO Legal Database on 2 August 2021 inviting feedback and comments for a two-week period. The ATO Legal Database is available to the general public through ato.gov.au and is referred to by stakeholders such as tax professional and industry.

20. Targeted consultation was also undertaken for a period of two weeks. Draft copies of the determination and explanatory statement were sent to various Stewardship Groups inviting members to provide feedback and comments.

21. Comments were supportive of the instrument with one submission which was out of scope for consideration in this instrument. It is noted that further written guidance may be made available for staff.

Exemption from disallowance and sunseting regime

22. Section 42 of the LA provides for the disallowance of legislative instruments. However, paragraph 44(2)(b) of the LA provides that section 42 does not apply to legislative instruments prescribed by regulation. Section 9 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (EOMR) provides a list of instruments that are not subject to disallowance. Item 3 of the table in section 9 of the EOMR lists instruments (other than regulations) relating to superannuation. As a result, this instrument is not a disallowable legislative instrument under section 42 of the LA.

23. Part 4 of the LA provides for the sunseting of legislative instruments. However, paragraph 54(2)(b) of the LA provides that Part 4 of the LA does not apply if the legislative instrument is prescribed by regulation. Section 11 of the EOMR provides a list of instruments that are not subject to sunseting. Item 6 of the table in section 11 of the EOMR lists instruments (other than regulations) relating to superannuation. As a result, Part 4 of the LA does not apply to this instrument. Therefore, this instrument will not sunset.

Legislative references

Acts Interpretation Act 1901

Legislation Act 2003

Superannuation Guarantee (Administration) Act 1992

Human Rights (Parliamentary Scrutiny) Act 2011

Legislation (Exemptions and Other Matters) Regulation 2015

Statement of compatibility with human rights

As section 42 of the *Legislation Act 2003* does not apply to this instrument, a Statement of compatibility with Human Rights in respect of this instrument is not required under section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.