

## **EXPLANATORY STATEMENT**

### **Issued by authority of the Treasurer**

*Superannuation Guarantee (Administration) Act 1992*

*Treasury Laws Amendment (Your Future, Your Super—Single Default Account) Regulations 2021*

The *Superannuation Guarantee (Administration) Act 1992* (the Act) establishes the Superannuation Guarantee Scheme, which requires employers to provide a prescribed level of superannuation support for their employees, and provides rules for its administration.

Section 80 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the *Treasury Laws Amendment (Your Future, Your Super—Single Default Account) Regulations 2021* (the Regulations) is to support the amendments in Schedule 1 to the *Treasury Laws Amendment (Your Future, Your Super) Act 2021* which received Royal Assent on 22 June 2021.

Schedule 1 to the *Treasury Laws Amendment (Your Future, Your Super) Act 2021* limits the creation of multiple superannuation accounts for employees who do not choose a superannuation fund when they start a new job. In particular, if a new employee (who has started their employment on or after 1 November 2021) has no chosen fund but has an existing ‘stapled’ fund, the amendments in Schedule 1:

- allow the employer to comply with the choice of fund rules by making contributions to the employee’s stapled fund; and
- provide that the employer *cannot* comply with the choice of fund rules by making contributions to the employer’s chosen default fund or the fund specified under a workplace determination or an enterprise agreement.

If an employee does not have an existing stapled fund, the employer may comply with the choice of fund rules by making contributions to:

- the employer’s chosen default fund (if fund meets the requirements in paragraph 32C(2)(ba) of the *Treasury Laws Amendment (Your Future, Your Super) Act 2021* and the employee has no chosen fund); or
- the fund specified under a workplace determination or an enterprise agreement, provided the determination or agreement was made before 1 January 2021.

To determine whether a stapled fund for an employee exists, the amendments require employers to request that information from the Commissioner of Taxation.

The Regulations support the amendments to the Act by setting out the requirements that a fund must meet to be a stapled fund and procedural matters relating to requests to and responses from the Commissioner of Taxation about stapled funds.

Public consultation on the draft Regulations and explanatory materials was held between 28 April 2021 and 25 May 2021. Twenty one submissions were received in response to the consultation.

A number of submissions raised concerns about whether underperforming funds should be excluded from being a stapled fund and whether these reforms could leave employees in superannuation funds with inappropriate insurance offerings for their occupation. In response to these concerns, the Government tabled parliamentary amendments relating to Schedule 1 to the Treasury Laws Amendment (Your Future, Your Super) Bill 2021 and has committed to undertake a review into occupational exclusions in default insurance associated with MySuper products.

Details of the Regulations are set out in [Attachment A](#).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on the day after they are registered.

A Statement of Compatibility with Human Rights is at [Attachment B](#).

The Productivity Commission's report, *Superannuation: Assessing Efficiency and Competitiveness*, has been certified as a process and analysis equivalent to a Regulation Impact Statement for the purposes of the Government decision to implement this measure.<sup>1</sup>

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<sup>1</sup> Available at <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22publications%2Ftabledpapers%2F44ff06bb-45c2-48fc-935e-0b84a2bfd6cb%22>.

**Details of the *Treasury Laws Amendment (Your Future, Your Super—Single Default Account) Regulations 2021***

**Section 1 – Name**

The name of the instrument is the *Treasury Laws Amendment (Your Future, Your Super—Single Default Account) Regulations 2021* (the Regulations).

**Section 2 – Commencement**

The Regulations commence on the day after the instrument is registered on the Federal Register of Legislation.

**Section 3 – Authority**

The Regulations are made under the *Superannuation Guarantee (Administration) Act 1992* (the Act).

**Section 4 – Schedules**

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

**Schedule 1 – Amendments**

Item 1 updates the definitions section in the *Superannuation Guarantee (Administration) Regulations 2018* to signpost the new definition of ***selection period***, which is used in the Regulations.

Item 2 inserts new provisions into the *Superannuation Guarantee (Administration) Regulations 2018* setting out when a fund is a stapled fund and procedural matters relating to requests to and responses from the Commissioner of Taxation (Commissioner) about stapled funds.

***When is a fund a stapled fund?***

Item 2 inserts new section 17A, which prescribes the requirements for working out if a fund is the stapled fund for an employee.

***Basic requirements***

For a fund to be a stapled fund for an employee at a particular time, the following basic requirements must be satisfied at that time:

- the fund must be a retirement savings account (RSA) or a complying superannuation fund or a complying superannuation scheme;
- the employee must be a holder of that RSA or be a member of that fund or scheme;

- insofar as the Commissioner is aware, the RSA, fund or scheme can accept contributions from the employee's employer; and
- the Commissioner can disclose information about the employee or their fund to the employer (and the employer's agent if the agent made the request).

The basic requirement that a stapled fund must be an RSA or a complying superannuation fund or a complying superannuation scheme ensures the existing fund is regulated under either the *Retirement Savings Account Act 1997* or the *Superannuation Industry (Supervision) Act 1993*.

The other basic requirements generally ensure that an employee's stapled fund is an existing fund of the employee and that the employer will likely be able to make contributions on behalf of the employee into the stapled fund.

Additionally, a fund is a stapled fund if, insofar as the Commissioner is aware, the RSA, fund or scheme is able to accept contributions from the employee's employer. This does not require the Commissioner to be aware of whether the RSA, fund or scheme is able to accept contributions from the employee's employer in every circumstance.

Rather, this basic requirement ensures that an RSA, fund or scheme is no longer a stapled fund for an employee if, at that time, the Commissioner becomes aware that the employee's employer cannot make contributions to the RSA, fund or scheme. In practice, this may occur where:

- the employee's employer has requested that the Commissioner identify a stapled fund for their employee; and
- the Commissioner has notified the employer that there is a stapled fund (the first fund) for the employee; and
- the employer is unable to make contributions into that fund on behalf of the employee and the employer notifies the Commissioner of this matter.

If this occurs, the first fund is no longer the employee's stapled fund. Therefore, to comply with the choice of fund rules, the employer may need to make a further request that the Commissioner identify whether there is another fund that could be the employee's stapled fund. If these circumstances result in the employer making contributions to a fund after the quarterly due date, the employer may seek relief from the Commissioner for the shortfall incurred due to the lateness of such contributions. This mechanism is provided for in the amendments in Schedule 1 to the *Treasury Laws Amendment (Your Future, Your Super) Act 2021* – see new subsection 19(2F) of the Act.

Finally, if the Commissioner is unable to provide information about an employee or their fund to the employer (and the employer's agent, if the agent made the request), that fund cannot be a stapled fund. For example, this may occur if the Commissioner has classified the employee as a security assessed client. This requirement ensures the Commissioner can comply with obligations under the relevant legislation and policy frameworks that restrict the disclosure of such information.

### *Tiebreaker requirements*

If an employee has two or more existing funds that meet the basic requirements (i.e. multiple eligible funds), the tiebreaker requirements will be applied to determine the employee's stapled fund.

The tiebreaker requirements are:

1. First, the employee's stapled fund is the most recent fund that has been identified by the Commissioner to be the employee's stapled fund in the selection period.
2. If the first requirement does not apply to any of the eligible funds, the employee's stapled fund is the fund that received the most recent contribution for the employee during the selection period.
3. If the first and second requirements do not apply to any of the eligible funds, the employee's stapled fund is the fund that held the largest account balance at the end of the previous financial year.
4. If the first, second and third requirements do not apply to any of the eligible funds, the employee's stapled fund is the fund selected by the Commissioner.

For the purposes of the fourth requirement, the Commissioner will select the most appropriate fund to be the stapled for the employee, having regard to:

- when the employee became a member or holder of each of the eligible funds (such as which fund or account was most recently opened); and
- any other relevant matters.

Depending on each case, the other relevant matters may include the amount of contributions made on behalf of the employee and the timing and pattern of such contributions.

The selection period is the period starting at the beginning of the previous financial year and ending at the time the Commissioner applies the tiebreaker requirements. For example, if the Commissioner applies the tiebreaker requirements to identify the stapled fund for an employee on 16 August 2022, the selection period is the period beginning on 1 July 2021 and ending on 16 August 2022.

These tiebreaker requirements are loosely based on the tiebreaker requirements for the unclaimed money rules, which are set out in section 14 of the *Superannuation (Unclaimed Money and Lost Members) Regulations 2019*.

When applying the tiebreaker requirements (and the basic requirements), the Commissioner will consider information reported to the Commissioner or otherwise available at the time of responding to the request by the employer or the employer's agent.

Prescribing these basic requirements and tiebreaker requirements in the Regulations ensures the meaning of a stapled fund can remain targeted and responsive to

changing practices, particularly as these reforms are implemented by employers and industry. Additionally, given the level of detail in the basic requirements and tiebreaker requirements, it is appropriate for these matters to be dealt with in subordinate legislation.

***When can an employer request information about stapled funds to the Commissioner?***

Item 2 also inserts new section 17B, which provides that an employer (or their agent) can only request the Commissioner to identify any stapled fund for their employee if the request is for the purposes of complying with the new choice of fund rule relating to stapled funds.

Therefore, if the relevant employee already has a chosen fund, the request will not satisfy new section 17B. This reflects that the choice of fund rule relating to stapled funds cannot be satisfied if the employee already has a chosen fund.

Additionally, if the individual is not employed by the employer, a request to the Commissioner by the employer (or their agent) about whether a stapled fund for that individual exists would not satisfy section 17B.

Making false or misleading statements to a taxation officer (such as falsely purporting to be the employer of an individual) may be an offence under the *Taxation Administration Act 1953*.

***When can the Commissioner change an earlier notification?***

Item 2 also inserts new section 17C, which provides that the Commissioner *may* change an earlier notification given to an employer if:

- the Commissioner has identified an error in the earlier notification; and
- if the earlier notification stated that the Commissioner is satisfied that there is a stapled fund for the employee—the Commissioner is unaware of any contributions being made by the employer on behalf of the employee to the erroneously identified fund.

The error in the earlier notification could include an administrative error such as providing the incorrect account number. These provisions are not intended to allow or require the Commissioner to provide ongoing updates to an employer about their employee's stapled fund.

The requirement that the Commissioner is unaware of any contributions being made by the employer to the erroneously identified fund reflects that changing an earlier notification is likely to be unnecessary if the employer is already making contributions into a fund on behalf of the employee. This reflects that the erroneously identified fund is likely to be an existing fund of the employee.

**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

*Treasury Laws Amendment (Your Future, Your Super—Single Default Account) Regulations 2021*

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the Legislative Instrument**

The *Treasury Laws Amendment (Your Future, Your Super—Single Default Account) Regulations 2021* (the Regulations) support the amendments in Schedule 1 to the *Treasury Laws Amendment (Your Future, Your Super) Act 2021* (the Act).

Schedule 1 to the Act limits the creation of multiple superannuation accounts for employees who do not choose a superannuation fund when they start a new job. In particular, if a new employee (who has started their employment on or after 1 November 2021) has no chosen fund but has an existing ‘stapled’ fund, the amendments in Schedule 1 to the Act:

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If an employee does not have an existing stapled fund, the employer may comply with the choice of fund rules by making contributions to:

- the employer’s chosen default fund (if fund meets the requirements in paragraph 32C(2)(ba) of the Act and the employee has no chosen fund); or
- the fund specified under a workplace determination or an enterprise agreement, provided the determination or agreement was made before 1 January 2021.

To determine whether a stapled fund for an employee exists, the amendments require employers to request that information from the Commissioner of Taxation.

The Regulations support the amendments in Schedule 1 to the Act by setting out the requirements that a fund must meet to be a stapled fund and procedural matters relating to requests to and responses from the Commissioner of Taxation about stapled funds.

**Human rights implications**

The Regulations do not engage any of the applicable rights or freedoms.

**Conclusion**

The Regulations are compatible with human rights as they do not raise any human rights issues.