

**EXPOSURE DRAFT EXPLANATORY MATERIALS – SIMPLIFICATION OF
SUPERANNUATION GUARANTEE COMPLIANCE FOR EMPLOYERS**

Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
Commissioner	Commissioner of Taxation
CTOA	<i>Crimes (Taxation Offences) Act 1980</i>
NIRA	<i>Tax and Superannuation Laws Amendment (Norfolk Island Reforms) Act 2015</i>
SG	Superannuation Guarantee
SGAA	<i>Superannuation Guarantee (Administration) Act 1992</i>
SGAR	<i>Superannuation Guarantee (Administration) Regulations 1993</i>
SGC	Superannuation Guarantee Charge
TAA	<i>Taxation Administration Act 1953</i>

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Chapter 1

Simplification of superannuation guarantee compliance for employers

Outline of chapter

1.1 Schedule 1 to this Bill amends the *Superannuation Guarantee (Administration) Act 1992* (SGAA); the *Taxation Administration Act 1953* (TAA); the *Tax and Superannuation Laws Amendment (Norfolk Island Reforms) Act 2015* (NIRA) and the *Crimes (Taxation Offences) Act 1980* (CTOA) to simplify and reduce the harshness of the superannuation guarantee (SG) charge for employers by:

- replacing salary and wages as the current basis for calculating SG charge (SGC) and aligning this with the base used to calculate SG contributions (ordinary time earnings);
- aligning the nominal interest on unpaid or late SG contributions with the period over which they are actually outstanding; and
- removing the additional SGC penalty imposed under Part 7 and replacing this with the general tax penalty provisions imposed under the TAA.

Context of amendments

1.2 An important part of Australia's superannuation system is the provision of compulsory employer contributions by employers to complying superannuation funds in respect of their employees. Employers must make quarterly SG contributions for their eligible employees to avoid having to pay SGC to the Commissioner of Taxation (Commissioner).

1.3 The SGC regime imposes punitive costs on employers who pay their SG contributions late or in part. This can have a significant impact on small businesses.

1.4 If an employer does not make the correct amount of SG contributions they will have an SG shortfall on which SGC is imposed.

SG shortfall consists of the total of the employer's individual SG shortfalls for each employee, nominal interest component and administration component for the quarter.

1.5 The requirement for employers to calculate SGC and SG contributions on different bases increases compliance complexity for employers. Also, if an employer pays SG contributions late the requirement to calculate SGC based on salary or wages can result in an SG shortfall higher than the minimum required contribution amount.

1.6 Late payment of SG contributions also attracts nominal interest on the shortfall amount from the beginning of the relevant quarter until the employer lodges an SG statement or the Commissioner makes a default assessment. This means if an employer pays SG contributions late but does not lodge an SG statement, then nominal interest accrues indefinitely until an assessment is made.

1.7 If the employer does not lodge an SG statement (or fails to give information to the Commissioner) they are also liable to pay the additional SGC penalty at a rate of up to 200 per cent of the SGC payable by the employer.

1.8 In 2014 the Government announced a number of measures to reduce small business superannuation compliance costs.

1.9 The amendments contained in this Bill implement one of these measures by simplifying and reducing the harshness of the SGC for employers.

Summary of new law

1.10 Part 1 of Schedule 1 amends the SGAA to provide that an employer's individual SG shortfall for an employee is worked out using ordinary time earnings.

1.11 Part 2 of Schedule 1 amends the SGAA to align the period over which nominal interest accrues with the period SG contributions are actually outstanding.

1.12 Part 3 of Schedule 1 amends the SGAA and the TAA to remove the additional SGC penalty imposed under Part 7 of the SGAA and replace this with the general tax penalty provisions in the TAA.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The SG is calculated as 9.5 per cent of ordinary time earnings.	The SG is calculated as 9.5 per cent of ordinary time earnings.
An employer's liability to SGC is calculated based on the employee's ordinary time earnings.	An employer's liability to SGC is calculated based on the employee's salary or wages.
Nominal interest is imposed on each of the employer's individual SG shortfalls from the 29 th day after the end of the relevant quarter until the day that late contributions are paid in full for the employee, or the day before the day on which SGC is payable.	Nominal interest is imposed on the total of the employer's individual SG shortfalls from the beginning of the relevant quarter until the date on which SGC is payable.
If an employer refuses or fails to give the Commissioner an SG statement or information when required they are liable to an administrative penalty under the TAA.	If an employer refuses or fails to give the Commissioner an SG statement or information relevant to assessing their SGC liability for a quarter they are liable to pay additional SGC penalty under Part 7 of the SGAA equal to up to 200 per cent of the SGC payable.

Detailed explanation of new law

1.13 Employers must make quarterly SG contributions on behalf of their eligible employees to avoid having to pay the SGC. SG contributions are due 28 days after the end of the relevant quarter.

1.14 Currently, the SG contributions an employer should make to reduce their SG shortfall are worked out based on the employee's ordinary time earnings. Conversely, if an employer does not make the correct amount of SG contributions on time and has an SG shortfall, the employer's individual SG shortfall (and therefore SGC) is worked out based on the employee's salary or wages.

1.15 'Salary or wages' as defined in the SGAA describes a broader scope of remuneration than 'ordinary time earnings'. This means that if an employer pays SG contributions late then they could be liable for to pay an SG shortfall amount higher than the original amount of contribution required to be made.

1.16 If an employer makes a late contribution to their employee's superannuation fund they are able to elect to offset the contribution amount against their SGC liability for a quarter under section 23A of the SGAA. The late contribution must also be made before the employer's original SGC assessment for the quarter.

1.17 SGC is imposed on an employer's SG shortfall for a quarter. The SG shortfall consists of the total of the employer's individual SG shortfalls, nominal interest component and administration component for the quarter.

1.18 Currently, the nominal interest component is calculated on the total of the employer's individual SG shortfalls for a quarter, from the beginning of the quarter until the date SGC is payable. SGC is generally payable when the employer lodges an SG statement (deemed assessment) or the Commissioner makes a default assessment.

1.19 If the employer does not lodge an SG statement then nominal interest accrues indefinitely until the Commissioner makes a default assessment.

1.20 If an employer fails to provide an SG statement or information relevant to assessing their SGC liability, the employer is currently liable for the additional SGC penalty equal to up to 200 per cent of the SGC payable by the employer for the quarter. This penalty is imposed under Part 7 of the SGAA.

Ordinary time earnings

1.21 Part 1 of Schedule 1 amends the SGAA to provide that an employer's individual SG shortfall for an employee is worked out using ordinary time earnings.

1.22 Specifically, subsection 19(1) of the SGAA is amended so that the employer's individual SG shortfall for an employee is worked out based on the employee's ordinary time earnings for the quarter.

1.23 This will mean that the calculations for SG contributions and SG shortfall will both be based on the concept of ordinary time earnings.

1.24 The definition of ordinary time earnings is amended to specifically refer to salary or wages. Ordinary time earnings includes the total of the salary or wages paid by the employer to the employee that are earnings in respect of ordinary hours of work or earnings consisting of over-award payments, shift-loading or commission. Ordinary time earnings does not include a lump sum payment to an employee with their

termination of employment being a payment in lieu of unused sick, annual or long service leave.

1.25 Salary or wages is defined in section 11 of the SGAA to specifically include certain payments and remuneration. Section 27 of the SGAA specifically excludes salary or wages paid in specific circumstances for the purposes of calculating SGC under section 19 of the SGAA. The *Superannuation Guarantee (Administration) Regulations 1993* (SGAR) prescribes further exclusions for the purposes of section 27 of the SGAA.

1.26 As the definition of ordinary time earnings is amended to specifically refer to salary or wages paid by the employer to the employee, the above inclusions and exclusions are preserved for the purposes of calculating SGC under section 19 of the SGAA.

1.27 Part 1 of Schedule 1 includes consequential amendments to the NIRA. Schedule 2 of the NIRA contains application and transitional provisions for the purposes of incorporating Norfolk Island salary or wages into the SG regime. Schedule 2 of the NIRA is amended so that it reflects the above changes to the calculation of an employer's individual SG shortfall by changing references to 'salary or wages' to 'ordinary time earnings'.

Example 1.1

During the July – September 2016 quarter Mario earns \$4,000 from his employer, ABC Ltd. This amount includes \$200 in overtime and \$800 salary paid while Mario was undertaking service with the Defence Force Reserves.

ABC Ltd does not make SG contributions on behalf of Mario for the July – September 2016 quarter. According to the formula in subsection 23(2) of the SGAA, ABC Ltd should have made SG contributions of \$285 on behalf of Mario. This amount is based on Mario's ordinary time earnings of \$3,000 for the quarter and a charge percentage rate of 9.5 per cent. The amounts Mario earned in overtime and while undertaking Service with the Reserves are not taken into account when calculating ordinary time earnings.

Because ABC Ltd did not make any contributions on behalf of Mario, ABC Ltd has an individual SG shortfall of \$285 for Mario for the July – September 2016 quarter. This amount is based on Mario's ordinary time earnings for the quarter. As with the calculation of SG contributions, the amounts Mario earned in overtime and while undertaking service with the Reserves are not taken into account.

Nominal interest

1.28 Part 2 of Schedule 1 amends the SGAA to align the period over which nominal interest accrues with the period SG contributions are actually outstanding.

1.29 The nominal interest component forms part of the SGC payable by an employer if they have an SG shortfall for a quarter. If an employer makes the required contribution to a Retirement Savings Account or to a complying superannuation fund within 28 days after the end of the relevant quarter they will not have an SG shortfall.

1.30 Nominal interest is calculated at the rate applicable under the regulations made for the purposes of section 31 of the SGAA, which is currently 10 per cent.

1.31 Nominal interest will accrue on each of the employer's individual SG shortfalls for the quarter from the 29th day after the end of the quarter until the day the employer makes contributions, to which section 23A of the SGAA applies in relation to a quarter, that equal or exceed the employer's individual SG shortfall for the employee for the quarter or, until the day before the day the SGC in relation to the total is payable.

1.32 If the employer's individual SG shortfall is not paid in full then nominal interest will continue to accrue until the day before the day the SGC is payable. This is generally the day before either the employer lodges an SG statement or the Commissioner makes a default assessment. This will avoid an overlap with the imposition of General Interest Charge, which is imposed from the day the SGC is payable.

Example 1.2

On 23 December 2016 ABC Ltd makes a late payment of \$285 on behalf of Mario.

ABC Ltd does not give the Commissioner an SG statement by the required date. On 1 March 2017 the Commissioner makes a default assessment of ABC Ltd's SG shortfall for the July – September 2016 quarter and of the SGC payable on the shortfall. ABC Ltd elects to make a late payment offset against their SGC liability for the July – September 2016 quarter.

The default assessment shows that ABC Ltd has an SGC liability for the September 2016 quarter, which includes an individual SG shortfall of \$285 for Mario, nominal interest of \$4.36 and the administration component of \$20.

Nominal interest is calculated from 29 October 2016 (the day after the SG contribution was due) until 23 December 2016 (the day ABC Ltd paid Mario's SG contribution in full).

The LPO will reduce ABC Ltd's SGC liability by \$285, however ABC Ltd will still have an amount of \$24.36 outstanding.

Example 1.3

ABC Ltd also fails to make SG contributions for the July – September 2016 quarter on behalf of its other employee, Aisha. According to the formula in subsection 23(2) of the SGAA, ABC Ltd should have made SG contributions of \$285 on behalf of Aisha.

Nominal interest on ABC Ltd's individual SG shortfall for Aisha is calculated from 29 October 2016 (the day after the SG contribution was due) until 28 February 2017 (the day before the Commissioner makes a default assessment).

Nominal interest on ABC Ltd's individual SG shortfall for Aisha is \$9.60.

Penalties

1.33 Part 3 of Schedule 1 amends the CTOA, the SGAA and the TAA to remove the additional SGC penalty imposed under the SGAA and replace this with the general tax penalty provisions in the TAA.

1.34 Section 33 of the SGAA requires an employer who has an SG shortfall for a quarter to lodge an SG statement in the approved form. If an employer has not lodged an SG statement, section 34 of the SGAA gives the Commissioner the power to require the employer to give the Commissioner a written statement.

1.35 If an employer refuses or fails to provide an SG statement or information when required they will be subject to administrative penalties under the TAA.

1.36 Under subsection 284-75(3) of Schedule 1 of the TAA an employer will be liable to an administrative penalty if they fail to give a statement to the Commissioner and the Commissioner makes a default assessment without the assistance of the statement. Under subsection 286-75(1) of Schedule 1 of the TAA an employer will be liable to an administrative penalty if they do not give the Commissioner a statement in the approved form by the required day.

Example 1.4

As ABC Ltd had an SG shortfall for the July – September 2016 quarter it was required to give the Commissioner an SG statement by 28 November 2016. As ABC Ltd did not do so it will be liable to administrative penalties under the TAA.

Consequential amendments

1.37 Part 3 of Schedule 1 makes a number of consequential amendments that are required to remove the additional SGC penalty imposed under Part 7 of the SGAA and replace these with the general tax penalty provisions in the TAA.

1.38 Consequential amendments to the SGAR and other regulations will be made.

Application and transitional provisions

1.39 The amendments made by Schedule 1 apply in relation to a quarter beginning on or after 1 July 2016.