

EXPOSURE DRAFT

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TREASURY LAWS AMENDMENT (IMPROVING ACCOUNTABILITY AND  
MEMBER OUTCOMES) BILL 2017: SUPERANNUATION GUARANTEE  
(SALARY SACRIFICE INTEGRITY MEASURES)

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EXPLANATORY MEMORANDUM



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## ***Glossary***

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

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
OTE	Ordinary Time Earnings
RSA	Retirement Savings Account
SG	Superannuation Guarantee
SGAA 1992	<i>Superannuation Guarantee (Administration) Act 1992</i>



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# Chapter 1

## Salary sacrifice integrity

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### Outline of chapter

1.1 Schedule # to this Exposure Draft Bill amends the *Superannuation Guarantee (Administration) Act 1992* (SGAA 1992) to improve the integrity of the superannuation system by ensuring that an individual's salary sacrifice contributions cannot be used to reduce an employer's own superannuation guarantee (SG) obligations.

1.2 All legislative references in this Chapter are to the SGAA 1992.

### Context of amendments

1.3 In December 2016, the Government established the Superannuation Guarantee Cross-Agency Working Group to investigate practical ways to improve employer compliance with their SG obligations.

1.4 On 14 July 2017, the Minister for Revenue and Financial Services announced that the Government would amend the SGAA 1992 to implement recommendations made by Cross-Agency Working Group to close loopholes that could be used by employers to short change employees who choose to make salary sacrifice contributions into their superannuation accounts and released the Cross-Agency Working Group's Report, *Superannuation Guarantee Non-compliance*.

1.5 In particular, these amendments will implement the Cross-Agency Working Group's recommendations to amend the law to:

- prevent contributions made as part of a salary sacrifice arrangement from satisfying an employer's SG obligations (Recommendation 8); and
- specifically include salary or wages sacrificed to superannuation in the base for calculating an employer's SG obligations (Recommendation 9).

1.6 Under a salary sacrifice arrangement an employee agrees to forego part of their future salary or wages in return for their employer providing benefits of a similar value — for example, in exchange for a company provided car or childcare benefits.

1.7 Employees are also able to salary sacrifice amounts of their future salary and wages to be paid by their employer to a superannuation fund as superannuation contributions. These contributions are deductible for the employer and are not included in the assessable income of the employee (subject to concessional contributions caps). Instead, these contributions are included in the assessable income of the superannuation fund and generally taxed concessional at a rate of 15 per cent.

1.8 Currently, salary sacrificed amounts can count towards employer contributions that reduce an employer's charge percentage. In addition, employers can calculate SG obligations on (lower) post-salary sacrifice amounts. While employees salary sacrificing may obtain other taxation benefits, employees who salary sacrifice to boost their superannuation savings may end up with less superannuation than they expect.

## Summary of new law

1.9 Schedule # to this Exposure Draft Bill amends the SGAA 1992 to prevent employers from using amounts their employees' salary sacrifice superannuation contribution amounts to reduce their own SG obligations and ensure that SG is paid on the pre-salary sacrifice base.

1.10 This is done by distinguishing between the mandatory and salary sacrificed components of an employer contribution, so only mandatory employer contributions (that is, a minimum of 9.5 per cent of ordinary time earnings (OTE) or higher amount specified in a workplace agreement/award) reduce the SG charge.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>Amounts that an employee salary sacrifices to superannuation do not reduce an employer's SG charge. Salary sacrificed amounts also do not form part of any late contributions an employer makes that are eligible to be offset against the SG charge.</p> <p>To avoid a shortfall and the SG charge, an employer must contribute at least 9.5 per cent of an employee's OTE to a complying superannuation fund or retirement</p>	<p>Amounts that an employee salary sacrifices to superannuation form part of the employer's contribution. The employer contribution reduces an employer's SG charge. These contributions, if paid late, can also be offset against the SG charge.</p> <p>To avoid a shortfall and the SG charge, an employer must contribute at least 9.5 per cent of an employee's OTE to a complying superannuation fund or RSA. The</p>



<p>savings account (RSA). The employer must include salary sacrificed amounts in the OTE base, because OTE also includes any contributions made in the quarter that are sacrificed OTE contributions.</p>	<p>employer may or may not choose to include salary sacrificed amounts in the OTE base, because OTE is the number of dollars in the OTE of the employee for the quarter in respect of the employer.</p>
<p>SG entitlements must be calculated on the pre-salary sacrifice base, as individual superannuation guarantee shortfalls for an employee are calculated on the quarterly salary or wages base. The quarterly salary or wages base is the sum of the total salary and wages paid by the employer to the employee for the quarter and any contributions made in the quarter under a salary sacrifice agreement.</p>	<p>SG entitlements may be calculated on the post-salary sacrifice base, as individual superannuation guarantee shortfalls for an employee are calculated on the base of total salary or wages paid by the employer to the employee for that quarter.</p>

## Detailed explanation of new law

### Working out the SG shortfall

1.11 Employers are liable for the SG charge if they have a shortfall for the quarter (section 16). The SG charge percentage is currently 9.5 per cent (subsection 19(2)).

1.12 A SG shortfall will arise if an employer does not contribute at least 9.5 per cent of an employee's quarterly salary and wage base for the quarter. *[Schedule #, item 4, subsection 19(1)]*

1.13 The **quarterly salary or wages base**, for an employer in respect of an employee, for a quarter is the sum of:

- the total salary or wages paid by the employer to the employee for the quarter; and
- any contributions that are sacrificed salary or wages contributions by the employer for the benefit of the employee in respect of the quarter.

*[Schedule #, items 1, 2 and 5, definition of 'quarterly salary or wages base' in subsection 6(1), note to section 11, and subsection 19(1)]*

1.14 This ensures that the shortfall and charge is calculated on the correct pre-salary sacrifice base and that employers cannot calculate their superannuation guarantee obligations on reduced salary and wages.

1.15 A **sacrificed salary or wages contribution** is a contribution by an employer for the benefit of an employee, in respect of the quarter if:

- the contribution was made to a complying superannuation fund or an RSA by the employer for the benefit of the employee;
- the contribution was made because the employee agreed for it to be made in return for the employee's salary or wages for the quarter being reduced; and
- had the salary or wages been paid to the employee (instead of being reduced), those salary or wages would not have been excluded salary or wages.

*[Schedule #, items 1 and 3, definition of 'sacrificed salary or wages contribution' in subsection 6(1) and subsection 15A(2)]*

1.16 Salary and wages are excluded salary or wages if they are paid to, for example, a part-time employee under 18 years of age, an employee to whom an international social security agreement applies or an employee who earns less than \$450 a month (sections 27 and 28). Sacrificed salary or wages contributions do not include contributions that are made from excluded salary and wages that are salary sacrificed. *[Schedule #, item 3, paragraph 15A(2)(c) and subsection 15A(3)]*

## Reduction of the SG charge percentage

1.17 The SG charge percentage of an employer in relation to an employee is reduced if, so far as is relevant, the employer makes a contribution (other than a salary sacrifice contribution) to a superannuation fund that is not a defined benefits fund or to an RSA for the employee's benefit (section 23). The amount of the reduction is worked out using the formula:

$$\frac{\text{Contribution}}{\text{Ordinary times earnings base}} \times 100$$

*[Schedule #, items 7 and 8, subsection 23(2)]*

1.18 The ordinary times earnings base is the number of dollars in the sum of:

- the ordinary times earnings of the employee in respect of the quarter; and
- any contributions that are sacrificed ordinary times earnings contributions by the employer for the benefit of the employee in respect of the quarter (including contributions that may not be taken into account under section 23 because of another provision in the SGAA 1992).

*[Schedule #, items 9 to 11, definition of ‘ordinary times earnings base’ in subsection 23(2) and subsection 23(2A)]*

1.19 This ensures that mandatory employer contributions that reduce the SG charge are calculated on a pre-salary sacrifice base.

1.20 A **sacrificed ordinary times earnings contribution** is a contribution by an employer for the benefit of an employee, in respect of the quarter if:

- the contribution was made to a complying superannuation fund or an RSA by the employer for the benefit of the employee;
- the contribution was made because the employee agreed for it to be made in return for the employee’s salary or wages for the quarter being reduced; and
- had the ordinary times earnings been paid to the employee (instead of being reduced), those ordinary times earnings would not have been excluded salary or wages.

*[Schedule #, items 1 and 3, definition of ‘sacrificed ordinary times earnings contribution’ in subsection 6(1) and subsection 15A(2)]*

1.21 Sacrificed ordinary times earnings contributions do not include contributions made from excluded salary and wages that are salary sacrificed. *[Schedule #, items 3, 13, 14 and 15, paragraph 15A(1)(c), subsection 23(2) and subsection 23(12)]*

1.22 Subsection 23(9A) ensures that an employer can fulfil their SG obligations in respect of a deceased employee by paying contributions (including salary sacrificed contributions) to the employee’s estate or legal representative. *[Schedule #, item 12, subsection 23(9A)]*

1.23 In addition, where the employer makes a late contribution for their employee and seeks to offset it against the SG charge they have incurred, salary sacrificed amounts cannot form part of that late contribution. *[Schedule #, item 16, subsection 23A(1)]*

1.24 Section 23B currently applies to contributions made through an approved clearing house for the purposes of section 23 (reduction of the charge percentage) and section 23A (offsetting late payments). The amendments modify the section so that it also applies to contributions made through an approved clearing house for the purposes of section 15A (salary sacrifice arrangements). *[Schedule #, items 17 to 19, section 23B]*

1.25 A consequential amendment is made to ensure that the presumption in section 25 that certain contributions are contributions to a complying superannuation fund or RSA covers salary sacrifice contributions. *[Schedule #, items 20, section 25]*

**Example 1.1: Sacrificed OTE or salary and wages contributions do not reduce SG charge and Employers cannot use salary sacrificed amounts to satisfy their own SG obligation**

Pablo has quarterly ordinary time earnings of \$15,000 which would ordinarily generate an entitlement to \$1,425 in SG contributions ( $\$15,000 \times 9.5$  per cent). He salary sacrifices \$1,000 a quarter, expecting his superannuation contributions to rise to \$2,425 for that quarter.

However, his employer uses the sacrificed amount (\$1,000) to satisfy part of the employer's SG obligation, and only makes a total contribution of \$1,425 (consisting of the employee's \$1,000 salary sacrificed amount and \$425 employer mandatory contribution).

Under new subsection 23(2), sacrificed ordinary time earnings contributions will not reduce the charge percentage. Therefore, the charge percentage would be reduced by 2.83 per cent ( $\$425 / \$15,000 \times 100$ ). As the employer is required to contribute 9.5 per cent, they must contribute an additional 6.67 per cent to meet their SG obligations. The employer's contribution of \$425 creates a shortfall of \$1,000 ( $6.67 \times \$15,000$ ), which is the amount of the employee's salary sacrificed amount.

Under new subsection 23(2), sacrificed ordinary time earnings or sacrificed salary and wages contributions will not reduce the charge percentage. Pablo's employer will need to contribute \$2,425 in total (comprised of \$1,425 mandatory employer contributions and \$1,000 employee salary sacrificed amount) to avoid a shortfall under section 19 and imposition of the SG charge.

**Example 1.2: SG liability to be calculated on the pre-salary sacrifice base and Employers cannot calculate SG obligation on post-salary sacrifice salary and wages**

Pablo's colleague, Consuela, earns the same salary as Pablo (\$15,000 per quarter) and salary sacrifices the same amount (\$1,000 per quarter).

Consuela's employer previously calculated SG liability on Consuela's post salary sacrifice wage (\$14,000 instead of \$15,000 per quarter). The employer contributed \$2,330 per quarter (\$1,330 mandated employer contribution + \$1,000 salary sacrifice amount) instead of \$2,425 (\$1,425 + \$1,000).

When calculating their SG obligations Consuela's employer must exclude salary sacrificed OTE contributions. The OTE base is the sum of OTE and sacrificed OTE contributions.

Consuela's employer's charge percentage would be reduced by 8.86 per cent ( $\$1,330 / \$15,000 \times 100$ ).

The \$1,330 is the amount the employer contributed, and the \$15,000 is the correct OTE that the employer's SG obligation should have been calculated on.

Since 8.86 per cent is less than the required 9.5 per cent, the employer will have a charge percentage of 0.64 per cent under section 19 and a shortfall of \$95.

To avoid the shortfall, Consuela's employer contributes \$2,425 each quarter (consisting of \$1,425 in mandated employer contribution and \$1,000 in salary sacrificed amounts) which is the correct amount.

### **Example 1.3: Amounts that are salary and wages but not OTE**

Lucille is paid \$20,000 in salary and wages a quarter, which includes overtime of \$5,000. She enters into a salary sacrifice arrangement of \$2,500 of overtime pay per quarter. Her ordinary time earnings are \$15,000 a quarter (as overtime is not included in OTE).

Lucille's total employer contribution should be \$3,925 (\$1,425 mandatory employer contribution + \$2,500 salary sacrificed amount for the quarter).

Lucille's employer contributes \$3,925, with \$1,425 being the amount relevant under subsection 23(2) for reducing the charge percentage. The sacrificed salary or wages contribution is not added into the base of OTE, to the extent it includes overtime. This is because it is not a sacrificed OTE contribution under section 15A, since the salary sacrifice arrangement results in no reduction in the employee's OTE.

Lucille's employer's SG charge percentage is reduced by the following amount:

$$\frac{\$1,425}{\$15,000} \times 100 = 9.5\%$$

Therefore, the SG charge percentage is reduced to zero and there is no shortfall to pay, which is the correct outcome since overtime should be excluded from OTE.

## **Application and transitional provisions**

1.26 The amendments made by this Schedule apply in relation to working out an employer's superannuation guarantee shortfall for quarters beginning on or after 1 July 2018. *[Schedule #, item 21]*