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General Manager
Retirement Income Policy Division
The Treasury
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PARKES ACT 2600
Email: superannuation@treasury.gov.au

Dear Sir/Madam

Exposure Draft: *Treasury Legislation Amendment (Improving Accountability and Member Outcomes) Bill 2017: superannuation guarantee (salary sacrifice integrity measures)*

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to the exposure draft *Treasury Legislation Amendment (Improving Accountability and Member Outcomes) Bill 2017: superannuation guarantee (salary sacrifice integrity measures)* (Exposure Draft).

About ASFA

ASFA is a non-profit, non-political national organisation whose mission is to continuously improve the superannuation system so people can live in retirement with increasing prosperity. We focus on the issues that affect the entire superannuation system. Our membership, which includes corporate, public sector, industry and retail superannuation funds, plus self-managed superannuation funds and small APRA funds through its service provider membership, represent over 90 per cent of the 14.8 million Australians with superannuation.

General comments

ASFA is strongly committed to measures and policies that reflect the core role of the superannuation system in providing adequate retirement incomes for all Australians. As such, we welcome the amendments in the Exposure Draft, that are designed to prevent an employer using salary sacrificed contributions made by their employees to reduce their Superannuation Guarantee (SG) obligations.

Under the *Superannuation Guarantee (Administration) Act 1992* (SGA Act) as currently drafted, there is no mechanism to prevent employers:

- counting salary sacrificed contributions made by employees toward discharging their superannuation guarantee (SG) obligations, and/or
- calculating those SG obligations on the employees' reduced earnings base, after deduction of the salary sacrificed contributions.

The making of salary sacrificed contributions necessarily involves an employee foregoing current disposable income, with a view to boosting their superannuation savings for use in their retirement. Ideally, the impacts on the level of SG contributions to be made by the employer is a matter that would be discussed during negotiation of the salary sacrifice arrangement, with the consequences clearly understood by the employee. However, this does not always occur, with the result that frequently the employee ends up with less superannuation than they had expected.

In effect, the employer's conduct, in taking advantage of the lack of an explicit prohibition on this behaviour, runs counter to efforts by their employees to boost their retirement savings by making additional contributions. This is, in ASFA's view, inappropriate.

We note that in its recent report, the Superannuation Guarantee Cross-Agency Working Group on SG non-compliance (Working Group), indicated that:

- while the Australian Government Solicitor has previously advised that the use of salary sacrificed contributions to satisfy an employer's SG obligations would likely breach the *Fair Work Act 2009*, it is considered that relying on the Fair Work Office to enforce this interpretation is unlikely to be effective as it lacks the specialist expertise to deal with complex superannuation matters¹
- the Australian Government Solicitor has previously advised that the practice of employers reducing their employees' SG base by amounts that are salary sacrificed is unlikely to constitute a breach of the *Fair Work Act*².

ASFA is strongly committed to measures and policies that reflect the core role of the superannuation system in providing adequate retirement incomes for all Australians. As such, we strongly welcome the proposed amendments to the SGA Act to ensure that an individual's salary sacrificed contributions cannot be used to reduce their employer's superannuation guarantee (SG) obligations.

As well as enhancing equity, the proposed amendments to the SGA Act are also timely, as they will improve consistency in the treatment of employees who make additional contributions to their superannuation.

Recent reforms to the taxation law have removed a restriction which allowed individuals to claim a tax deduction for personal contributions only where they derived less than 10 per cent of their income from employment sources. These reforms, announced in the Government's May 2016 Budget, apply to contributions made from 1 July 2017. The proposed amendments to the SGA Act will ensure that those individuals who utilise salary sacrifice to make additional superannuation contributions are treated consistently, for SG purposes, with those who make contributions from after-tax monies and subsequently claim an income tax deduction.

¹ [Superannuation Guarantee Cross Agency Working Group - Superannuation Guarantee Non-compliance: a report to the Minister for Revenue and Financial Services](#), 31 March 2017, paragraph 5.26

² *Ibid.*, paragraph 5.34

Further measures required to reduce SG non-compliance

We note that the proposed amendments were announced as part of the Government's response to the report from the Cross-Agency Working Group³.

We would welcome further Government action including:

- requiring employers to pay SG contributions monthly
- enhancing the resources of the Australian Taxation Office (ATO) around SG non-payment and its powers around phoenixing activity by company directors
- requiring the ATO to notify employees before they enter into an SG payment plan with an employer
- expanding the Fair Entitlements Guarantee to include unpaid SG contributions
- removing the earnings threshold of \$450 per month, below which employers are not required to make SG contributions for employees.

These proposed changes were either raised in ASFA's submission to the recent inquiry by the Senate Economics Reference Committee into non payment of SG⁴ or by the Working Group's final report.

We urge the Government to consider these measures, and the remaining recommendations of the Working Group, to develop a comprehensive policy response to the issue of SG non-payment.

Ability of the ATO to monitor compliance with the integrity measure

The ability of the ATO to effectively monitor compliance with the amended SG law will be completely dependent on the accuracy and completeness of the data it receives. The employer has a critical part to play in this process, however we note that the Exposure Draft and accompanying explanatory material do not appear to outline measures to improve reporting by employers.

The report by the Working Group indicated that employers should report information about their SG obligations to the ATO in a more timely manner. According to the Working Group, one way to achieve this is by leveraging the Single Touch Payroll (STP) reporting regime.

While the precise data to be reported by employers under STP is yet to be finalised, the current draft guidelines for STP⁵ payroll events provide for employers to separately report to the ATO, at the time they pay their employees:

- the "SG amount" - the amount of SG contribution entitlement on behalf of the employee (note that this is not confirmation that the entitlement has actually been paid)
- the "OTE amount" – the amount of the employee's Ordinary Time Earnings
- the "RESC amount" - the amount of reportable employer superannuation contributions.

³ [Superannuation Guarantee Cross Agency Working Group - Superannuation Guarantee Non-compliance: a report to the Minister for Revenue and Financial Services](#), 31 March 2017, recommendations 8 and 9

⁴ [ASFA - Superannuation Guarantee non-payment \(submission to Senate Economics Reference Committee\)](#), 17 February 2017

⁵ [Australian Taxation Office - Single Touch Payroll – Payroll Event – Release 2: Software Developer Guidelines, version 2.0 \(draft\)](#), 20 December 2016; [Australian Taxation Office - Single Touch Payroll Data Definitions Payroll Event version 1](#), 3 March 2017

While salary sacrificed contributions should be reported in the RESC amount field, so too should other types of employer contributions that are additional to SG obligations, where the employee has influenced the amount or rate of the contribution. An example is the scenario where an employee has negotiated an employer contribution rate that is higher than the mandatory SG rate.

The RESC amount is therefore not a perfect proxy for salary sacrificed contributions. However, in ASFA's view, it will highlight to the ATO the potential that salary sacrificed contributions were payable for an employee. We note, however, that should an employer choose to disregard the amendments made by the Exposure Draft, and report any salary sacrificed contributions for an employee as "SG amount" rather than "RESC amount", this may be difficult for the ATO to detect.

While STP will provide the ATO with improved data from employers, it will not become mandatory until 1 July 2018, and then only for larger employers (those with 20 or more employees). Many cases of SG non-compliance involve small employers – in fact, the Working Group concluded, based on ATO data, that non-compliance is not spread evenly across the employer population, but is "more prevalent in small and micro businesses and in certain industries"⁶. As a result, the effectiveness of STP as an SG compliance tool will not be fully realised until small employers are also bound by the regime.

The data reported by superannuation funds provides another key element in the ATO's toolkit for monitoring SG compliance.

Data is currently reported annually by superannuation funds, as prescribed by the ATO's electronic reporting specification *Member Contributions Statement (MCS)* (MCS specification)⁷. The MCS sets out the 'employer contributed amount' received for each individual who is a member of a fund⁸. This is defined in general terms as "contributions made by an employer on behalf of the member", and may include "employer contributions made.... to meet super guarantee, award or other obligations" and "contributions paid as a result of a salary sacrifice arrangement"⁹.

The MCS provides a summation of activity in respect of a member's account over a 12 month period to 30 June; it does not report data about contributions on an employer-by-employer basis. That is, the 'employer contributed amounts' reported for an individual may include contributions made by one or more employers. Further, the MCS does not require funds to report salary sacrificed contributions separately from other employer contributions. As a result, currently the ATO could not use data reported by funds under the MCS specification to monitor employers' compliance with the amendments proposed by the Exposure Draft.

The ATO is in the process of developing new event-based reporting requirements for superannuation funds, referred to as the Member Account Transaction Service (MATS). These will see funds report to the ATO about contributions received within 10 days of their allocation, rather than annually as is the case under the MCS currently.

⁶ [Superannuation Guarantee Cross Agency Working Group - Superannuation Guarantee Non-compliance: a report to the Minister for Revenue and Financial Services](#), 31 March 2017, paragraph 3.13

⁷ [Australian Taxation Office - Electronic reporting specification: Member contributions statement \(MCS\) version 10.1.0](#)

⁸ *Ibid.*, para 6.107

⁹ *Ibid.*

The design for MATS is not yet finalised, however we understand it will require funds to report data about contributions received for an individual on an employer by employer basis. We also understand MATS will provide for funds to separately report salary sacrificed contributions, should this information be available to them. Accordingly, in addition to providing more frequent reporting of data by funds, MATS may also increase the granularity of data reported about employer contributions.

ASFA urges Treasury to confirm with the ATO the design of the MATS regime, and for the ATO to urgently consider whether the data to be reported will be adequate to support its compliance activities in relation to the amendments proposed in the Exposure Draft. Any necessary amendments to MATS should be incorporated now, during the design stage. It would, in ASFA's view, represent an unreasonable impost on the industry to require further changes once MATS has been implemented by funds.

Finally, we note that the data that funds report can only ever provide one part of the overall data picture required by the ATO in order to effectively monitor employers' SG compliance, and the quality of the data reported by employers continues to be an issue.

While most funds have the capacity to record data from employers that breaks down the contributions made for their employees into various sub-categories – for example, salary sacrificed contributions – funds have no ability to confirm the accuracy or completeness of this data. Issues of consistency will arise in the data reported to funds by different employers, and even by the same employer over time. In addition, funds have no awareness of individuals' ordinary time earnings, which is a vital component of the calculation of employers' SG obligations.

We note that with the proposed introduction of the First Home Saver Super Scheme from 1 July 2017, an employer' failure to correctly report contributions as having been salary sacrificed may mean they are not properly identified as 'voluntary' contributions that are eligible to be withdrawn by the employee and applied toward the purchase of a first home under the Scheme.

Accordingly, ASFA considers that significant effort is required to educate employers regarding their responsibility to provide, to both the ATO and funds, complete and accurate data about superannuation contributions made for employees. We recommend that the ATO, as the responsible regulator, include messaging to this effect in communications with employers and as part of any education campaign regarding the implementation of STP.

If you have any queries or comments in relation to the content of our submission, please contact Julia Stannard, Senior Policy Adviser, on (03) 9225 4027 or by email jstannard@superannuation.asn.au.

Yours sincerely

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