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Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017 - Senate Economics Legislation Committee

29 September 2017

Australian
Chamber of Commerce
and Industry

Australian Chamber of Commerce and Industry

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Summary of recommendations

Recommendation 1:

The Australian Chamber proposes that the Committee recommend passage of Schedule 1 of the Bill as introduced, subject to one proviso. The effect of item 6 of Schedule 1 appears to be that not only new employees commencing on or after the day which a new agreement (made after 30 June 2018) starts to apply should be given standard choice forms, but so should those which have commenced with the employer within the previous 28 days. The Australian Chamber encourages the Committee to consider whether this might be addressed by publicity or an amended transitional provision clearly excluding employees in employment with the employer on the day that the new agreement commences.

Recommendation 2:

The Australian Chamber proposes that the Committee recommends passage of Schedule 2 as introduced.

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1. Introduction

The *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No.2) Bill 2017* (**Bill**) was introduced on 14 September 2017 and referred to the Economics Legislation Committee (**Committee**) for review. The Australian Chamber of Commerce and Industry (**Australian Chamber**) welcomes the chance to comment on the Bill and thanks the Committee for the opportunity.

Employers are a significant actor in the Australian superannuation system. They are not only the primary source of contribution revenue, but also a major source of member and account data for funds, much of which they do not generate, but must collect, format and forward.

The Australian Chamber's long standing and continuing interest in the superannuation system arises from its impact on employers. No less than members, employers have an interest in the superannuation system being efficient, equitable and orderly. Inefficiencies, administrative disruptions and changes cost employers.

Many of the actors in the superannuation system have material, diverse and sometimes multiple interests. As an organisation the Australian Chamber is an employer and has that set of interests, but it does not have other material interests in the superannuation system. Whilst some Australian Chamber members have nominating rights to the board of a registered superannuation entity (**RSE**) or to its trustee group, others do not, and the Australian Chamber itself does not. The Australian Chamber has no material interest in any RSE or fund type.

The Bill comprises two schedules which propose to amend the *Superannuation Guarantee (Administration) Act 1992* (**SG(A) Act**) in two distinct and unrelated ways. The Australian Chamber proposes that the Committee recommends the Bill's passage in the form it has been presented with one possible exception in Schedule 1.

2. Schedule 1

Schedule 1 proposes to amend the SG(A) Act to extend a statutory right to choice of fund to employees who are eligible for superannuation guarantee contributions and whose employment is covered by an operating enterprise agreement or workplace determination[1] (collectively, **enterprise agreements**).

Although many employees covered by enterprise agreements can and do exercise choice, they do so because that choice is accepted by their employer. Electing to accept an agreement covered employee's choice is permissible under the SG(A) Act[2] and therefore permissible for the employer to do unless expressly excluded by the terms of the enterprise agreement, but it is not required.

[1] Once made and operating a workplace determination is relevantly the same as an enterprise agreement. There is one significant difference, which is the time between their making and their commencement. This is discussed below.
[2] S 32Z SG(A) Act provides that a requirement under an award or agreement to contribute into a fund is not enforceable to the extent that an employer is contributing into an employee's chosen fund.

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Enterprise agreement covered employees do not have a statutory right to choice because the SG(A) Act treats contributions made under or in accordance with an enterprise agreement as complying with choice.[3]

Schedule 1 will give these employees[4] the same rights as the majority of employees who are not enterprise agreement covered. It alters the choice provisions so that a contribution made to a fund under an enterprise agreement which is made on or after 1 July 2018 does not of itself satisfy choice. From the time that an agreement made from 1 July 2018 applies, the employer will have to observe the choice regime for those enterprise agreement covered employees.

Unlike enterprise agreements, modern awards do not impact the SG(A) Act choice of fund provisions because contributions under or in accordance with a modern award do not comply with choice.

2.1 What extending choice means for the superannuation system

The Explanatory Memorandum draws attention to the consequences of the change.

> *"Lack of choice of fund for all workers disadvantages some Australians and contributes to employees having multiple superannuation accounts and paying multiple sets of fees and insurance premiums, which can reduce their retirement income. It also leads to member disengagement with their superannuation*."[5]

Reducing the incidence of multiple account holding and account consolidation has been a major focus of superannuation policy and reform actions over the last few years. Changes to the lost small accounts rules, the use of the TFN as an identifier, SuperStream,[6] and the structure and functionality of MyGov have all been directed at reducing the incidence of multiple account holding and supporting account consolidation.

Coinciding with the introduction of MySuper the *Superannuation Industry (Supervision) Act 1993* (**SI(S) Act**) was amended to require trustees to identify multiple accounts held by a member within the superannuation entity and, unless not in the member's best interests, to merge them.

The removal of the member protection rule,[7] which protected small accounts from fee erosion, also coincided with the introduction of MySuper. Member protection was removed in order to support fee equity within MySuper but its removal also reduced the incentive to do nothing about small

[3] S 32C(6)(g) and (h) SG(A) Act provides that a contribution under a workplace determination or enterprise agreement complies with choice.

[4] In May 2016 an estimated 38.9% of non-managerial employees had their pay set by collective agreement. *Employee Earnings and Hours, Australia*, May 2016, ABS Cat 6306.0.

[5] Para 1.5, P 7, Explanatory Memorandum

[6] In its media release announcing the release of *SuperStream Benefits Report* on 29 August 2017 the ATOsaid "The Australian Taxation Office has today released a benefits report that shows 95 per cent of superannuation payments are now digital. This enables faster rollover of member's monies from fund to fund and greater consolidation of accounts, which has led to a sustained drop in the number of lost accounts"

[7] Until 30 June 2013 funds could not charge an administration fee on member accounts up to $1,000 with employer contributions which was greater than the earnings return credited to the account. Thus, in a year with zero or negative returns the other members carried the total administrative costs (or costs less $10 which a fund could charge the account) of these member protected accounts. The exception applied only to administration fees, other fees, taxes and premiums were still charged, so these accounts could still reduce year on year. This was discontinued from 30 June with the introduction of MySuper which required that a fund did not discriminate between members' fees in MySuper.

accounts. Stronger lost super rules were introduced. These required funds to transfer small lost super accounts (an account of less than $4,000 (now $6,000) which had been inactive for 12 months where the fund had not been able to contact the member) to the ATO.

2.2 Supporting the extension

Schedule 1 is in relevantly similar terms to the *Superannuation Legislation Amendment (Choice of Fund) Bill 2016* which the Australian Chamber also supported.

The Australian Chamber has not always supported extending choice to enterprise agreement covered employees because of the administrative complexity of giving effect to choice and having to contribute to multiple funds. Prior to SuperStream contribution data rules and format were set by funds, and additional funds meant increased administrative burden. As stated in the recently released *SuperStream Benefits Report*

> "*The [Cooper] review also found that employers often struggled to get their employees' contributions right as 'choice of fund' took hold and their compliance costs increased. It was also found that employers varied widely in their capabilities, especially across small business, as they were challenged to manage the rising number of divergent funds they had to deal with in supporting their employees' exercise of choice*."[8]

Enterprise agreements provided shelter from this potential administrative cost. However the absence of statutory choice also increased the importance of the employer's default fund, since it meant that all incoming new employees were enrolled in that fund. In addition, enterprise agreements were more likely amongst larger employers. It was rational for funds to compete for employers rather than for members.

SuperStream has significantly reduced the administrative costs of choice for employers. The *SuperStream Benefits Report* identified efficiencies of approximately $800M p.a. split about evenly between funds and employers.[9] It said

> "*An employer's experience has been improved from:*
>
> > ***less processing time for completing contributions*** *with an average 70% time saving and $400 million in ongoing efficiencies*
> >
> > ***simplification in sending contributions through a single channel*** *so that in the case of a typical 60 employee business, eliminating interactions with between 15-30 funds*
> >
> > ***a reduction in re-work*** *through receiving help to get data right at the source via improved tools and processes*."[10]

A typical chosen fund pathway is that an incoming new employee retains his or her current fund rather than being enrolled in the new employer's default fund. Opening enterprise agreements to

[8] P 4, *SuperStream Benefits Report*, August 2017, ATO
[9] P 5, *SuperStream Benefits Report*, August 2017, ATO
[10] P 6, *SuperStream Benefits Report*, August 2017, ATO

statutory choice reduces the imperative on funds to compete for employers and makes it more rational for funds to compete for members.

2.3 Extending choice is a change

Extending statutory choice to agreement covered employees will not be costless for employers and in assessing the bill the Australian Chamber has sought to ensure that costs are minimised. The actual costs are determined by the final form of the amending legislation and its transitional arrangements.

2.3.1 Effect on current employees

The first and most obvious source of additional costs arises from how choice is extended to those who are employed at the time they are given access to statutory choice.

Schedule 1 commences the day after Assent (cl 2). Statutory choice is extended to agreement covered employees by items 5 and 6. These items amend s 32C(6)(g) and s 32C(6)(h) SG(A) Act to provide that a contribution made under or in accordance with a workplace determination or an enterprise agreement which is made before 1 July 2018[11] complies with choice. This places enterprise agreement covered employees, to whom an enterprise agreement made on or after 1 July 2018 applies, under the normal choice regime.

Under the *Fair Work Act 2009* (Cth) FW Act an enterprise agreement does not apply to the employees which it covers from the time it is made.[12] Enterprise agreements apply 7 days after they have been approved (or at some later time specified in the agreement) which will be in all cases some reasonable time after the agreement was made.

There will therefore be a period in most enterprise agreement covered workplaces where an enterprise agreement which precludes choice is still operating and a new enterprise agreement which extends statutory choice is made but not yet operating. The effect of item 6 is that statutory choice is extended to these employees from the day that the new enterprise agreement begins operating, rather than the day it was made, because it is only at that time that a contribution can be said to be made under or in accordance with the new enterprise agreement.

Under the choice regime (s 32N SG(A) Act) an employer must give an employee a standard choice form (which identifies the default fund which will apply if the employee does not choose a fund) within 28 days of:

- the employee commencing;
- the employee requesting a choice form (unless the employee has been given a standard choice form in the previous 12 months);
- the employer becoming aware that it is unable contribute into the employee's fund or the fund becomes non-complying;
- the employer changing the fund it is making default fund employee contributions into.

[11] A workplace determination is made by the FWC and comes into effect on the day it is made (s 276 FW Act). An enterprise agreement is made when a majority of those casting valid votes approve the agreement (s 182 FW Act).
[12] A workplace agreement applies on the day that it is made.

As advised by the Explanatory Memorandum at paragraph 1.23, the effect of s 32N SG(A) together with items 5 and 6 is that, when an agreement extending statutory choice to those who are covered by it in a workplace starts to apply, standard choice forms will have to be given to new employees within 28 days of their commencement. Employers will not have to give standard choice forms to existing employees unless requested by the employee. In a workplace where choice has not been observed this means that every existing agreement covered employee receives the statutory right to request a standard choice form when the agreement comes into effect.

This is an appropriate balance. It implements the statutory choice regime for all enterprise agreement covered employees without requiring unnecessary administrative action.

That said, the Australian Chamber's understanding of the effect of item 6 differs slightly from the explanation put above. The Australian Chamber's reading of item 6 is that a subset of existing employees, the recently employed, will also have to be given choice forms. Presuming an enterprise agreement made after 1 July 2018 comes into operation on 1 September 2018, an employee who commenced with the employer on or after 5 August will acquire the right to be given a standard choice form on 1 September because on 1 September (s)he will not have been employed for 28 days at the time that the s 32N(2) obligation applies.

Presuming that this reading is correct the Australian Chamber accepts that few employees are likely to fall into this category. The risk of an employer misunderstanding its obligations might be addressed by pre-commencement publicity. Alternatively it might be addressed by a minor amendment to the bill which clarifies that for this transition s 32N(2) applies to employees who start when and after the enterprise agreement or workplace determination commences to apply.

2.3.2 Does the bill apply to all agreements?

Sometimes an enterprise agreement explicitly prohibits choice, rather than indirectly doing so by specifying one or more funds. This is possible under the current choice regime because the SG(A) Act does not require an employer to give effect to choice. Item 6 removes deemed compliance with choice for contributions made under or in accordance with an enterprise agreement made after 30 June 2018, which would make this type of prohibition in these new agreements inconsistent with the SG(A) Act and therefore unenforceable.

2.3.3 Impact on existing agreements

A second potential cost for employers arises from a requirement to renegotiate a variation or a new agreement because of the new amendments. Renegotiation would not be the formal consequence if the bill simply voided agreement clauses which were inconsistent with the variations on a specified date, but such a provision would create pressures in some agreements.

Agreements should be allowed to run their course for a reform of this kind, rather than being imposed upon during their currency, and a period of warning about the changed rules is appropriate for the negotiation of new agreements. The Australian Chamber supports the proposed start date of 1 July 2018 and linking the operation of the new provisions to agreements made on or after that date.

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2.3.4 Continuity of defaults

Another cost is the impact of the Bill's amendments on the existing default because under the choice regime a standard choice form must be issued when a default fund is altered. Item 7 provides that where the employer contributes under the new rules for an employee who has not chosen a fund, to the fund it had contributed to under or in accordance with an agreement which was deemed to comply with choice under the current rules, the contribution complies with choice.

This ensures continuity of the default fund which applied under an agreement which was made prior to 1 July 2018.

There is no requirement for an enterprise agreement to contain superannuation provisions or to specify any fund. Many enterprise agreements do not. In these cases the selection of a default fund is at large because the operation of the enterprise agreement means that the superannuation provisions in the award do not apply. An enterprise agreement covered employee's default fund may not be a fund which is specified in the relevant award(s). Item 7 is supported.

Items 1 – 4 address a technical oversight in the SG(A) Act concerning defined benefit schemes. Under certain conditions an employer contributing into a defined benefit scheme is not required to offer choice to the employee members (s 32NA(7) – (9)). S 20 SG(A) Act defines a defined benefit member for the purposes of excluding defined benefit arrangements where requiring contributions is in excess of ordinary SG obligations or the operation of choice would create an effective double dip.

S 20(2) and (3) describe circumstances which are equivalent to those described by s 32NA(7) and (8). The technical error is that s 20 does not include the circumstances addressed by s 32NA(9), a situation where contributions to a fund in addition to the defined benefit does not alter the member's defined benefit, which creates a technical breach of the choice rules if not observed, despite the fact that under s 32F another fund cannot become an employee's chosen fund in these circumstances.

In the circumstances of these defined benefit members the principle of universal choice is not appropriate, because the nature of their scheme membership and its benefits. The Australian Chamber supports the amendments.

3. Schedule 2

Schedule 2 alters the treatment of salary sacrifice contributions.

As outlined in the Explanatory Memorandum the proposed salary sacrifice amendments arose from the report of the Cross Agency Working Group (**Report**) and its recommendations 8 and 9.

The amendments implement the Cross Agency Working Group's recommendation to ensure the superannuation guarantee (**SG**) is paid on the pre-salary sacrifice base (Recommendation 9) and that salary sacrificed amounts are not used to reduce the minimum amount of SG the employer must pay (Recommendation 8). Recommendation 9 is achieved by introducing the concepts of quarterly salary and wages base and OTE base which explicitly include sacrificed amounts. The

amendments implement Recommendation 8 by providing amounts sacrificed under a salary sacrifice arrangement will not reduce an employer's mandated SG contributions.[13]

Recommendation 8 is to amend the SG(A) Act to prevent salary sacrifice contributions from satisfying employers' SG obligations. The Report discussion supporting Recommendation 8 notes that it is difficult to quantify the extent to which employers use salary sacrifice contributions to reduce their SG charge, and that the Working Group had no evidence of it being a common practice. As is discussed below, salary sacrifice arrangements are the result of individual negotiations.

Recommendation 9 proposed that salary sacrificed to superannuation contributions form part of the employee's base for calculating the employer's SG obligation. Recommendation 9 is made on the basis of bringing consistency between contributions made under effective salary sacrifice arrangements and those made as personal deductible contributions. The supporting discussion also notes that ATO's experience in enforcing the SG does not indicate that the practice of reducing the base is widespread.

The interaction between the salary sacrifice rules and the SG has existed since the introduction of salary sacrifice and has been commented upon in the past. The proposed amendments will support improved confidence in the system.

3.1 What is superannuation salary sacrifice?

A salary sacrifice arrangement arises when an employee and an employer agree that the employee's compensation for service includes non-monetary benefits in substitution for the headline remuneration. It is a contractual arrangement between the individual employee and the employer which must be established in advance of the service being rendered and the benefit attracted. A salary sacrifice arrangement must be a remuneration package applying to future work otherwise it is just a diversion of money which is being paid to the employee. An employee can enter into a sacrifice arrangement after (s)he commences the employment. An employee can renegotiate a sacrifice arrangement during the course of his or her employment as long as the revised benefit regime is confined to future service.

Under a salary sacrifice arrangement the employee's taxable income is the identified net (remaining) level of salary.This does not include the value of the sacrifice benefits. The cost of the benefits is not money which is paid to the employee. Depending on the status of the employer and the amount and nature of the non-cash benefit provided in the package the benefits may attract fringe benefits tax. In the case of superannuation salary sacrifice, complying contributions do not attract fringe benefits tax. Fringe benefits are not salary or wages for the SG(A) Act.

A superannuation contribution paid under a salary sacrifice arrangement is not money which is paid to the employee or deducted from the employee's taxable income, it is an employer contribution. Like the SG contribution itself it is paid by the employer from pre-tax dollars and is taxed on entry to the fund at the concessional rate[14]. A superannuation contribution which is

[13] Para 2.12, p 41, Explanatory Memorandum

[14] This is 15%. For salary or wages in excess of $250,000 the concessional tax rate on contributions is higher than 15% because of an additional 15% Division 293 (*Income Tax Assessment Act 1997*) tax.

deducted from the employee's salary or wages net of PAYGW and paid by the employer is a non-concessional employee contribution.

3.2 The effect of the bill

Currently a superannuation salary sacrifice arrangement reduces the employee's salary or wages and also reduces the employee's ordinary time earnings. These reductions impact the amount of contribution which an employer needs to make to avoid a SG charge. As well, a "sacrifice contribution" is treated as an employer contribution.

Under Schedule 2 an employer contribution does not include a "sacrifice contribution" – a contribution made under a "salary sacrifice arrangement". As well, the amount contributed under a "salary sacrifice arrangement" is added to the employee's:

- ordinary time earnings when calculating how much is needed for a contribution;
- salary or wages when calculating guarantee shortfalls.

Item 2 defines a "salary sacrifice arrangement" as an arrangement between the employer and the employee for the benefit of the employee for a superannuation contribution to be made with the effect of reducing either or both the employee's ordinary time earnings and/or salary or wages.

Items 3 - 4 alter the formula used in s 19 SG(A) Act to determine an individual SG shortfall to include the salary sacrificed amount in the salary or wages base which is used to determine the amount of charge, if any, arising for the quarter. Item 5 applies the sacrifice amount to the quarter that the sacrifice was made and also addresses the situation where the employee subsequently decides that an amount intended to be paid as a sacrifice contribution should not be. The possible amount of shortfall is limited by the maximum contribution base and this is not altered by the inclusion of the sacrificed amount.

Item 7 alters the formula in s 23 which identifies the reduction in the outstanding percentage of required contribution to include the sacrificed amount in the ordinary time earnings base for the calculation. The percentage figure arising from this calculation is then used in the s 19 SG shortfall calculation.

Item 14 excludes the amount of sacrificed contribution from late contribution which can be used to offset the amount of SG charge under s 23A.

Under item 18 the new provisions would apply to calculating an employer's guarantee shortfall for the quarter commencing 1 July 2018 and thereafter. Transitioned in this way there is not imposition of retrospectivity. Passage of Schedule 2 is supported.

Australian Chamber of Commerce and Industry

4. About the Australian Chamber

The Australian Chamber of Commerce and Industry is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

Australian Chamber of Commerce and Industry

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