



# TECHNICAL ANALYSIS REPORT

## Superannuation Guarantee - Can a High-Income

### Employee Opt Out of SG Payments?

<b>Prepared for:</b>	Instructing Accountant / Client
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<b>Classification:</b>	Confidential

## Question

An employee has only one employer. The employee's salary is more than \$450,000 per annum.

### Client Query

Can the employee (high salary earner) request that the employer stop making superannuation guarantee payments to their super fund as it will go over the \$27,500 cap?

And, ask the employer to pay the excess as salary?

If so, any agreement required?

## 1. Summary

### **Result: SG Opt-Out NOT Available for Single-Employer Employees**

No - the employee cannot opt out of superannuation guarantee (SG) contributions from a single employer. The SG is a mandatory obligation imposed on the employer by the Superannuation Guarantee (Administration) Act 1992 (SGAA). It cannot be waived, reduced, or redirected to salary by agreement between the employer and employee.

The SG opt-out mechanism in s 19AB SGAA is available ONLY to employees who have multiple employers and whose combined SG contributions would exceed the concessional contributions (CC) cap. An employee with a single employer does not qualify.

Any agreement between the employer and employee to stop or reduce SG would be void and unenforceable. The employer would remain liable for the SG charge (s 19 SGAA) - including a non-deductible administration component and nominal interest - if SG contributions are not paid.

### **Key Practical Point: The MCB Already Limits SG**

However, the concern about exceeding the CC cap may be overstated. The maximum super contribution base (MCB) caps the employer's SG obligation at \$65,070 per quarter for 2024-25 (or \$62,500 for 2025-26). For a \$450,000+ salary, SG is calculated only on the MCB amount - not the full salary.

For 2024-25: SG at 11.5% on MCB = approximately \$29,932/year - under the \$30,000 CC cap.

For 2025-26: SG at 12% on MCB = \$30,000/year - exactly at the \$30,000 CC cap.

Note: The question references the \$27,500 CC cap. This was the cap for the 2021-22 to 2023-24 income years. The CC cap increased to \$30,000 from 1 July 2024.

## 2. Facts & Assumptions

### Facts Provided

The employee has only one employer.

The employee's salary exceeds \$450,000 per annum.

The employee is concerned that SG contributions will exceed the concessional contributions cap.

The employee wishes to request the employer stop SG payments and pay the equivalent as salary instead.

### Assumptions Made

Assumption [ASSUMED]	Affects
The employee is an "employee" within the ordinary meaning and for the purposes of the SGAA (not an independent contractor). [ASSUMED]	Whether SG obligations arise at all. If the worker is a contractor, SG may not apply (subject to the extended definition in s 12 SGAA).
The employee is aged 18 or over. [ASSUMED]	SG eligibility - employees under 18 must work more than 30 hours/week to qualify.
The employee is an Australian resident for tax purposes. [ASSUMED]	Non-resident and bilateral agreement exemptions would not apply.
The employment is not covered by an enterprise agreement, award, or employment contract that mandates super contributions above the SG minimum. [ASSUMED]	If an award or EA mandates higher contributions, the employer cannot reduce to SG minimum even if MCB applies. Award obligations are separate from the SGAA.
The employee does not make salary sacrifice contributions to super. [ASSUMED]	If salary sacrifice is made on top of SG, total concessional contributions would exceed the CC cap, creating an excess CC issue.
The \$27,500 cap referred to in the question is the CC cap applicable for 2021-22 to 2023-24. The current CC cap (from 1 July 2024) is \$30,000. [ASSUMED]	Changes the quantitative analysis. The MCB-limited SG for a \$450K+ earner now sits at or near the \$30,000 CC cap, not \$27,500.

### Information Needed

Missing Information [NEEDED]	If Different, Would Change
The exact income year in question. [NEEDED]	SG rate (11.5% for 2024-25 vs 12% for 2025-26), MCB amount, and CC cap (\$27,500 pre-2024, \$30,000 from 2024-25) all vary by year.
Whether the employee has any unused concessional contributions cap carried forward from prior years (s 291-20 ITAA 1997). [NEEDED]	If the employee has unused CC cap from prior years (available if total super balance < \$500,000 at prior 30 June), the effective CC cap may be higher than \$30,000, reducing or eliminating any excess CC concern.
Whether the employment contract or applicable award mandates SG contributions above the statutory minimum. [NEEDED]	Award or contractual super obligations are separate from and may exceed the SG minimum. These cannot be reduced by reference to the MCB.

Missing Information [NEEDED]	If Different, Would Change
The employee's total superannuation balance (TSB) at 30 June of the prior year. [NEEDED]	Affects carry-forward of unused CC cap. If TSB >= \$500,000, carry-forward is not available.

### 3. Related Areas & Cross-Over Analysis

Area	Relevance	Key Provision	Impact
SG Obligation	Core issue - SG is mandatory; employer cannot cease contributions by agreement.	s 19 SGAA 1992; s 23 SGAA	Employer liable for SG charge if contributions not paid. Charge is non-deductible.
SG Opt-Out	Opt-out mechanism exists but only for multiple employers.	s 19AB SGAA 1992	Single-employer employee does not qualify. Opt-out requires ATO-issued exemption certificate.
Maximum Contribution Base	Caps SG for high-income employees.	s 19(3) SGAA; Reg 7 SG Regs	\$65,070/quarter (2024-25); \$62,500/quarter (2025-26). SG on salary above MCB is not required.
Concessional Contributions Cap	Annual cap on before-tax super contributions.	Div 291 ITAA 1997; s 291-20	\$30,000 from 2024-25. Excess taxed at marginal rate with 15% tax offset.
Division 293 Tax	Additional 15% tax on CC for high-income earners.	Div 293 ITAA 1997	Applies if income + CC > \$250,000. On \$450K+ salary, Div 293 definitely applies.
Carry-Forward Unused CC Cap	May increase effective CC cap above \$30,000.	s 291-20 ITAA 1997	Available if TSB < \$500,000 at prior 30 June. Unused amounts from up to 5 prior years can be carried forward.
Excess CC Treatment	Tax consequences if CC cap is exceeded.	s 291-15 ITAA 1997	Excess included in assessable income at marginal rate; 15% tax offset for contributions tax already paid in fund.

## 4. Analysis

### 4.1 SG is a Mandatory Employer Obligation

#### Relevant Law

Section 19 of the Superannuation Guarantee (Administration) Act 1992 (SGAA) imposes the superannuation guarantee charge on an employer who fails to make minimum SG contributions for an eligible employee. The charge includes the SG shortfall amount, a nominal interest component, and an administration charge.

Section 23 SGAA provides that the SG charge is not a tax-deductible expense - this is a punitive measure designed to ensure compliance. The employer cannot claim a deduction for the SG charge under s 26-95 ITAA 1997.

There is no provision in the SGAA that permits an employer to cease, reduce, or redirect SG contributions at the employee's request. The obligation is imposed on the employer by statute, not by agreement. An employee cannot waive a statutory obligation that exists for the employer's account.

#### Application to Facts

The employee has requested that the employer stop making SG payments and pay the equivalent as salary. This request cannot be lawfully honoured. If the employer stops SG contributions:

- (a) The employer becomes liable for the SG charge under s 19 SGAA - which is higher than the SG contribution would have been (includes nominal interest and administration fee);
- (b) The SG charge is not deductible (s 26-95 ITAA 1997), whereas SG contributions are deductible under s 290-60 ITAA 1997;
- (c) Any "agreement" to this effect between the employer and employee is void - it cannot override the statutory obligation.

SG is a mandatory employer obligation. No agreement, request, or arrangement between the employer and employee can lawfully reduce or eliminate the SG obligation. The employer remains liable for the SG charge if contributions are not paid, regardless of any employee request.

### 4.2 The SG Opt-Out - Section 19AB SGAA

#### Relevant Law

Section 19AB SGAA provides a limited opt-out mechanism. An employee may apply to the ATO for an "SG employer shortfall exemption certificate" that releases one or more employers from the SG obligation. However, s 19AB has strict conditions:

- (a) The employee must have multiple employers in the financial year;
- (b) The employee must expect that the combined SG contributions from all employers will exceed the concessional contributions cap;
- (c) The employee must still receive SG from at least one employer in each quarter covered by the certificate;
- (d) The application is made by the employee to the ATO (not by the employer); and

(e) The ATO issues the exemption certificate to the employer, who is then released from the SG obligation for that employee for the relevant quarters.

### Application to Facts

**Finding: Opt-Out Unavailable**

The employee has only one employer. Section 19AB requires multiple employers as a threshold condition. The employee does not qualify for the opt-out. There is no equivalent opt-out mechanism for single-employer employees.

### 4.3 The Maximum Contribution Base - The Practical Safeguard

#### Relevant Law

Section 19(3) SGAA, read with Regulation 7 of the Superannuation Guarantee (Administration) Regulations 2018, provides for a maximum super contribution base (MCB). The employer is not required to pay SG on the portion of an employee's ordinary time earnings (OTE) that exceeds the MCB for each quarter.

The MCB is indexed annually in line with Average Weekly Ordinary Time Earnings (AWOTE):

Income Year	SG Rate	Quarterly MCB	Annual MCB Equivalent	Maximum Annual SG
2023-24	11%	\$62,270	\$249,080	\$27,400
2024-25	11.5%	\$65,070	\$260,280	\$29,932
<b>2025-26</b>	<b>12%</b>	<b>\$62,500</b>	<b>\$250,000</b>	<b>\$30,000</b>

#### Application to Facts

The employee earns \$450,000+ per annum. Quarterly OTE is approximately \$112,500, which significantly exceeds the MCB. The employer is therefore only required to pay SG on the MCB amount - not the full salary.

For 2024-25: Maximum SG = \$65,070 x 11.5% x 4 quarters = \$29,932 per year. This is below the \$30,000 CC cap.

For 2025-26: Maximum SG = \$62,500 x 12% x 4 quarters = \$30,000 per year. This exactly equals the \$30,000 CC cap.

#### Key Finding: MCB Limits the Problem

The MCB already limits SG for high-income earners with a single employer. At \$450,000+, the SG obligation is capped at approximately \$29,932 (2024-25) or \$30,000 (2025-26) per year - at or below the CC cap.

The employee's concern about exceeding the \$27,500 cap reflects the pre-2024 CC cap. From 2024-25, the CC cap is \$30,000, which aligns closely with the MCB-capped SG for high earners. Provided the employee does not make additional concessional contributions (salary sacrifice or personal deductible contributions), SG alone should not exceed the CC cap.

### 4.4 Division 293 - Additional Tax for High Earners

Even though SG may not exceed the CC cap, the employee should be aware of Division 293 ITAA 1997. Where an individual's income for surcharge purposes plus low tax contributed amounts exceeds \$250,000, an additional 15% tax is payable on the lesser of: (a) the low tax contributed amounts; or (b) the excess over \$250,000.

On a \$450,000 salary, Division 293 definitely applies. The additional 15% tax on the SG contributions means the effective tax rate on those contributions is 30% (15% contributions tax in the fund + 15% Div 293), rather than the standard 15%.

This does not affect the employer's SG obligation, but it is a relevant consideration for the employee's overall tax planning.

### 4.5 What Happens if the CC Cap is Exceeded?

If for any reason the employee's concessional contributions exceed the \$30,000 CC cap (e.g., employer pays above the MCB voluntarily, or employee makes salary sacrifice on top of SG):

- (a) The excess concessional contributions are included in the individual's assessable income and taxed at their marginal rate (Div 291 ITAA 1997);
- (b) A 15% tax offset is provided for the contributions tax already paid by the super fund on the excess amount (s 291-15(2));
- (c) The individual may elect to release up to 85% of the excess from the super fund to help pay the additional tax (s 292-410 ITAA 1997); and
- (d) The excess amount remains in super and counts towards the non-concessional contributions cap if the release election is not made.

## 5. Worked Example Tables

### 5.1 SG Calculation - \$450,000 Salary (2025-26)

Item	Amount / Calculation
Annual salary (OTE)	\$450,000
Quarterly OTE	\$112,500
Quarterly MCB (2025-26)	\$62,500
OTE for SG purposes (capped at MCB)	\$62,500 per quarter
SG rate (2025-26)	12%
SG per quarter	\$62,500 x 12% = \$7,500
<b>Annual SG</b>	<b>\$7,500 x 4 = \$30,000</b>
<b>CC cap (2025-26)</b>	<b>\$30,000</b>
<b>Excess concessional contributions (SG only)</b>	<b>\$0 - SG exactly at CC cap</b>

### 5.2 Comparison: SG vs Salary (After-Tax Outcome)

Assumes the employee is on the top marginal rate (47% + 2% Medicare = 49%). Compares receiving SG versus receiving the equivalent as additional salary.

Item	SG to Super Fund (\$30,000)	Equivalent Paid as Salary (\$30,000)
Gross amount	\$30,000	\$30,000
Contributions tax in fund (15%)	(\$4,500)	N/A
Division 293 additional tax (15%)	(\$4,500)	N/A
Income tax at marginal rate (49%)	N/A	(\$14,700)
<b>Net amount retained</b>	<b>\$21,000 (in super - preserved)</b>	<b>\$15,300 (in hand - accessible)</b>
<b>Effective tax rate</b>	<b>30% (15% + 15% Div 293)</b>	<b>49% (marginal rate)</b>
<b>Tax saving from SG vs salary</b>	<b>\$5,700</b>	N/A

#### Key Comparison

Even with Division 293 applying, SG contributions are taxed at an effective rate of 30% - significantly lower than the 49% marginal rate on equivalent salary. The employee is \$5,700 better off per year (on \$30,000 of SG) by receiving SG rather than salary, albeit the amount is preserved in super until a condition of release is met.

The employee's desire to receive the amount as salary would result in a worse after-tax outcome, not a better one.

## 6. Case Law Support

### Primary Authority

Case / Reference	Source	Principle	Application
<b>SGR 2005/1</b>	ATO (Binding Ruling)	Comprehensive guidance on who is an "employee" for SG purposes. Confirms that SG is a statutory obligation on the employer - not a contractual entitlement that can be varied by agreement.	Supports the position that the employer's SG obligation cannot be reduced by agreement with the employee.
<b>SGR 2009/2</b>	ATO (Binding Ruling)	Defines "ordinary time earnings" (OTE) for SG purposes and confirms the MCB limits the employer's SG obligation.	Confirms that SG on \$450K+ salary is calculated only on the MCB, not the full salary.

### Supporting Authority

Reference	Source	Principle	Relevance
TR 2010/1	ATO (Binding Ruling)	Meaning of "contribution" for super purposes - contribution is "made" when received by the fund.	Relevant to timing of when SG counts towards the CC cap.
ATO - SG opt-out guidance (NAT 75067)	ATO (Administrative)	The opt-out application form is only available to employees with multiple employers who expect combined SG to exceed the CC cap.	Directly confirms single-employer employees are excluded from the opt-out mechanism.

## 7. Conclusion

**No - the employee cannot opt out of SG with a single employer.** The superannuation guarantee is a mandatory statutory obligation on the employer under s 19 SGAA 1992. There is no mechanism for a single-employer employee to request, and no lawful basis for an employer to agree to, the cessation or reduction of SG contributions.

The opt-out mechanism in s 19AB SGAA is exclusively available to employees with multiple employers whose combined SG would exceed the CC cap. This employee does not qualify.

Any agreement between the employer and employee to stop SG and pay the equivalent as salary would be void. The employer would remain liable for the SG charge under s 19 SGAA, which includes nominal interest and a non-deductible administration fee - making the cost to the employer higher, not lower.

Importantly, the employee's concern about exceeding the CC cap is largely addressed by the maximum contribution base (MCB). At \$450,000+, SG is calculated only on the MCB amount - producing maximum SG of \$29,932 (2024-25) or \$30,000 (2025-26). From 2024-25, the CC cap is \$30,000, so MCB-limited SG sits at or just under the CC cap. Provided the employee does not make additional concessional contributions (salary sacrifice or personal deductible), SG alone should not create an excess CC issue.

Furthermore, even with Division 293 applying (additional 15% tax on CC for income + CC > \$250,000), the effective tax rate on SG contributions (30%) is substantially lower than the marginal rate on equivalent salary (49%). The employee is better off receiving SG than salary.

## 8. Risks & Caveats

**Employer compliance risk: [Critical]** If the employer stops SG contributions at the employee's request, the employer - not the employee - is liable for the SG charge (s 19 SGAA). The SG charge includes the shortfall, nominal interest (currently based on the GIC rate), and a \$20/employee/quarter administration fee. None of these are tax-deductible (s 26-95 ITAA 1997). The employer should be strongly advised not to agree to any arrangement to cease SG.

**Award / EA obligations: [Verify]** If the employee's employment is covered by a modern award or enterprise agreement that mandates super contributions above the SG minimum, those obligations continue independently of the SGAA. The MCB does not limit award or EA super obligations - only SG obligations under the SGAA.

**Salary sacrifice risk: [Monitor]** If the employee currently salary-sacrifices into super (or starts to), total concessional contributions (SG + salary sacrifice) will exceed the CC cap. From 1 January 2020, salary sacrifice amounts do not reduce OTE for SG purposes (s 15A SGAA). The employee should review whether any salary sacrifice arrangements are in place.

**Carry-forward unused CC cap: [Opportunity]** If the employee has a total super balance < \$500,000 at 30 June of the prior year and has unused CC cap from prior years (up to 5 years), the effective CC cap may be higher than \$30,000 (s 291-20 ITAA 1997). This could provide headroom for additional concessional contributions above SG.

**Division 293: [Information]** Division 293 additional tax of 15% applies because income + CC > \$250,000. The ATO issues a Div 293 assessment directly to the individual. The employee can elect to release the amount from super or pay from personal funds. This is a known cost - not a risk.

**Payday Super (from 1 July 2026): [Forward planning]** From 1 July 2026, SG must be paid on or before each payday (not quarterly). The MCB will be calculated annually instead of quarterly. This may slightly affect the SG/CC cap interaction for employees with variable earnings.

## 9. Rulings & References

### Legislation

Provision	Relevance
Superannuation Guarantee (Administration) Act 1992, s 19	SG charge - imposed on employer for failure to pay SG
SGAA 1992, s 19(3)	Maximum super contribution base - caps SG for high earners
SGAA 1992, s 19AB	SG opt-out for employees with multiple employers
SGAA 1992, s 23	SG charge is not deductible
SGAA 1992, s 15A	Salary sacrifice does not reduce OTE for SG calculation (from 1 January 2020)
SG (Administration) Regulations 2018, Reg 7	MCB quarterly amount - indexed annually to AWOTE
ITAA 1997, Div 291 (s 291-15, s 291-20)	Concessional contributions cap and excess CC treatment
ITAA 1997, Div 293	Additional 15% tax on CC for income + CC > \$250,000
ITAA 1997, s 290-60	Deductibility of SG contributions by employer
ITAA 1997, s 26-95	SG charge is non-deductible
ITAA 1997, s 292-410	Election to release excess CC from super fund

### ATO Rulings & Guidance

Reference	Topic	Binding Status
SGR 2005/1	Who is an "employee" for SG purposes	Binding (SG Ruling)
SGR 2009/2	Ordinary time earnings (OTE) for SG purposes	Binding (SG Ruling)
TR 2010/1	Meaning of "contribution" - when a contribution is "made"	Binding (Public Ruling)
NAT 75067	SG opt-out form for high income earners with multiple employers	Administrative (ATO form)

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