

# Exercising the Commissioner's discretion to disregard or reallocate remedial super guarantee contributions

This fact sheet applies to you if you are:

- an employer
- you need to make remedial super guarantee (SG) contributions on behalf of your employees
- as a result, they may exceed their concessional contributions cap for the year.

This fact sheet explains what information you need to provide to your employees and our approach to the exercise of the Commissioner's discretion to disregard or reallocate contributions when an employer makes remedial SG contributions.

## Remedial super guarantee contributions

Paying super is an important part of being an employer. In some instances, you may need to make remedial SG contributions where you have not paid enough SG contributions on time for your current or former employees in the past.

These remedial SG contributions may have been made directly to a super fund or via the ATO to the super fund when an employer has paid the super guarantee charge.

We consider remedial SG contributions to be contributions made due to underpaid super entitlements. This may include:

- an underpayment of contributions is identified for a quarter which gives rise to an SG shortfall for an employee, or
- back payment of wages resulting in you having to make larger than normal SG contributions during the income year.

Even though these remedial SG contributions may relate to an earlier period of time, they are treated as a concessional contribution in the year they are made to the employee's chosen super fund.

As a result, these SG remedial contributions may cause your employees to exceed their concessional contributions cap. This may result in them having to pay additional tax and an excess concessional contributions charge.

## Exercising the Commissioner's discretion

An employee may apply for a determination to have these remedial SG contributions disregarded or allocated to another year and not count towards their concessional contributions cap in the year they are made.

We have discretion to do this for contributions cap purposes only and not for other purposes such as Division 293 tax. We can exercise this discretion if there are special circumstances and it is in line with the objective of the contributions cap provisions.

We will consider an employee's application and decide whether to reallocate or disregard the remedial SG contributions. When checking whether we can exercise this discretion, we consider:

- whether making the remedial SG contributions results in unfair or unintended outcomes
- whether the employee had control over the circumstances that led to you having to make remedial SG contributions
- whether it was reasonably predictable that the remedial SG contributions would result in the employee exceeding their concessional contributions cap
- whether the contributions would be more appropriately allocated to another financial year
- other relevant factors that help us to understand the circumstances surrounding the remedial SG contributions.

The circumstances which give rise to remedial SG contributions being made are generally considered to be unforeseeable and outside of the control of the employee. However if the employee were a director of the employer entity the circumstances might not be considered outside their control.

## Which employees are able to apply?

Before an employee applies for a determination, they should first check if they will exceed their concessional contributions cap in the income year in which the remedial SG contributions will be received by their super fund.

Concessional contributions include:

- employer contributions (including contributions made under a salary sacrifice arrangement)
- personal contributions allowable as a tax deduction
- notional taxed contributions and unfunded defined benefit contributions (if an employee is a member of a defined benefit fund)
- some amounts allocated from a fund reserve.

If an employee has more than one fund, all concessional contributions made to all of their super funds should be added together and counted towards their concessional contributions cap.

If the employee believes they will exceed their cap they can apply for a determination to disregard or reallocate contributions to another year.

## Can I apply on my employee's behalf?

You cannot apply on behalf of your employees for the exercise of the Commissioner's discretion.

An employee or their authorised representative will need to apply for the determination.

## How can I assist my employees?

We have made the application process as simple as possible for affected employees.

As the employer, you can help your employee with their application. You should provide your employee with a letter outlining the amounts of the remedial SG contributions and the quarters of the relevant income year that the contributions relate to if you made the contributions direct to a fund.

We will already have the contribution information and the periods they relate to if the contributions were made via the ATO due to you paying the super guarantee charge.

You should also provide the employee with any further information that will help us to understand why the remedial SG contributions are being made.

## How to apply

To apply to have contributions disregarded or allocated to another income year, the employee will need to send us:

- a completed [Application – excess contributions determination](#) form
- all supporting information relevant to their circumstances as outlined under *Section D: Checklist* of that form.

The application can only be lodged after the remedial SG contribution/s have been made to the super fund/s.

## More information

For more information on ato.gov.au, see:

- [Super for employers](#)
- [Super contributions - too much can mean extra tax](#)
- [Disregarding or reallocating your contributions](#)

For a more detailed explanation about what we consider when an application is made, see

- Law Administration Practice Statement [PS LA 2008/1](#) *The Commissioner's discretion to disregard or allocate to another period superannuation contributions for excess contributions purposes*

If you wish to discuss your circumstances, call us on 13 20 10 between 8.00am and 5.00pm, Monday to Friday.

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### Our commitment to you

We are committed to providing you with accurate, consistent and clear information to help you understand your rights and entitlements and meet your obligations.

If you follow our information in this publication and it turns out to be incorrect, or it is misleading and you make a mistake as a result, we must still apply the law correctly. If that means you owe us money, we must ask you to pay it but we will not charge you a penalty. Also, if you acted reasonably and in good faith we will not charge you interest.

If you make an honest mistake trying to follow our information in this publication and you owe us money as a result, we will not charge you a penalty. However, we will ask you to pay the money, and we may also charge you interest. If correcting the mistake means we owe you money, we will pay it to you. We will also pay you any interest you are entitled to.

If you feel that this publication does not fully cover your circumstances, or you are unsure how it applies to you, you can seek further assistance from us.

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