

# Bargaining for Super

March 2022



# Strengthen EBAs with Modern Super Clauses

The union movement won compulsory employer-paid superannuation through national worker-led campaigns. The superannuation system is today one of the labour movement's proudest achievements. As a result, nearly every worker in Australia has an industrial right to superannuation.

Superannuation is core union business. Winning super meant we were able to build one of the largest and best retirement systems in the world. We are now making sure that every union member gets the best possible deal in superannuation.

Too many workers are ripped off without knowing it. Their employers put them in dud for-profit super funds. They retire with too little to live on, and by then it is too late.

Industry super funds have a strong history of good returns with low fees. They deliver all their profits to members and do not siphon money off for shareholders. Instead, many for-profit funds — mainly owned by big banks — have ripped off their

customers, delivering poor returns, and charging massive fees. These for-profit funds are another way for big businesses to take money out of workers' retirement savings.

That is why we need to make sure that each agreement ensures workers' money goes to funds which benefit workers.

Nearly one in three workers have their super stolen — this is wage theft. When a model clause is written into an EBA, workers and their unions can take action to recover stolen superannuation. Without a model clause there is no right to take action, leaving workers stranded with the Australian Tax Office whose process is slow and ineffective.

There are important practical steps unions can take when bargaining to protect workers from being ripped off.

This kit highlights default clauses you can incorporate into your next agreement.

## MODEL CLAUSE

### X Superannuation

#### X.1 Introductory

This clause requires the employer to make Superannuation contributions to employees' superannuation accounts and sets out the level of contributions that must be made, when those contributions must be made and related obligations. This clause:

- a. applies to all employees covered by this Agreement, regardless of their age, hours of work or level of earnings; and
- b. Imposes obligations which are separate to those imposed by the Superannuation Guarantee (Administration) Act 1992 (as amended) and the Superannuation Guarantee Charge Act 1992 (as amended).

It is acknowledged that, save for salary sacrifice amounts identified in **clause X.3**, amounts paid by the Employer to a superannuation fund on behalf of an employee as required by this clause will also count towards reducing the individual superannuation guarantee shortfall for that employee.

## X.2 Choice of fund

Superannuation contributions will be made to a fund of the employee's choice, subject to the following:

- a. The employer will provide an employee with a copy of the form set out [or described] in Schedule [X] via post:<sup>1</sup>
  - i. upon commencement of their employment;
  - ii. when the employer is notified by the ATO that the employee has a stapled fund; and
  - iii. at other times as requested.
- b. If the employer provides an employee with a standard choice form, the employer must specify [Insert Name of Fund] ([insert USI Number of the Fund]) as the employer nominated superannuation fund.

## X.3 Salary Sacrifice

An employee who wishes to make salary sacrifice contributions to their superannuation fund from their earnings will be entitled to do so and the employer will make the necessary arrangements to make those salary sacrifice contributions as directed by the employee. The following conditions apply to such contributions and the arrangements under which they are made:

- a. Salary sacrifice contributions shall not reduce the calculation and payment of superannuation contributions for the purposes of this clause, or for any other purpose under this Agreement;
- b. A salary sacrifice contribution by an employee will be treated for all purposes by the employer solely as a voluntary contribution made by the employee from the employee's earnings, exclusively for that employee's own benefit; and
- c. The employer shall not rely on its transmission of an employee's salary sacrifice contribution under this sub-clause to reduce or offset any other liability to or in respect of any person.

## X.4 Timing of Contributions

### [Option 1]

The employer will pay superannuation contributions, including salary sacrifice, on behalf of each employee and in full to the nominated fund at the same time at which wages and other amounts payable to an employee in relation to the performance of work by the employee are paid.

### [Option 2]

The employer will pay superannuation contributions, including salary sacrifice, on behalf of each employee at least monthly and in full to the nominated fund.

## X.5 Information to employees

Employees will receive information on their payslips as required by Regulation 3.46 of the *Fair Work Regulations 2009* including all such information that will enable them to confirm that all due superannuation contributions, including salary sacrifice, have been paid. In addition, the employer will schedule a 30 minute superannuation familiarisation session as part of the paid induction process for new employees. The session will be delivered jointly by a representative of [inset super fund] and a representative of [insert union/s].

<sup>1</sup> Refer to Notes and information on the model clause

## X.6 Relevant earnings

### [Option 1]

Save as specified in clause X.9, contributions will be paid as a percentage on all earnings (all wages, allowances, bonuses and similar) and all payments due on termination of employment.

### [Option 2]

Save as specified in clause X.9:

- a. For employees in receipt of annualised salaries, contributions will be paid on the total of their annualised salary amount.
- b. Contributions for other employees will be paid on ordinary time earnings as defined in the Superannuation Guarantee (Administration) Act 1992 (as amended).

### [Option 3]

Save as specified in clause X.9, contributions will be paid on ordinary time earnings as defined in the Superannuation Guarantee (Administration) Act 1992 (as amended).

## X.7 Contribution rate on relevant earnings

### [Option 1]

The rate of superannuation payable on the relevant earnings of an employee under clause X.6 is a percentage which is the greater of:

- a. [insert higher rate if applicable -it must be no less than 10] percent; or
- b. the percentage fixed by the Superannuation Guarantee (Administration) Act 1992 (as amended).

and is paid in addition to any salary sacrificed amounts.

### [Option 2]

The rate of superannuation payable to an employee at the commencement of this agreement is [insert rate-it must be no less than the current SG rate] percent of the relevant earnings under clause X.6 above ("Superannuation Rate") and is paid in addition to any salary sacrificed amounts. The Employer shall increase the Superannuation Rate in accordance with the table below. However, if the percentage fixed by the Superannuation Guarantee (Administration) Act 1992 (as amended) rises above the Superannuation Rate in the table below during the operation of this agreement, that higher rate will apply.

Date of Increase	Percentage by which the Superannuation Rate will increase	Superannuation Rate
On and from 1 July 2022	0.5%	10.5% [or whatever the above rate is + .5]
On and from 1 July 2023	0.5%	11% [or whatever the above rate is + .5]
On and from 1 July 2024	0.5%	11.5% [or whatever the above rate is + .5]
On and from 1 July 2025	0.5%	12% [or whatever the above rate is + .5]



## X.8 No set-offs

Any increases to the percentage of superannuation payable that occurs during the operation of this Agreement will not result in a reduction in any other form of payment to the employees.

## X.9 Contributions during leave and workers compensation

The contributions provided for in this clause will be made:

- a. During all periods of absence or leave as a result of a work-related injury or illness, provided that the employee is receiving workers' compensation or regular payments directly from the employer in accordance with statutory requirements and the employee remains employed by the employer. Contributions will be made on the basis that the employee's pre-injury earnings determine their relevant earnings;
- b. To employees who take unpaid or paid parental leave or a combination of paid and unpaid parental leave. Where this occurs, the employee's relevant earnings will be deemed to be at least equivalent to their average relevant earnings during the 12 months immediately preceding the commencement of parental leave. Any base salary increases payable under this Agreement during the period of leave will be applied to those relevant earnings;
- c. In respect of all other periods of paid leave, on the basis that all earnings received in respect of the period of leave are relevant earnings.

## Notes and information on the model clause

### Which fund?

On average, most industry funds charge less and perform better than most retail funds. Enterprise agreements should therefore try to ensure that contributions are made to industry funds, to the extent possible.

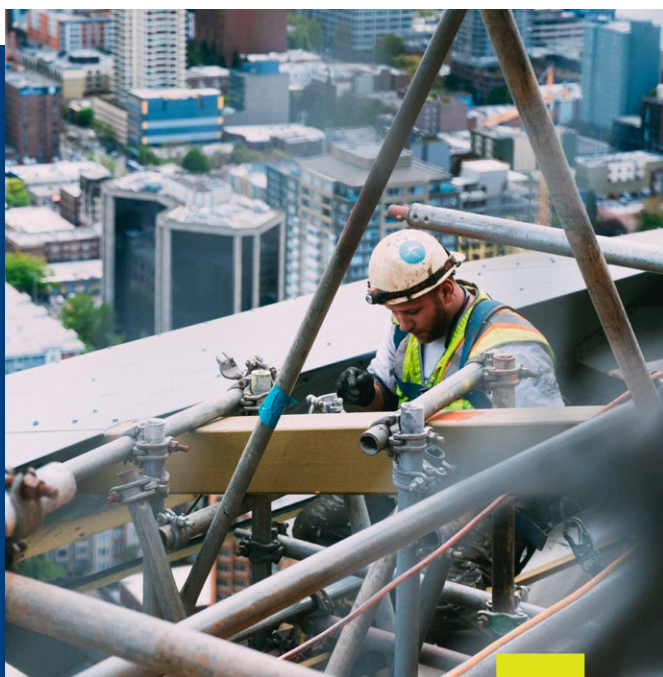
Whilst it has been longstanding practice to require contributions to be made to a particular superannuation fund in enterprise agreements, there are now limitations on achieving this. These limitations are the result of changes to legislation governing "stapling" of superannuation funds and "choice" of superannuation funds.

The circumstances concerning when an employee has a "stapled fund" will be set out in new regulations, which have not yet been made. However, we understand that effect will be that from 1 November 2021, an employee's stapled fund will be their existing superannuation fund (or one of them) even if they change jobs, unless or until they actively choose a different fund.

The choice of superannuation fund rules used to provide that enterprise agreements could specify which superannuation fund contributions needed to be paid into. These rules have now been cut back and grandfathered, with the result that there is a hierarchy of methods of allocation of members to funds and an agreement can no longer require contributions be made to a particular fund. The hierarchy is effectively as follows:



- An employee chosen fund trumps all. To choose a fund, employees need to provide written notice of their chosen superannuation fund to either the employer or the ATO in accordance with Division 4 of the Superannuation Guarantee (Administration) Act 1992. Many Industry superannuation funds have developed nomination forms that comply with these requirements. **Clause X.2a** in our proposed model clause assumes you will obtain that form and include it as a Schedule to your enterprise agreement. Alternately, the form can be described in that schedule (for example “A form provided by XYZ Fund which enables the employee to give written notice to the employer that XYZ is their chosen fund and provides the information necessary for the employer to make contributions to it”)
- Stapled superannuation funds trump default employer funds. Stapled superannuation funds are effectively taken to be the employee’s chosen fund unless or until they choose different a different fund. Standard choice forms (see below) are still required to be provided to employees within 28 days of their starting employment (except where they have already chosen a fund, as above) but they will be ignored by the employer and the ATO if the employee already has a stapled fund and accepts the employer’s nominated fund.
- Standard Choice forms, which are provided by employers to employees within 28 days of commencing employment and in other particular situations, allow employees to nominate their choice of superannuation fund or alternately accept the default that the employer has nominated. Standard choice forms do not need to be provided to new employees if they have already chosen a fund.
- Enterprise Agreements and Workplace Determinations: A clause in agreement made before 1 January 2021 which required contributions to be made to a particular fund is effective only insofar as the employee does not have a stapled fund or has not chosen another fund. There is little point in including a default clause in new agreements and workplace determinations as these will not be enforceable and, if complied with by the employer, could subject the employer to additional taxation.



**Clause X.2** and **X.5** in our model clause are designed to increase the likelihood that contributions will be directed to a particular industry superannuation fund. They achieve this by ensuring that employees are given an opportunity to accept that industry fund as their choice when they start their employment, when the employer becomes aware that the employee already has a stapled fund and at other times when the employee is required to be provided with a standard choice form. The induction session described in the second sentence of **clause X.5** provides a further opportunity to explain the benefits of industry super funds, however the part of the clause providing for the familiarisation session is not suitable for agreements that will operate in workplaces that are subject to section 11 of the Code for the Tendering and Performance of Building Work 2016. An alternative to a

familiarisation session may be to require that the employer will provide all new employees with written information about superannuation prepared by [union name], or that the union may elect to provide written information to new employees in lieu of the familiarisation (which may be more practicable in workplaces where new employees do not routinely commence in groups).

If union members want an agreement that provides even greater choice in making contributions, a suggested alternative to **X.2** is as follows:



Superannuation contributions will be made to a fund of the employee's choice, subject to the following

- c. The employer will provide an employee with a copy of the forms described in Schedule [X] via post:
  - i. upon commencement of their employment;
  - ii. when the employer is notified by the ATO that the employee has a stapled fund; and
  - iii. at other times as requested.
- d. If the employer provides an employee with a standard choice form, the employer must specify either of the following as the employer nominated superannuation fund:
  - i. [Insert Name of Fund] ([insert USI Number of the Fund])
  - ii. [Insert Name of Fund] ([insert USI Number of the Fund])
  - iii. [etc]

### Including everyone

Employers are not required to contribute SG contributions for employees who are paid less than \$450 a month or under 18 and working less than 30 hours per week. Whilst the government has announced its intention to abolish the \$450 per month threshold from 1 July 2022, this has not yet occurred. **Clause X.1(a)** is designed to ensure that all employees receive a contribution on their earnings, even those currently excluded from receiving SG contributions. In addition, **clause X.9(c)** ensures that employees who access parental leave and other entitlements are not excluded from receiving superannuation contributions.



### Salary Sacrifice

At present, some employers do not offer a facility to their employees to make salary sacrifice contributions. Such contributions receive favourable tax treatment and help to increase the value of final retirement balances. All employees should therefore be entitled to make such contributions if they wish, and **clause X.3** is designed to address this. In addition, prior to 1 January 2020, employers could in some circumstances use salary sacrifice contributions to reduce their obligations to make minimum super guarantee payments. Paragraphs a – c of **X.3** of the proposed model clause are designed to ensure that workers have a remedy under the agreement in the event that employers do not abide by these new rules, rather than merely rely on the ATO to resolve an underpayment issue of this type.

### Timely payment of superannuation contributions

Employers are currently only required to make superannuation contributions on a quarterly basis, irrespective of whether the employee is in a weekly, fortnightly or monthly pay cycle. **Clause X.4** provides two options to promoting more regular payment of superannuation: aligned with the pay cycle (option 1) or at least monthly (option 2). In addition, **clause X.5** ensures that information is included on pay slips to show how much has been actually been paid in contributions over a pay period, rather than only the amount of contributions that the employer owes over that pay period.

## Super as percentage of what?

SG contributions are normally calculated as a percentage of an employees Ordinary Time Earnings, which is defined in legislation. However, most overtime payments, some allowances and bonuses and some payments made during leave or absence are not included in this definition. **Clause X.6** is designed to expand the range of payments that superannuation contributions are payable on. Options 1 and 2 in the clause provide for an enhanced payment, whereas option 3 provides the standard ordinary time earnings. **Clause X.9** provides for payment during paid leave, workers compensation and where an employee



takes parental leave (or a combination of paid and unpaid parental leave. This is important when we consider that women retire of 47% of the superannuation of men. **Clause X.9** provides for employees on parental leave to be paid contributions based on their average earnings over the last 12 months and for employees on workers compensation to be paid contributions based on their pre-injury earnings. Where employees take other forms of leave, **clause X.9** provides for superannuation contributions to be paid based on the total of their earnings received during leave, which significantly will include leave loadings that are usually excluded from the calculation or ordinary time earnings.

## The rate of contributions

Whilst most employers pay the standard SG contribution rate (10% as of 1 July 2021), some unions have negotiated a higher rate. **Clause X.7** is designed to be tailored to preserve any existing any higher level contribution rates. Two options are provided for this. Option 1 allows the existing rate to be preserved unless or until the Superannuation Guarantee rate exceeds it. Option 2 locks in .5% increments on 1 July of each year, which may be increments on the SG rate or on the higher rate which may already apply at the workplace. It also provides for an increase in the event that the Superannuation Guarantee rate



rises above rates specified in the table while the agreement remains in operation. The superannuation guarantee rate is legislated to rise on by .5% on each 1 July until it reaches 12% on 1 July 2025. Option 2 protects against disappointment in the event the that Government changes the law to remove or postpone those automatic increases.

**Clause X.8** is designed to ensure that employees who are paid on the basis of a “total remuneration package” or similar arrangements get the benefit of increases to the superannuation rate without are reduction in their other forms of payment. Whilst it is uncommon if not unheard of for employees covered by enterprise agreements to be paid on the basis of a “total remuneration package”, this clause is included out of an abundance of caution and also to raise awareness of the issue. The clause can be adapted to individual contracts for those employees not covered by the agreement and are more likely to be subject to “total remuneration” type arrangements.

