Superannuation reform doesn't go far enough

By Andrew Proebstl, Chief Executive of Legalsuper

The Federal Government is claiming that the 'Better Super' changes are the biggest reform to superannuation ever. Andrew Proebstl, Chief Executive of Legalsuper, argues that while the new superannuation rules have improved the tax-effectiveness of superannuation, current reforms fall short of helping all Australians save for a comfortable retirement and more needs to be done.

The 'Better Super' reforms introduced by the Federal Government have certainly bolstered the position of superannuation as the long-term savings vehicle of choice for Australians.

Indeed, one of the biggest changes to superannuation has been to withdrawals from taxed super funds (such as Legalsuper), which are now tax-free after age 60 (whether paid as a pension or lump sum). With contributions to superannuation taxed at a maximum of 15 per cent, it is difficult to beat super as a tax-effective savings vehicle over the long term.

For employees, one of the most tax-effective ways to take advantage of the new rules is to invest into superannuation through salary sacrifice.

Salary sacrifice is giving up part of your pay packet and directing the selected amount into your super fund. Salary sacrifice contributions are taxed at 15 per cent. For many employees this tax rate is far below that paid when the selected amount is paid instead into their pocket. The following table explains this further:

Every dollar of taxable income in this range:

Every dollar of taxable income in this range:	paid into your pocket, is taxed at:	or 'sacrificed' into super, is taxed at:
$30,001 – $75,000	30%	15%
$75,001 – $150,000	40%	15%
$150,000+	45%	15%

Employees on higher incomes, like many lawyers, are often in a better position to take advantage of salary sacrificing than others. They can afford to sacrifice a portion of their income, taking advantage of the low tax rate, without greatly affecting their lifestyle.

However, salary sacrifice remains largely untouched by recent reforms. Unlike other areas of superannuation that tend to be governed by numerous and complex regulations, salary sacrifice is covered by little regulation. Traditionally, salary sacrifice has tended to be covered in awards and industrial agreements. This vacuum has put much of the control over salary sacrifice arrangements into the hands of employers.

One of the most fundamental areas not covered by legislation is when employers should provide salary sacrifice. Employers are not obligated to make salary sacrifice available to their employees, and many Australians are unable to take better advantage of the super reforms. According to Mercer Human Resources Consulting, about 50 per cent of wage earners and 20 per cent of salaried workers are currently blocked by their employers from salary sacrificing.

When salary sacrifice is offered a lack of legislation governing the way it is applied has created an uneven and sometimes unfair playing field.

While salary sacrifice is supposed to be about employees deciding what to do with their income, employers currently make the key decisions about any income their employees elect to salary sacrifice.

For instance, employers have flexibility over when they pay salary sacrificed income into an employee's super fund. Over the long term this delay can have a significant effect on the value of employees' super fund balances.

Employers are also able to decide whether to calculate their Superannuation Guarantee (SG) obligation based on employees' pre- or post-salary sacrifice earnings. For instance if an employee earning $80,000 decides to sacrifice an additional $5,000 into their superannuation, the employer is by law allowed to calculate their 9% SG contribution based on the reduced $75,000 salary and not the employee's gross salary of $80,000.

Employers also elect whether to use salary sacrifice contributions to reduce their obligation to pay the 9% SG. An extreme example would be the case of an employee who salary sacrifices 9% of their income and their employer using this contribution to meet their employer obligation, thereby giving the employer a financial advantage.

Finally, employers are not obliged to disclose their salary sacrifice contribution policies to their employees, meaning these rules may be applied without employees' knowledge.

Ultimately, salary sacrifice is about giving employees an effective way to boost their retirement savings. The majority of Australians would see it as inherently unfair that an employer can make decisions that have consequences on their decision to save, especially if those decisions were to be made without full and upfront disclosure.

We need a level playing field with employers and members on an equal footing. There also needs to be increased certainty about when and how salary sacrifice operates and there needs to be transparency

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A new frontier in vicarious liability? - Employer held responsible for rape committed by an employee cont...

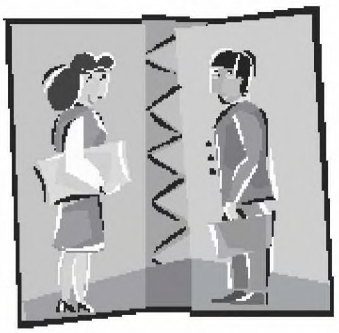
nolly found the Commonwealth (through the agency of the Department of Defence) vicariously liable under the SDA for the rape, sexual discrimination, harassment, and victimisation of Cassandra Lee, a civilian administration officer at a Cairns naval base.

Over a period of several months, Lee was sexually harassed by naval officer Austin Smith. Smith repeatedly asked Lee for sex, intimidated her with inappropriate and offensive comments, and made attempts to grope her. After Lee demanded that these activities cease, Smith stopped harassing her for about two weeks.

Around this time, Lee and Smith attended an after-work dinner party at the home of two colleagues, also employed by the Australian Defence Force ('ADF'). Lee became intoxicated at the dinner and passed out. When she woke up the next day, she was in Smith's house and he was raping her.

The Court's finding that the dinner itself would not have occurred but for the collusion with Smith of his ADF colleagues, was also significant to its conclusion that the rape occurred 'in connection with' Lee's employment and, accordingly, that the Commonwealth was vicariously liable.

While the Commonwealth attempted to rely on the defence under s 106(2), that it 'took all reasonable steps to prevent' Smith's conduct, this defence failed. The Court found that, while the ADF had comprehensive equity and diversity guidelines in place, these were not followed. In addition, the ADF's gross mismanagement of Lee's complaint, and the fact that she had not received any training on equal employment opportunity during the period of her employment, were factors considered by the Court in rejecting this defence.



Vicarious liability under common law

A general principle of torts is that an employer will only be responsible for the actions of an employee which occur during the course of their employment. Accordingly, to establish vicarious liability, there must be a sufficiently strong nexus between the act and the employment to prove that the employee was not merely off 'on a frolic of their own'.

In South Pacific Hotels Pty Ltd v Trainor, a case which also involved sexual harassment, the common law doctrine of vicarious liability was contrasted with the provisions under the SDA. In this case, the Court adopted an expansive interpretation of the phrase in s 106(1), 'in connection with the employment of the employee'. While both employees were off-duty, one employee sexually harassed another late at night in accommodation provided (and controlled) by the employer. Finding that there was a sufficient connection between the acts of the harasser and his employment, the Court held the employer liable for the employee's actions.

Similarly, in McAlister v SEQ Aboriginal Corporation, the Court held that the words 'in connection with' in s 106(1) should be given a more expansive meaning than that given to phrases such as, 'in the course of' or 'in the scope of'. In this case, Violet McAlister was sexually harassed by lawyer Christopher Lamb when he went to her home to provide her with legal services in relation to her divorce. Even though Lamb was a lawyer with an Aboriginal legal service and, as a non-Aboriginal, McAlister was not eligible to receive the organisation's assistance, the Court found that Lamb's acts were sufficiently connected to his employment to bring them within s 106(1). However, after making out a defence under s 106(2), the employer was not held vicariously liable in this case.

Applying the common law test of vicarious liability, it seems highly unlikely that the Commonwealth would have been held liable for the rape in Lee. However, applying the much broader provisions set out in the SDA, the Court reached the opposite conclusion.

What are the implications for employers?

Lee provides guidance on the extent to which an employer may be held vicariously liable for the sexual discrimination and/or harassment of one employee by another, occurring beyond the workplace. The broad operation of s 106(1) of the SDA means that employers must be vigilant in preventing and policing such conduct wherever it arises.

Superannuation reform doesn't go far enough, cont...

throughout the process.

It's not good enough for the Federal Government to trumpet the success of their superannuation reforms when more work is needed.

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