



Tax Insights

Extended Superannuation Guarantee (SG) amnesty to be legislated

Snapshot

On 18 September 2019, the Government introduced a new Bill into Parliament reintroducing a one-off amnesty to encourage employers to self-correct historical superannuation guarantee (SG) non-compliance.

The majority of amendments reflect the lapsed measures contained in Treasury Laws Amendment (2018 Superannuation Measures No 1) Bill 2018; a Bill that the government was unable to progress through the Parliament last term.

Introduction

The Bill sets out a carrot and stick approach to collection – a further extension to the amnesty period together with legislative backing for remission of penalties during the amnesty period, counteracted by legislatively mandated minimum penalties for employers that do not voluntarily disclose historical non-compliance during the amnesty period.

The updated SG penalty measures and amnesty combined with the full implementation of Single Touch Payroll (STP), (where employers provide tax and super information directly to the ATO from their payroll or accounting software as they run their payroll) will provide a powerful incentive for voluntary disclosure.

It is anticipated that both the ATO and employees themselves will have unprecedented access to information about SG and payroll related payments in virtually real time when STP is fully implemented.

Superannuation Guarantee underpayment is a significant issue in the tax system. When last calculated (for the 2015-16 year), the ATO estimated that the net gap (the amount theoretically underpaid) for SG contributions was approximately 4.8% or \$2.79 Billion¹.

Extended amnesty period

The amnesty period is to be extended from 24 May 2018 to a period which ends six months after the day the Act receives Royal Assent.

It will mean that employers who have already made disclosures to the ATO during the previously announced amnesty period (24 May 2018 to 24 May 2019), which was never legislated, should benefit from the penalty remissions provided in the Bill.

Employers should however note, that the new amnesty is not yet law and must pass through both Houses of Parliament. It is expected that the Bill might not receive bi-partisan support on its passage through Parliament.

What is the required SG contribution?

Broadly, employers are required to deduct and remit, at a minimum, superannuation contributions based on an employee's ordinary times earnings (OTE) at the applicable SG rate. This rate has increased over time from 3% at inception to its current rate today of 9.5%.

Payments are subject to a maximum contribution base (for high income earners), and workers earning less than \$450 a month are not generally subject to superannuation guarantee. Where employees are under 18 or are a private or domestic worker (as defined), they must also work for more than 30 hours per week to qualify for mandated superannuation contributions².

Existing penalties for non- compliance

Normally, non-compliant employers are liable to pay the Commissioner each quarter, an SG charge comprising of:

- The total of the employer's SG shortfalls per employee in the quarter
- A nominal interest component calculated as at the beginning of the relevant quarter until the date the SG charge is payable;
- An administration component which is \$20 per employee in shortfall for the quarter.

These amounts are generally reallocated by the Commissioner to the employee's relevant superannuation account.

Further penalties can also be levied including:

- Part 7 penalties; where the employer fails to provide an SGC Statement; or information relevant to assessing the employer's liability to pay the SGC for a quarter. These penalties can be up to 200 per cent of the amount of the underlying SG charge, and
- General interest charge imposed where either the SG charge or Part 7 penalty charge is not paid by the due date.

¹ https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Superannuation-guarantee-gap/?anchor=Measuring_the_gap#Measuring_the_gap

² <https://www.ato.gov.au/Business/Super-for-employers/Working-out-if-you-have-to-pay-super/>

In addition, an employer who makes a false or misleading statement which results in a reduced SGC being payable for a year is liable for a penalty. The amount of the penalty varies according to the amount of the 'tax shortfall' resulting from the statement.

Both the SG charge, penalties and late contributions that an employer has elected to offset against their SG charge liability are not deductible.

Under the current rules, the Commissioner may remit all or part of the additional Part 7 penalties imposed on an employer.

What are the conditions and benefits of the amnesty?

To qualify for the amnesty, the employer must disclose to the Commissioner information related to a SG shortfall for any quarter that ends at least 28 days before the start of the amnesty period.

This means that the applicable shortfall period covered by the amnesty is from quarters starting on 1 July 1992 and ceasing 31 March 2018.

It is important to note that the amnesty is not relevant for quarters within the disclosure period.

The employer must disclose to the Commissioner in the approved form, information that related to the amount of SG shortfall for the first time. An employer that has come forward before the start of the amnesty period will not benefit from the amnesty, unless providing new disclosures.

The Commissioner must not have, at any time before the disclosure, informed the employer that the Commissioner is, or is intending to examine, the employer's compliance with an obligation to pay SG charge for the quarter.

Employers that have previously been disqualified from participating, cannot benefit from the treatment under the amnesty.

Where an employer has capacity to pay on the day they make the disclosure, and does not have an existing SG charge assessment, they may choose to make the contributions of shortfall and interest directly into an employee's superannuation account. Otherwise the payments must be made to the Commissioner.

Where an employer fails to pay or enter into payments arrangement to pay any SG charge imposed, the benefits of the amnesty will be lost.

Benefits of the amnesty

Under the amnesty, employers:

- Can claim tax deductions for payments up to the amount of the SG charge, where made during the amnesty period
- Can claim tax deductions for late contributions made during the amnesty period to offset the SG charge
- Will not be subject for the \$20 administration charge per employee in respect of whom the employer has an individual SG shortfall
- Will not be subject to penalties under Part 7 in respect of amounts of SG shortfall that qualify for the amnesty (this concession will be legislated rather than at the Commissioners discretion).

An employer's liability to pay penalties under Part 7 for a quarter will be reduced by the extent to which the employer qualifies for the amnesty for the quarter.

Penalties post the amnesty period

From the day after the amnesty period ends, the Commissioner's ability to remit Part 7 penalties will be curtailed by legislation. Under the amendments, the Commissioner will not be able to remit Part 7

penalties below 100 per cent of the amount of the SG charge payable by the employer for an historical quarter that was covered by the amnesty where the employer did not disclose the shortfall as part of the amnesty.

However, the Commissioner's discretion to remit penalties remains where:

- There are exceptional circumstances
- Any SG shortfalls relating to quarters starting on 1 April 2018 and later periods
- Any SG shortfalls for historical periods under the amnesty, where the employer comes forward voluntarily with information relevant to the shortfall whether under the amnesty or following its conclusion (and not prompted by ATO compliance activity).

Concessional contributions cap

The amnesty may result in employers paying additional sums to an employee's superannuation account in a year that may breach the employee's concessional contributions cap (currently \$25,000 per financial year). The Bill introduces amendments that provide an exception to the requirement for an individual to apply to the Commissioner for a determination to disregard or reallocate a contribution and will allow the Commissioner to make a determination on his own initiative in conjunction with making the contribution on behalf of the employer.

This exception will not however apply where the employer makes the contributions directly into the employee's fund. In this case, individuals will still need to request that the Commissioner exercise his discretion in relation to the contributions.

Division 293 (15% additional tax on superannuation contributions for high income earners)

Amendments will be introduced that will broadly ensure that high income earners (over \$250,000) paying additional 15% tax on their superannuation contributions, will not be subject to the additional tax in respect of additional contributions received under the amnesty disclosures.

Deloitte comment

Superannuation rules, particularly the way they interact with industrial agreements, can be extremely complex. So much so that even the most astute employers are often unaware that their systems may not be accurately calculating the required SG contributions. The most common errors relate to allowances or certain pay types (such as leave loading) not being included as OTE, incorrect treatment of contractors, incorrect application of maximum contribution base limits and late or non-payment of SG, particularly when using clearing houses.

The proposed amnesty provides a generous incentive for employers to conduct a Superannuation 'health check' and remediate any instances of unpaid superannuation without incurring the prohibitive penalties that currently exist for non-compliance.

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