



Tax Insights

Superannuation Guarantee amnesty requires action now

Snapshot

On 6 March 2020, the Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019, also referred to as the Superannuation Guarantee (**SG**) Amnesty Bill, received Royal Assent.

Consequently, employers will have six months from the date of Royal Assent to voluntarily disclose any SG shortfalls to the Australian Taxation Office (**ATO**) and qualify for the terms of the amnesty.

The amnesty will allow employers to review payroll compliance processes and make good any historical underpayments of SG to employees along with legislated temporary remission of penalties and other charges.

The updated SG penalty measures and amnesty combined with the full implementation of Single Touch Payroll (**STP**) provides a powerful incentive for voluntary disclosure. The ATO now has near real-time data to assess employers' compliance with SG obligations as a result of STP. The ATO is using this data to help prevent and correct late or under-payment of employer SG contributions.

As widely published in the media, SG underpayments is a significant issue in the tax system. When last calculated (for the 2016-17 year), the ATO estimated that the net gap (the amount theoretically underpaid) for SG contributions was approximately 3.9% or \$2.3 billion¹.

Extended amnesty period

The amnesty period is to be extended from the original proposed date of 24 May 2018 to a period which ends six months after the date of 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, will benefit from the penalty remissions provided in the new legislation.

What is the required SG contribution?

Broadly, employers are required to remit, at a minimum, SG 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 quarterly maximum contribution base (for high income earners) and workers earning less than \$450 a month are not generally subject to SG. 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

Non-compliant employers are liable to pay the Commissioner each quarter, a Superannuation Guarantee Charge (**SGC**) comprising of:

- The total of the employer's SG shortfalls per employee in the quarter;
- A nominal interest component of 10% per annum calculated from the beginning of the relevant quarter until the date the SGC Statement is lodged with the ATO; and
- An administration component of \$20 per employee, per quarter where there is a shortfall.

These amounts are generally reallocated by the Commissioner to the employee's relevant Superannuation account (other than the \$20 administration component).

Further penalties can also be levied including:

- Part 7 penalties may apply 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 SGC however the Commissioner may remit part or all of this penalty; and
- General interest charge imposed where either the SGC or Part 7 penalty charge is not paid by the due date.

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

¹ <https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Superannuation-guarantee-gap/>

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

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

What are the conditions and benefits of the amnesty?

To qualify for the amnesty, the employer must disclose to the Commissioner, information relating 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 the quarter beginning 1 July 1992 and ends on 31 March 2018.

It is important to recognise that the amnesty is not available for all quarters within the disclosure period (i.e. from 1 April 2018 to six months post the date of Royal Assent).

Under the amnesty, the employer must disclose to the Commissioner in the approved form, information 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. Furthermore, employers that have previously been disqualified from participating, cannot benefit from the treatment under the amnesty.

Where an employer fails to pay or enter into a payment arrangement to pay any SGC 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 SGC, where made during the amnesty period
- Can claim tax deductions for late contributions made during the amnesty period to offset the SGC
- Will not be subject to 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 SGC payable by the employer for a 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
- SG shortfalls relating to quarters starting on 1 April 2018 and later periods
- 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 making additional superannuation contributions 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 03

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.

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

Amendments to Division 293 will 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 interpretation of and interaction 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.

We recommend that employers conduct a Superannuation 'health check' and remediate any instances of unpaid superannuation without incurring the regular penalties for non-compliance that currently exist and will apply post the amnesty.

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