



3 October 2019

Committee Secretary
Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Submitted via www.aph.gov.au online submission function

Dear Sir/Madam

Submission – Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019

Chartered Accountants Australia and New Zealand welcomes the invitation to make a submission on the Committee's review of the above Bill.

We would be pleased to discuss any aspect of our submission.

Chartered Accountants Australia and New Zealand is a professional body comprised of over 120,000 diverse, talented and financially astute members who utilise their skills every day to make a difference for businesses the world over.

Members are known for their professional integrity, principled judgment, financial discipline and a forward-looking approach to business which contributes to the prosperity of our nations.

Introductory Comments

This proposed legislation re-introduces a policy first presented to Parliament in late May 2018 that was not legislated before the May 2019 Federal election.

We strongly supported this original version of this amnesty legislation and likewise strongly support its reintroduction into Parliament. We appreciate the provisions to limit exposure to excess concessional contributions tax and/or higher income earners contribution tax when an employer accesses the amnesty.

Chartered Accountants ANZ has long advocated adjusting the penalty regime in the *Superannuation Guarantee (Administration) Act 1992* (SGAA) because we believe its penalties for non-compliance discourages employers from seeking to correct their mistakes.

This is certainly the case when the penalties might be the unpaid contributions, an administrative fee, notional lost earnings *and* other penalties, all of which can add up to a considerable sum of money. A tax deduction is specifically denied for any of these amounts.

Taken together all these penalties can be a significant disincentive for small to medium businesses to admit their error and dissuades some employers from submitting a Super Guarantee Charge (SGC) assessment to the Commissioner. While this 'head in the sand approach' only makes the problem worse, it is an understandable reaction if the payment of these amounts might cause a business to cease trading.

The accepted view amongst policymakers appears to be that employer Superannuation Guarantee payments are re-directed salary and wages and as such their non-payment effectively represents "wage theft". Consequently, the penalties for non-payment of SG contributions should be similar to those that apply for the underpayment of normal salary and wages.

We note that the proposed amnesty would remit all usual SGAA penalties, other than the General Interest Charge, and administrative fees and permit the claiming of other amounts (contributions and notional earnings) as a tax deduction assuming an employer satisfies all relevant requirements of this amnesty, including paying all required amounts before the end of the amnesty period.

We note that one criticism of this measure is that it seems to reward employers by allowing potentially systemic SG non-compliance to be tax effectively dealt with.

Some believe this is inappropriate and there is some merit in this argument.

It is a fact that some employers regrettably do not make any Super Guarantee contributions and may even not pay award wages. Such employers are often operating in industries in which participating businesses often seek to avoid having a traditional employment relationship. In many cases these industries involve the frequent use of unskilled, young or immigrant employees.

The reality is however that the majority of employers seek to comply with the Superannuation Guarantee laws and go to considerable effort to fulfil its obligations. But given the complexity of this and other tax and employment laws inadvertent mistakes inevitably arise.

We note the recent Full Federal Court case *Bluescope Steel (AIS) Pty Ltd v Australian Workers' Union* [2019] FCAFC 84 which found that the employer had calculated ordinary time earnings correctly when determining its compulsory superannuation contribution obligations. This judgement overturned the decision of the Federal Court case *Australian Workers' Union v BlueScope Steel (AIS) Pty Ltd* [2018] FCA 80 which concluded that the employer had not satisfied the compulsory super contribution requirements for many years.

When the judiciary interprets these provisions differently we can see clearly how some employers, despite their best endeavours, also find it very difficult to get every requirement of the Super Guarantee laws absolutely correct.

The benefit of the amnesty is that it incentivises all employers to audit their Super Guarantee compliance and fix any identified underpayment issues. In the years ahead Chartered Accountants ANZ expects the ATO will keep a very watchful eye over those employers who avail themselves of the amnesty.

We believe the fact that the amnesty means the late payment of previously unpaid SG contributions and generous notional earnings outweigh concerns about rewarding employers for “wage theft”.

In an answer to a Parliamentary question without notice, the former Prime Minister Turnbull noted that the original proposed amnesty had been “designed to recover over \$200 million – hopefully more – of unpaid contributions for the benefit of workers and for the benefit of employees.”

We do not know how this amount was arrived at but have no reason to doubt its accuracy. We believe these contributions are better in employee retirement savings.

Amnesty window

We note that to access the amnesty an employer must approach the ATO between 24 May 2018 and within six months of the amending legislation receiving Royal Assent. The Amnesty applies to previously undeclared SG shortfalls for any quarterly period from 1 July 1992 up to 31 March 2018.

Given the original amnesty period was not legislated we believe the proposed new amnesty period should ideally be longer than six months after the proposed legislation receives Royal Assent (see below for rationale).

Higher ongoing penalties once amnesty window shuts

We note the proposed measure that would see employers face higher minimum penalties if SG non-compliance for any quarter before April 2018 is self-reported to or detected by the Tax Office once the amnesty window is shut.

We believe that such an incentive is appropriate however for this to be fair, we consider that the amnesty period should be longer – say to run from 24 May 2018 and up to **12 months** after Royal Assent – and, in addition, be accompanied by an appropriately comprehensive government information campaign to all employers encouraging them to deal with SG non-compliance issues in this period.

Deceased employees

In some cases employers may be required to make SGC contributions under the amnesty for former employees who have died. If death occurred many years ago, the deceased’s estate may have been wound up. In [ATO Interpretative Decision 2014/31](#), the ATO said that Super Guarantee contributions remain payable on an employee’s death. We suggest that in some cases – for example, where the ATO is aware a former employee has died but is unable to locate the deceased’s executors and/or dependants – a provision to allow those amounts to remain in consolidated revenue would be appropriate.

Other potential areas of Super Guarantee reform

We take this opportunity to note other areas of reform in the Super Guarantee laws that would improve the system:

- There are significant inconsistencies between the definition of employee under the Super Guarantee legislation, general income tax laws (for example, PAYG withholding) and industrial relations legislation. Most employers find dealing with all these different requirements time consuming and costly. To that end, we note that over the last 25 years there have been a number of Court and Administrative Appeals Tribunal cases about this issue and each year the Australian Taxation Office publishes a steady stream of redacted Private Binding Rulings responses on its website. Urgent reform is required. This reform program should also engage the States and Territories under the Council of Australian Governments banner, given similar problems encountered in complying with the laws of those jurisdictions.
- To avoid paying the SGC, employers are required to make contributions based on each employee's ordinary time earnings however the SGC is determined on salary and wages. We believe consistency here would make the system simpler to understand and hence easier for employers to comply.
- The penalties for SG non-payment are designed as a major deterrent. However, in our view they are often oppressive and, as we have noted above, actively discourage employers from approaching the ATO about their failure to make super contributions. We think this comment applies to ATO administered tax penalty regimes generally. This is also an area in urgent need of reform.

Should you wish to discuss the contents of this submission, please contact me on [REDACTED] or [REDACTED]

Yours faithfully,

[REDACTED]

Tony Negline CA
Senior Consultant - Superannuation and Retirement Income
Advocacy, Professional Standing and International