



AUSTRALIAN CHAMBER OF
COMMERCE AND INDUSTRY

ACCI SUBMISSION

Parliamentary Joint
Committee on Corporations
and Financial Services

Superannuation Legislation Amendment
(Service Providers and Other Governance Measures)
Bill 2012

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Superannuation Legislation Amendment (Service Providers and
Other Governance Measures) Bill 2012

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1. ABOUT ACCI

1.1 Who We Are

The Australian Chamber of Commerce and Industry (ACCI) speaks on behalf of Australian business at a national and international level.

Australia's largest and most representative business advocate, ACCI develops and advocates policies that are in the best interests of Australian business, economy and community.

We achieve this through the collaborative action of our national member network which comprises:

- All state and territory chambers of commerce
- 29 national industry associations
- Bilateral and multilateral business organisations

In this way, ACCI provides leadership for more than 350,000 businesses which:

- Operate in all industry sectors
- Includes small, medium and large businesses
- Are located throughout metropolitan and regional Australia

1.2 What We Do

ACCI takes a leading role in advocating the views of Australian business to public policy decision makers and influencers including:

- Federal Government Ministers & Shadow Ministers
- Federal Parliamentarians
- Policy Advisors
- Commonwealth Public Servants
- Regulatory Authorities
- Federal Government Agencies

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

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Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally;
- Business representation on a range of statutory and business boards and committees;
- Representing business in national forums including Fair Work Commission, Safe Work Australia and many other bodies associated with economics, taxation, sustainability, small business, superannuation, employment, education and training, migration, trade, workplace relations and occupational health and safety;
- Representing business in international and global forums including the International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, Confederation of Asia-Pacific Chambers of Commerce and Industry and Confederation of Asia-Pacific Employers;
- Research and policy development on issues concerning Australian business;
- The publication of leading business surveys and other information products; and
- Providing forums for collective discussion amongst businesses on matters of law and policy.

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2. INTRODUCTION

1. The Superannuation *Legislation Amendment (Service Providers and Other Governance Measures) Bill 2012* (the Bill) proposes to amend the *Superannuation Industry (Supervision) Act 1993* (SIS Act) to over-ride fund rules which tie the fund to a specified service provider or product and to provide APRA with a power to issue infringement notices.
2. Schedule 1, item 112 inserts a new Part 22, "Infringement Notices", into the SIS Act. Most of the proposed infringement notice provisions are directed at trustee contraventions, but the Bill also proposes that an infringement notice can issue for an employer contravention of s 64 of the SIS Act.
3. Proposed s 223A(2)(c) provides that an infringement notice can be issued for a breach under s 64(3A) of the SIS Act. S 64(3A) creates an offence of strict liability which applies when under s 64(2) an employer who is required to deduct contributions from an employee's salary or wages fails to pay the contributions to the trustee of the relevant fund within 28 days following the month that the deduction was made.
4. Breach of s 64 of the SIS Act appears to be very rare, which is not surprising given the nature of the arrangement it addresses. Nonetheless, it is clearly intended and it can be expected that infringement notices will be issued more frequently than notices commencing court action. The Explanatory Memorandum states:

1.2 APRA currently has the power to issue infringement notices under the *Financial Sector (Collection of Data) Act 2001* (FSCOD Act). The power to issue infringement notices in this context has resulted in substantial improvement in the timeliness of lodgement of returns.

1.3 The Review recommended (recommendation 10.4) that APRA be given an administrative power to impose infringement notices as an alternative to criminal prosecution for selected SIS Act provisions.

1.4 Infringement notices provide regulators with a simple and flexible tool for dealing with non-compliance as an alternative to court action, which can be costly and time consuming for all parties. (P 9, Explanatory Memorandum)

5. Generally speaking APRA is the Regulator for s 64 of the SIS Act (see sections 3 and 4 below), however, Review Recommendation 10.4 really addresses APRA-fund issues, rather than employer related matters:

In chapter 8, the Panel has recommended that the ATO have access to infringement notice penalties to respond to certain breaches in SMSFs, rather

than being forced to disregard a breach unless it was of such seriousness as to warrant the removal of all tax concessions by way of making the fund non-complying, or recommending that the Director of Public Prosecutions initiate criminal action.

Similar considerations apply in the APRA-regulated sector. APRA has already demonstrated the effectiveness of comparable powers under the FS (CoD) Act where the capacity to levy a modest penalty (contestable in the court if the institution objected) resulted in a substantial improvement in the timeliness of lodgement of regulatory returns. The power has only been exercised on a handful of occasions, and no penalty has been contested. Had prosecution been required, both APRA and the affected trustees would have been faced with substantial legal and other costs.

Recommendation 10.4

Legislation should be amended to give APRA an administrative power to impose fines, contestable in a court, as an alternative to criminal prosecution in relation to selected SIS Act provisions.¹

3. KEY ISSUES

Strict Liability Offences and Super Stream

6. The Bill proposes that s 223A will apply to contraventions occurring on or after 1 July 2013. This timing corresponds with fund and employer MySuper obligations which also commence from that date. The timing is appropriate because a number of the proposed infringement notice contraventions are MySuper related.
7. The proposed timing also means that s 233A will be in operation when SuperStream is being implemented and employers are onboarding.
8. Current proposals are that from 1 July 2014 medium and large employers (employers which employ 20 or more employees on 1 July 2014) will have to deal with superannuation contributions for employees in a manner which complies with the SuperStream data and payment standards.
9. From 1 July 2014 all medium-large employer originated contributions will have to meet the relevant fund data and payment standards (SuperStream). For this to happen medium-large employers will be implementing SuperStream arrangements between 1 January 2014 and 1 July 2014. It is a least possible that there will be system errors which give rise to late payments.

¹ P 314, Super System Review. Final Report – Part 2: Recommendation packages, 2010

10. Small employers (those employing fewer than 20 employees on 1 July 2014) will have to deal with their contributions so as to comply with SuperStream data and payment standards from 1 July 2015. This means that small employers will be onboarding before that date.
11. While the timing of employers' SuperStream obligations has not shifted, the SuperStream implementation timetable has slowed somewhat.
12. Under the original Stronger Super timetable funds were to make roll-overs (transferring both money and data between funds) which were SuperStream data and payment standards compliant from 1 July 2013. The Government has now accepted that neither funds nor the network will be ready for this date. SuperStream roll-over compliance will now be phased and the final date for fund roll-over compliance is 31 December 2013. As a consequence, before employers commence onboarding, the SuperStream e-commerce system (network arrangements as well as the data standards) will have received much less testing than had been planned.
13. Proposed s 224C provides that the Chairman of APRA can withdraw an infringement notice upon representation by the recipient.

Recommendation #1: That the Committee recommend that the Regulator is sensitive to situations where overdue or failed payment is attributable to SuperStream system error or SuperStream onboarding and that the Regulator be prepared to waive infringement notices or waive court action in these circumstances. This should be reflected in publicly available enforcement policy guidelines.

SIS Act Offences and Breach of Award

14. The standard superannuation provision which is found in most modern awards requires an employer to deduct contributions from an employee's wages if requested. The standard provision also requires that contributions which an employer deducts from an employee's salary or wages (which are non-concessional contributions) must be paid by 28 days after the month of deduction. The standard provision states:

24.3 Voluntary employee contributions

(a) Subject to the governing rules of the relevant superannuation fund, an employee may, in writing, authorise their employer to pay on behalf of the employee a specified amount from the post-taxation wages of the employee into the same superannuation fund as the employer makes the superannuation contributions provided for in clause 24.2.

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(b) An employee may adjust the amount the employee has authorised their employer to pay from the wages of the employee from the first of the month following the giving of three months' written notice to their employer.

(c) The employer must pay the amount authorised under clauses 24.3(a) or (b) no later than 28 days after the end of the month in which the deduction authorised under clauses 24.3(a) or (b) was made.²

15. Under the *Fair Work Act 2009* a breach of award attracts 60 penalty units. Penalty units have recently increased as a result of the *Crimes Legislation Amendment (Serious Drugs, Identity Crime and Other Measures) Act 2012* (from \$110 to \$170).
16. The standard superannuation provision gives rise to an arbitrary double jeopardy. It is arbitrary because not all employees are covered by a modern award containing this provision and many of those *who* are, are also covered by enterprise agreements. Modern awards do not apply to employees covered by an enterprise agreement which is in operation and most agreements do not replicate the modern award clause.
17. Double jeopardy is itself arbitrary since it means there are different penalties for the same offence which may be pursued singly or jointly. In the case of a breach of s 64(2) of the SIS Act (which requires the *employer* to pay the deducted contribution within 28 days after the month it was deducted) considerable attention and consideration has gone into the penalty structure. There are two separate offences for contravention of s 64(2) – s 64(3) and 64(3A) which were inserted simultaneously and respectively provide penalties of 100 penalty units or 50 penalty units for strict liability³.
18. ACCI's preferred solution is that modern awards should not prescribe superannuation obligations – these should be provided by

² Taken from CI 24, Superannuation, of the *Clerks – Private Sector Award 2010*

³ Inserted by the *Financial Sector Legislation Amendment Act 2000*. That act's Explanatory Memorandum stated:

“8.52 This item repeals existing subsection 64(3) and replaces it with two new subsections, the effect of which is to convert the existing fault liability offence to a ‘two tier’ offence containing fault and strict liability components. New subsection 64(3) sets out the fault liability offence, which requires the prosecution to prove the relevant fault elements, and carries a maximum penalty of 100 penalty units. New subsection 64(3A) sets out the strict liability offence, which does not require proof of fault elements, and carries a lesser maximum penalty of 50 penalty units.

8.53 The item also inserts notes after new subsection 64(3A) drawing attention to the provisions of the *Criminal Code* relating to general principles of criminal responsibility and strict liability.”

superannuation legislation. Failing that, modern awards should not replicate this SIS Act requirement.

Recommendation #2: That the Committee recommend that the Fair Work Commission consider amending the standard superannuation provision to excise the requirement that deducted contributions are paid no later than 28 days after the month of deduction.

Deducted Contributions and Self Managed Superannuation Funds

19. Proposed s 223A(2)(c) identifies the provisions of the SIS Act for which APRA can issue infringement notices unless the offence relates to a self managed superannuation fund (SMSF). In the case of the other infringement notice offences under proposed s 223A(2)(c) this restriction is appropriate because SMSF trustees are regulated by the ATO, not APRA.
20. It seems arguable that where an authorised deduction from salary or wages for a non-concessional contribution into a SMSF is not paid within the required time, the contravention is one which relates to a SMSF. If so, the operation of s 223A(2)(c) seems to exclude contraventions under s 64(3A) where the deducted contribution is to be made into a SMSF from the infringement notice regime. This does not appear to be an intended result.

Recommendation #3: That the Committee consider recommending that the reference to s 64(3A) is relocated to proposed s 223A(1).

Which Regulator?

21. Providing APRA the power to issue infringement notices to employers who fail to pay contributions which have been deducted from salary or wages follows from the fact that s 64 of the SIS Act falls within Part 7 of that Act and, with minor exceptions, Part 7 is regulated by APRA.
22. However, APRA does not seem to be the appropriate Regulator for this offence. The ATO seems more appropriate.
23. Late payment or non-payment of superannuation guarantee contributions (attracting a superannuation guarantee charge) is overseen by the ATO and the ATO is significantly involved in implementing SuperStream. Most employers do not have any dealings

with APRA, and vice versa, and many employers would not know what APRA is. Having APRA issue infringement notices for a purported contravention under s 64(3A) would seem to increase the likelihood that infringement notices could be discarded because they seem to be a bureaucratic error.

24. From the perspective of a complainant there seems little sense or logic in distinguishing between regulators for perceived late or non-payment of contributions because one contribution is concessional and the other is non-concessional.

Recommendation #4: That the Committee consider recommending that the ATO is the Regulator for the provisions of s 64 of the SIS Act and recommending the s 64 SIS Act provisions are relocated into the *Superannuation Guarantee (Administration) Act 1992*.

25. Giving effect to this recommendation would alter Recommendation #3 because the effect of Recommendation#4 is to change the Regulator from APRA to the ATO.

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