

7 October 2019

Our ref: HZG TCB

Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
CANBERRA ACT 2600

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Dear Committee Secretary

Submission on *Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019*

We provide this memo in response to the measures contained in *Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019 (Bill)*. In our view, the terms of the Bill are not appropriately drafted to give effect to the intent of the amnesty.

The Bill provides employers with an amnesty from penalties that may apply under Part 7 of the *Superannuation Guarantee (Administration) Act 1992 (SGA Act)* where the employer has previously failed to lodge a superannuation guarantee statement. However, the Bill fails to provide employers with equivalent protection from penalties under Subdivision 284-B of Schedule 1 to the *Taxation Administration Act 1953 (Cth) (Administration Act)* where they request that the Commissioner of Taxation (**Commissioner**) amend a superannuation guarantee assessment.

We understand that the period for submissions on the Bill closed on 3 October 2019. Nevertheless, we ask that the Committee consider our below comments in preparing their report.

1 Background

1.1 Penalties for failure to lodge superannuation guarantee statement

Section 59 of the SGA Act provides that if an employer refuses or fails to provide a superannuation guarantee statement, or information relevant to assessing the employer's liability to pay superannuation guarantee charge for a quarter, the employer will be liable to additional superannuation guarantee charge (**SGC**).

It applies in two limited circumstances:

- (a) an employer lodges an SG statement for a quarter after the due date; or
- (b) the Commissioner makes a default assessment of the employer's liability for the SGC because they have not lodged a superannuation guarantee statement for a

quarter and the Commissioner is of the opinion that the employer is liable to pay SGC for the quarter.¹

This additional SGC is imposed at an amount equal to double the amount of SGC payable by the employer for the quarter. Under section 62 of the SGA Act the Commissioner then has the discretion to remit this additional SGC in full or in part.

1.2 Penalties for false or misleading statements to the Commissioner

Section 59 of the SGA Act does not capture employers who have previously lodged a superannuation guarantee statement with the Commissioner and are now seeking to amend that earlier statement, as there has not been the requisite failure to lodge. This is the case even if that amendment would result in the employer having an increased liability to SGC.

Where an employer seeks to amend a past superannuation guarantee assessment, and that amendment results in an increased liability to SGC, the penalty regime in Subdivision 284-B of Schedule 1 to the Administration Act for the making of false or misleading statements to the Commissioner will apply.²

An employer will be subject to a penalty under section 284-75 of the Administration Act if they make a statement to the Commissioner and that statement is false or misleading due to some inclusion or omission. This includes a superannuation guarantee statement that understates an employer's superannuation guarantee shortfall amount for a quarter, and the penalties are imposed on the shortfall amount.

2 Scope of the amnesty

Item 14 of the Bill proposes to insert section 74 into the SGA Act. Section 74 will determine an employer's eligibility for the amnesty.

In short, an employer will be eligible for the amnesty in relation to a superannuation guarantee shortfall if the shortfall is voluntarily disclosed to the Commissioner within the amnesty period and the shortfall relates to a period that ended prior to the amnesty period commencing. This would conceivably include shortfalls that have arisen due to a failure by the employer to lodge a superannuation guarantee statement for a prior period, and shortfalls that arise where an employer seeks to amend a past superannuation guarantee assessment, and that amendment results in an increased liability to SGC.

Item 12 of the Bill proposes to insert section 60 into the SGA Act. Section 60 will exempt an employer from the application of Part 7 penalties in relation to a superannuation guarantee shortfall to the extent that the employer qualifies for the amnesty in relation to the relevant shortfall.

However, the Bill is silent on penalties imposed under Subdivision 284-B of Schedule 1 to the Administration Act, as is the explanatory memorandum to the Bill.

In our view, this is a significant flaw in the scope of the amnesty and the drafting of the Bill, and should be urgently considered by the Committee. It does not seem fair or consistent with the intent of the amnesty, that employers who have failed to lodge superannuation

¹ See paragraph 2 of PS LA 2011/28 - *Superannuation guarantee - remission of additional superannuation guarantee charge imposed under subsection 59(1) of the Superannuation Guarantee (Administration) Act 1992 (PSLA 2011/28)* and paragraph 3 of PS LA 2019/D1 - *Remission of additional superannuation guarantee charge (PSLA 2019/D1)*.

² See paragraph 12 of PSLA 2011/28 and paragraph 3 of PSLA 2019/D1.

guarantee statements for past periods would be protected, while those seeking to amend an assessment are not.

3 Recommendation

We recommend that the Bill be amended to provide employers with equivalent protection from penalties imposed under Subdivision 284-B of Schedule 1 to the Administration Act on a superannuation guarantee shortfall in relation to which the employer is eligible for the amnesty.

Alternatively, we recommend that the Commissioner's administrative guidance³ be amended to make it clear that where an employer is eligible for the amnesty in relation to a superannuation guarantee shortfall, the Commissioner will exercise his discretion to remit in full any penalties imposed under Subdivision 284-B of Schedule 1 to the Administration Act.

Yours faithfully

A large black rectangular redaction box covering the signature area.

Hall & Wilcox

³ PS LA 2012/4 - *Administration of the false or misleading statements penalty - where there is no shortfall amount.*