

# MinterEllison

6 June 2018

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

Dear Senators Hume, Ketter, Bushby, McAllister, Stoker and Whish-Wilson

## **Superannuation Guarantee Amnesty – Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018**

We write in relation to the Superannuation Guarantee (**SG**) Amnesty that is proposed to be introduced by the *Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018 (Bill)*.

The views expressed in this submission are our own and do not necessarily reflect the views of our clients.

### **1. Our concerns**

- 1.1 We welcome most changes proposed by the Bill.
- 1.2 However, we are concerned that the SG Amnesty does not address the situation where SG contributions were made later than the quarterly cut-off dates for employees (although an SG charge statement has not been lodged) **before** the 12-month Amnesty period started on 24 May 2018.
- 1.3 Specifically, we are concerned that the SG Amnesty does not achieve an equitable outcome for employers who made late contributions before the SG Amnesty period started because:
  - (a) tax deductions are not allowed for these late contributions; and
  - (b) nominal interest at 10% p.a. continues to accrue on these late contributions, despite such contributions having already been paid for the benefit of employees.
- 1.4 We address each of these concerns below.

### **2. Tax deductibility of late contributions made before the SG Amnesty period**

- 2.1 The Bill in its current form:
  - (a) offers favourable treatment to non-compliant employers who have historically underpaid (or never paid) SG contributions for their employees, by allowing tax deductions for payments of SG shortfall amounts and nominal interest where these are made during the 12-month SG Amnesty period (24 May 2018 to 23 May 2019); **however**
  - (b) provides no relief for employers who have historically provided the compulsory minimum level of SG support for their employees, although made these SG contributions later than the quarterly cut-off dates **before** the 12-month SG Amnesty period started. The Bill does not allow tax deductions for these late contributions.
- 2.2 We consider this treatment to be unfair and not in the spirit of the SG Amnesty.



- 2.3 Employers who made late contributions before the SG Amnesty period should not be in a worse-off position than if they make SG contributions during the SG Amnesty period. Employers in this situation are deserving of the same (if not better) treatment, as their employees have benefited from having the contributions in their superannuation accounts at an earlier point in time so that they could accumulate more investment returns.
- 2.4 Our view as to the deductibility of late contributions is not unique.
- 2.5 We refer to the 31 March 2017 report titled 'Superannuation Guarantee Non-compliance' (**Report**) delivered by the SG Cross Agency Working Group (**Working Group**) to the Minister for Revenue and Financial Services.
- 2.6 In the Report at paragraph 5.15, the Working Group recommended (as one of two options) that tax deductions should be allowed for contributions in respect of which an employer has made a *late payment offset election*.<sup>1</sup> In the Working Group's opinion, this "may remove a disincentive for some employers to come forward".

### 3. Nominal interest on late contributions made before the SG Amnesty period

- 3.1 The Bill in its current form makes it difficult for an employer to voluntarily disclose late contributions made **before** the SG Amnesty started, as their liability to the nominal interest component could be substantial.
- 3.2 The SG Amnesty will allow tax deductions for employers who pay SG shortfalls and the nominal interest component **during** the SG Amnesty period.
- 3.3 However, the SG Amnesty provides no relief for employers who continue to be liable to nominal interest for late contributions made **before** the SG Amnesty period.
- 3.4 Where late contributions have not been previously disclosed by employers to the Australian Taxation Office (**ATO**), nominal interest is technically continuing to accrue from the beginning of the relevant quarter until the date that the employer actually lodges an SG charge statement with the ATO.<sup>2</sup> The rate is 10% p.a. on the SG shortfall amount as at the relevant quarterly cut-off date. The nominal interest component could be a significant amount depending on the time that has passed since the relevant quarter.
- 3.5 We consider that allowing nominal interest to accrue indefinitely in this way is unfairly punitive for employers where contributions (although paid late) are made before an SG charge statement is lodged or a default assessment raised by the Commissioner. The unfairness is compounded because the Commissioner does not have a discretion to remit any component of the SG charge, including the nominal interest component.
- 3.6 The nominal interest component is meant to compensate employees for investment earnings that they would have received had contributions been made on time. As such, the nominal interest component should be restricted to the lost time that the contributions were not in an employee's superannuation account. That is, nominal interest should be calculated until the date that the contributions are actually made (rather than until the lodgement of the SG charge statement or issue of a default assessment by the Commissioner).
- 3.7 Our views are supported by the Report at paragraph 5.19, where the Working Group recommended that the Government should amend the methodology for calculating the nominal interest of the SG charge as "the existing methodology produces anomalous and inequitable results" for employers.

### 4. Our recommendations

- 4.1 Given that the stated purpose of the SG Amnesty is to "allow employers to wipe the slate clean and pay their workers what they're owed",<sup>3</sup> the Bill should provide incentives for employers to come forward about historical late contributions made before the SG Amnesty period.

<sup>1</sup> Section 23A of the *Superannuation Guarantee (Administration) Act 1992*.

<sup>2</sup> Refer to sections 31 and 46 of the *Superannuation Guarantee (Administration) Act 1992* and regulation 7A of the *Superannuation Guarantee (Administration) Regulations 1993*.

<sup>3</sup> Media release 'Tackling non-payment of workers' superannuation' dated 24 May 2018 from the Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services available at <http://kmo.ministers.treasury.gov.au/media-release/056-2018/>.

*Tax deductions*

- 4.2 The Bill should be amended to allow tax deductions for late contributions made **before** and during the SG Amnesty period, where the employer makes a *late payment offset election* during the SG Amnesty period in respect of an employee (to offset late contributions against their SG charge for the relevant quarter).
- 4.3 With regard to timing, we propose that the deductions should be allowed in the income year that the late contributions were made, provided that a *late payment offset election* is made. We recognise that this may require taxpayers to seek amended assessments in some instances, with consideration to be given to whether any applicable statutory time limitation to amend the assessment is turned off. Extending the concessional treatment in this way would encourage employers in this category to make voluntary disclosures, which would enable the ATO to dedicate its compliance resources and enforcement activity to other focus areas.

*Nominal interest component*

- 4.4 Additionally, the Bill should be amended to provide that where an employer makes a *late payment offset election* during the SG Amnesty period in respect of late contributions paid **before** (or during) the SG Amnesty period, the nominal interest component is calculated until the date of actual payment of the contributions (rather than until the lodgement of the SG charge statement or issue of a default assessment by the Commissioner).
- 4.5 This incentive would encourage employers in this position to come forward, which would assist in recovering the nominal interest component of the SG charge to which employees are entitled.

**5. Our proposed amendments**

- 5.1 We set out our proposed amendments in Schedule 1 to this submission.
- 5.2 Additionally, we propose that the Explanatory Memorandum to the Bill should be amended in the manner outlined in Schedule 2 to this submission.
- 5.3 Our proposed amendments seek to achieve a reasonable and balanced approach that is fair to both employers and employees within the current way in which the rules apply.

**6. Contact**

- 6.1 We welcome the opportunity to discuss this submission further and to provide additional information in respect of the comments made above.
- 6.2 Please contact Wendy Lim of our firm [REDACTED] in the first instance if you wish to discuss.

Yours faithfully  
**MinterEllison**

*MinterEllison*

Elissa Romanin, Partner, Tax

T: [REDACTED]

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## Schedule 1 – Our proposed amendments

*Note: Black text means original text. Blue text means amendments proposed by the Bill. Red text means deletions proposed by the Bill. Green means amendments and deletions proposed by us.*

We propose that section 290-95 of the *Income Tax Assessment Act 1997* should be amended to read as follows:

### **290-95 Amounts offset against superannuation guarantee charge**

- (1) You cannot deduct a contribution under this Act if you elect under subsection 23A(1) of the *Superannuation Guarantee (Administration) Act 1992* that the contribution be offset against your liability to pay superannuation guarantee charge.

Note: ~~You cannot deduct a charge imposed by the *Superannuation Guarantee Charge Act 1992*: see section 26-95.~~ Section 26-95 restricts deductions for charges imposed by the *Superannuation Guarantee Charge Act 1992*.

- (2) However, this section does not apply to such a contribution in respect of which an election is made under subsection 23A(1) of the *Superannuation Guarantee (Administration) Act 1992* ~~that is made~~ during the amnesty period (within the meaning of subsection 74(3) of the *Superannuation Guarantee (Administration) Act 1992*), to the extent that the charge relates to a \*superannuation guarantee shortfall for which you qualify for an amnesty under section 74 of that Act.
- (3) If this section does not apply, you can deduct the contribution for the income year in which you made the contribution.

We propose that section 31 of the *Superannuation Guarantee (Administration) Act 1992* should be amended to read as follows:

### **31 Nominal interest component**

- (1) Subject to subsection (2) of this section, ~~The~~ nominal interest component in relation to an employer for a quarter is the amount that would accrue by way of interest on the total of the employer's individual superannuation guarantee shortfalls for the quarter if interest were calculated at the rate applicable under the regulations for the purposes of this subsection from the beginning of the quarter in question until the date on which superannuation guarantee charge in relation to the total would be payable under this Act.
- (2) Nominal interest is calculated from the beginning of the quarter in question until the date on which the relevant part of the individual superannuation guarantee shortfall is paid, where:
- (a) the employer qualifies for an amnesty under section 74; and
  - (b) an election is made under subsection 23A(1) during the amnesty period within the meaning of subsection 74(3).

## Schedule 2 – Our proposed amendments to the Explanatory Memorandum to the Bill

*Note: Black text means original text. Green means amendments and ~~deletions~~ proposed by us.*

### Summary of new law

1.9 The amendments encourage employers to voluntarily disclose historical SG non-compliance and pay an employee’s full entitlement including the employee’s individual shortfall, nominal interest, and any related general interest charge on unpaid amounts of SG charge. **The amendments also encourage employers to voluntarily disclose historical SG contributions which have been paid late.**

1.10 ~~They~~ **The amendments** achieve this outcome by providing a one-off 12-month amnesty to allow employers to:

- claim tax deductions for payments of SG charge or contributions made during the amnesty period to offset SG charge;
- **claim tax deductions for late contributions made before the amnesty period, where a late payment offset election is made during the amnesty period to offset SG charge; and**
- ~~as well as~~ have penalties and fees that may otherwise apply in relation to historical SG non-compliance reduced to nil.

1.10A **Additionally, the amendments achieve a more equitable result for employers who make a late payment offset election during the SG Amnesty period in respect of late contributions paid before or during the SG Amnesty period. For these employers, the nominal interest component is instead calculated from the beginning of the relevant quarter until the date of actual payment of the contributions (rather than until lodgement of the SG charge statement or issue of a default assessment by the Commissioner). This amendment will ensure that the nominal interest component is calculated on the actual time that contributions were not in an employee’s superannuation account. In particular, this amendment produces a fairer outcome for employers who made late contributions before an SG charge statement was lodged or a default assessment raised by the Commissioner.**

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### Comparison of key features of new law and current law

| <i>New law</i>   | <i>Current law</i>   |
|--|--|
| <b><i>Deductibility of payments of SG charge and contributions offset against SG charge</i></b>  |  |
| To the extent that SG charge is imposed in relation to SG shortfall qualifying for the beneficial treatment under the amnesty, payments in respect of that SG charge made during the amnesty period are deductible.<br>To the extent that contributions are offset against SG charge imposed in relation to SG shortfall qualifying for the beneficial treatment under the amnesty, contributions made <b>before and</b> during the amnesty period are deductible. | SG charge and contributions offset against SG charge are not deductible. |

...

1.13 These amendments provide a one-off 12-month amnesty with reduced penalties and fees to encourage employers to disclose historical SG non-compliance and pay any SG charge imposed in relation to the disclosed SG shortfall. To further encourage payment of SG, the amnesty allows employers who qualify for the amnesty to claim tax deductions for:

- payments of SG charge and contributions made to offset SG charge made during the amnesty period; and
- contributions made before and during the amnesty period, where a late payment offset election is made to offset these contributions against SG charge.

...

1.14 Specifically, an employer that qualifies for the amnesty in relation to their SG shortfall for a quarter:

- has no administrative component in respect of employees in respect of whom the employer has an individual SG shortfall that was only identified because of a disclosure under the amnesty;
- has no penalties under Part 7 in respect of amounts of SG shortfall that qualify for the amnesty; and
- can deduct:
  - payments made during the amnesty period in relation to SG charge imposed on the SG shortfall; and, or
  - contributions that are offset against the SG charge, that are made before or during the amnesty period.

...

1.45 If an employer fully offsets their liability for SG charge by making contributions directly into an employee's superannuation account and/or making a late payment offset election in respect of contributions paid before the amnesty period (refer above), no SG charge will become payable. In this situation, the Commissioner will not have the ability to disqualify an employer from qualifying for the amnesty.

...

1.54 The amendments also allow contributions that an employer has elected to offset against SG charge imposed on the SG shortfall disclosed in accordance with the amnesty to be deducted from an employer's assessable income. ~~in accordance with the general deductibility rules in the ITAA 1997.~~ The contributions must: ~~also~~

- have been made before the 12-month amnesty period, in which case they are deductible in the income year that they were made; or
- be made during the 12-month amnesty period, in which case they are deductible in accordance with the general deductibility rules in the ITAA 1997.

*[Schedule 1, items 3 and 5, subsections 290-95(1), ~~and (2) and (3) of ITAA 1997]~~*

...

1.79 The amendments relating to the deductibility of payments of SG charge and offsetting contributions apply in relation to the 2017-18 income year and later income years. Payments of SG charge are deductible if they are made during the 12-month amnesty period. Late contributions, whether paid before or during the amnesty period, are deductible if the employer elects during the amnesty period for these contributions to offset against their SG charge liability. ~~However, to be deductible the relevant payment or contribution must also be made during the 12-month amnesty period.~~ *[Schedule 1, items 2, 5 and 9, sections 26-95 and 290-95 of the ITAA 1997]*