

NEW LEGISLATION ENCOURAGES EMPLOYERS TO PROACTIVELY ADDRESS HISTORIC SG SHORTFALLS

08 June 2018 | Australia

Legal Briefings - By **Sarah Yu and Amber Kennedy**

The Minister for Revenue and Financial Services has announced a proposed 12 month Superannuation Guarantee (**SG**) amnesty to incentivise employers to voluntarily address past SG non-compliance.

Employers should be proactive in disclosing and rectifying historic SG non-compliance during the proposed 12 month SG amnesty period under the Treasury Laws Amendment (2018 Superannuation Measures No 1) Bill 2018, which was introduced into Parliament on 24 May 2018. The proposed SG amnesty is part of a range of broader superannuation integrity measures announced in the Federal Budget 2018-19. Subject to the legislation passing, the amnesty will retrospectively operate from 24 May 2018 to 23 May 2019 and applies to undeclared SG shortfalls between SG commencement on 1 July 1992 and 31 March 2018.

Employers who don't meet their SG obligation to pay SG contributions of 9.5% of employees' ordinary time earnings (**OTE**) are liable to pay a non-deductible SG charge (**SGC**). The SGC comprises the SG shortfall amount (calculated by reference to salary not OTE), nominal interest (at 10% per annum) and an administration component. There are also a range of other penalties which arise, including:

- a general interest charge (**GIC**), which accrues until the SGC is fully paid;
- an additional SGC penalty of 200% of the SGC amount under Part 7 of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (**SG Act**); and
- an administrative penalty of 75% of the SGC under the *Taxation Administration Act 1953*

(Cth) (**TAA**).

Directors of companies with employees may also become personally liable for any unpaid SG liability of their company, as discussed in our [Legal Briefing](#) on the director penalty regime.

The proposed SG amnesty incentivises employers to proactively address historic SG non-compliance as during the SG amnesty period:

- the administration component of the SGC will not be imposed;
- the Part 7 penalty under the SG Act will not be applied; and
- the SG shortfall will be deductible.

The SG amnesty only applies to amounts which have not previously been disclosed or the subject of an audit by the Australian Taxation Office (**ATO**).

The SG amnesty builds on the ATO's position under Practice Statement Law Administration 2011/28 (**PS LA 2011/28**), pursuant to which a tax officer is to consider remitting, in full or in part, the Part 7 penalty under the SG Act where there has been a genuine attempt on the part of the employer to comply with its SG obligations. PS LA 2011/28 also addresses remission of the TAA administrative penalty, which does not seem to be covered by the SG amnesty.

Employers are required to pay the full SG shortfall directly into the employees' superannuation fund and submit the relevant form or to enter into an arrangement with the ATO in respect of payment of the SG shortfall. No GIC will be payable if the employer pays the full amount into an employee superannuation fund and the GIC amount will be reduced in the case of payment plans with the ATO.

Ancillary amendments will also be enacted to ensure that employees are not disadvantaged by lump sum catch-up payments made by employers. The Commissioner will be able to exercise its discretion to disregard contributions made under the amnesty where payment of the SG shortfall amount would cause the employee to exceed their concessional contributions cap.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



MICHAEL VRISAKIS
PARTNER, SYDNEY

+61 2 9322 4411
Michael.Vrisakis@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

© Herbert Smith Freehills 2021

SUBSCRIBE TO STAY UP-TO-DATE WITH INSIGHTS, LEGAL UPDATES, EVENTS, AND MORE

Close

© HERBERT SMITH FREEHILLS LLP 2021