

17 June 2020

Senator the Hon Jane Hume
Assistant Minister for Superannuation, Financial Services and Financial Technology
PO Box 6100
Senate
Parliament House
CANBERRA ACT 2600

By email: senator.hume@aph.gov.au

CC: The Hon Josh Frydenberg MP, Treasurer: josh.frydenberg.mp@aph.gov.au
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Dear Assistant Minister,

Superannuation Guarantee Amnesty and the COVID-19 pandemic

The National Tax Liaison Group (**NTLG**) is the Australian Taxation Office's (**ATO**) longest standing consultative forum, focusing on strategic taxation matters of national interest. The primary objective of the NTLG is to provide a wide range of stakeholders with the opportunity to discuss the strategic direction of the tax system and to deliver opportunities for improvements to the administration of the tax system. The NTLG's membership is comprised of senior ATO and Treasury officers and representatives of the major tax, law, and accounting professional associations. Details of the activities of the NTLG, including its membership, can be found [here](#).

Chartered Accountants Australia and New Zealand, Corporate Tax Association, CPA Australia, Institute of Public Accountants, Law Council of Australia and The Tax Institute are the external members of the NTLG and with the Self-managed Independent Superannuation Funds Association are together the **Joint Bodies**. We write to you as the peak professional accounting and tax practitioner bodies in Australia representing the tax profession at this critical time.

We previously wrote to you on 7 April 2020 ([link to submission](#)) in relation to issues arising out of the COVID-19 crisis impacting on the Superannuation Guarantee Amnesty (**SG Amnesty**) and Superannuation Guarantee (**SG**) more broadly.

Request for Legislative Amendments

The purpose of this submission by the Joint Bodies is to:

- seek a six-month extension of the deadline to **7 March 2021** to submit an SG Amnesty application; and
- seek an open extension beyond the close of the SG Amnesty during which the Commissioner will retain his discretion to waive the entire 200% penalty under Part 7.

Submission

The Superannuation Guarantee Amnesty (**SG Amnesty**) was introduced on 6 March 2020. This was at a time when the COVID-19 pandemic resulted in sudden closures and severely restricted working conditions for many businesses. Eligibility for the SG Amnesty remains open for six months to 7 September 2020.

In view of the business disruption caused by COVID-19 and severe impact on the cash flow of most businesses, the Joint Bodies are concerned about the difficulties confronting many employers in being able to make an application for the SG Amnesty by 7 September 2020.

Application for the SG Amnesty requires completion of the SG Amnesty form for each relevant quarter during the eligibility period (1 July 1992 to 31 March 2018). This is a cumbersome and time-consuming task for many employers because:

- a separate calculation of SG shortfall is required for every affected employee for every quarter;
- for some employers the calculations will be made over longer periods of time – meaning that there are more than 40 separate calculations for the same employee (and past employee);
- the Super Guarantee laws have been regularly amended over the last 30 years and it is necessary to test compliance with the law applying for each relevant quarter;
- in many cases the shortfall amount is only a fraction of the SG charge which makes the shortfall percentage potentially different for every employee (for example, where an employer may not have paid SG contributions in respect of a bonus payment which the employer now realises was caught as part of 'ordinary time earnings (**OTE**)');
- once a relevant shortfall percentage is determined for an employee, the SG shortfall is calculated based upon the employee's 'salary and wages' and not simply OTE. As a consequence, the employer must determine overtime paid to the employee for the relevant quarter because it forms part of 'salary and wages'; and
- payroll and human resources (**HR**) records will need to be checked to determine various components of remuneration for each employee for each relevant quarter and for older shortfall amounts such records may be hard-copy versions stored in archives – making it a labour intensive and time consuming process.

Extension of SG Amnesty deadline to 7 March 2021

Many employers' HR and payroll areas are already under significant pressure due to managing the significant disruption to workplaces as a result of the impacts of COVID-19 which include managing 'JobKeeper' payments, restructuring working arrangements for employees and dealing with downsizing and staff redundancies. Australia has a reputation for having one of the most complex, prescriptive and most difficult HR-industrial relations systems in the world. For example, some employers face the prospect of having multiple awards covering a single employee or being subject to multiple awards for different employees. When one drills down on some of these awards, there are different classifications, different pay scales depending on various factors such as day, time of day, skill level, etc. In view of this very challenging background and with the addition of COVID-19 issues, many employers do not have sufficient resources to devote to making an application for the SG Amnesty by 7 September 2020.

The Joint Bodies consider that a legislative amendment to extend this date to 7 March 2021 will allow sufficient time for employers to apply for the SG Amnesty without placing their HR and payroll areas under undue stress. Such an extension may also avoid the unnecessary consequence of some employers being forced to preserve the benefit of the amnesty by making application before 7 September 2020 with the intent that they will then lodge an objection to the assessment on the basis that there is uncertainty about whether or the extent to

which SG was actually payable. In addition to the complex HR-industrial relations system that employers face in Australia, another example arises in the context of the complexity surrounding what should be a relatively simple determination about whether SG might properly apply to annual leave loadings (**ALL**), where employers wishing to preserve the advantages of the Amnesty may be forced to hastily apply for the SG Amnesty before they have thoroughly determined their liability and settled on a proper approach – meaning that they then lodge an objection to provide further time for the matter to be properly determined over the longer period. After all, the purpose of the Amnesty is about giving employees the best chance possible of having their superannuation entitlements brought up-to-date.

Discretion to waive the Part 7 penalty

The Part 7 penalty contained in the *Superannuation Guarantee (Administration) Act 1992* (Cth) is 200% of an employer's SG liability, which the Commissioner currently has the power to reduce to nil. However, from the close of the SG Amnesty, other than for cases referable to 'exceptional circumstances', the Commissioner will only have discretion to reduce the Part 7 penalty to 100% (in respect of any SG liabilities that were otherwise eligible for the SG Amnesty, being for quarters starting on or before 1 January 2018) where disclosure is not voluntarily made in the first instance by the taxpayer-employer.

The Joint Bodies consider that the operation of the minimum 100% penalty is harsh in circumstances where there may be reasonable grounds for an employer to fail to pay SG contributions or to apply for the SG Amnesty – not amounting to the narrow scope for 'exceptional circumstances'. The Joint Bodies submit one such reason would be uncertainty of the law (examples include: whether SG contributions are payable in respect of ALL and the difficulties for the proper categorisation of contractors as employees).

The Joint Bodies submit that a legislative amendment should be made to remove the current limit so that the Commissioner will continue to have broad discretion to waive the entire Part 7 penalty for liabilities that would have qualified for the SG Amnesty (had an eligible application been made by the deadline):

- because there is a high likelihood that many employers may miss the SG Amnesty deadline (even with an extended deadline) because of the overwhelming impact of COVID-19 on their businesses; and
- due to the otherwise harsh operation of the Part 7 penalty.

Such an amendment would mean that the Commissioner would retain discretion to apply anything from a zero to 200% penalty in any particular case.

Such an amendment would also be advantageous because it would remove the potentially anomalous and complex scenarios otherwise applicable where an SG liability is payable in respect of a total period - part of which relates to the SG Amnesty period and part of which does not, meaning that:

- the Commissioner would need to consider whether 'exceptional circumstances' apply for the SG liability to the extent to which it is referable to the SG Amnesty period, but apply a different (less confined) test to that part of the SG liability not referable to the SG Amnesty period; and
- the Commissioner's discretion is confined to a 100% reduction for the SG liability to the extent it relates to the SG Amnesty period but remains unlimited for that part of the SG liability that is outside the SG Amnesty period.

Such anomalies are compounded where the underlying cause of an employer's SG compliance failure across the SG Amnesty and non-SG Amnesty periods is the same (for example, stemming from uncertainty of the law – which would be unlikely to constitute 'exceptional circumstances').

The Joint Bodies consider that this will allow for fair and just outcomes. In cases where there is doubt about

whether SG is payable, employers may also be inclined to err on the side of caution and lodge a SG Charge statement rather than challenge or object to an assessment.

The SG penalties themselves can readily place an employer in an insolvent position forcing a liquidation, administration, bankruptcy or similar proceedings. As many businesses will be seeking to re-establish themselves in a difficult post-COVID environment, then the penalty system is not sending the right message. There will always be a certain number of employers who will seek to circumvent the rules, but the Joint Bodies consider that most employers seek to comply with their superannuation contribution obligations. In many cases however, the complexity of the SG and/or HR-industrial system can catch them unintentionally off guard.

If you would like to discuss any of the above, please contact Tax Counsel, Stephanie Carede, on 02 8223 0059 in the first instance.

Yours faithfully,



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