

Proposed SG amnesty raises opportunities and risks

dbalawyers.com.au/announcements/proposed-sg-amnesty-raises-opportunities-and-risks

Daniel Butler

By Christian Pakpahan, Lawyer and Daniel Butler, Director, DBA Lawyers

On 24 May 2018, the government announced a 12 month superannuation guarantee ('SG') amnesty ('Amnesty') that proposes to give employers an opportunity to rectify past SG non-compliance without penalty. If the Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018 ('SG Bill') is ever made law, the Amnesty period will apply from 24 May 2018 and run for a 12 month period to 23 May 2019.



We therefore recommend that Treasury and the Australian Taxation Office ('ATO') consider introducing the Amnesty when the law is actually passed rather than relying on legislation which still has to be passed by Parliament which will then have retroactive application to 24 May 2018. The Amnesty is already being actively promoted when no law exists and employers are already coming forward without reading the finer detail that the Amnesty is subject to the passing of the SG Bill into law. Further, the 12 month period already commenced to tick away on 24 May 2018 when the SG Bill was tabled in Parliament and no one knows when, if ever, the SG Bill will become law. In particular, it is understood that the Labor Government may not support the Amnesty. The many employers that have already made disclosures to the ATO on the basis of the proposed Amnesty may have therefore been misled. However, the ATO will broadly treat these as voluntary disclosures if the SG Bill fails to become law.

What is the SG Amnesty?

Current legislation

Under current law, failure to contribute the minimum 9.5% of an employee's ordinary time's earnings to the employee's superannuation fund by the required time can result in a liability to pay the following:

1. SG charge (a sum of the total of each relevant employee's SG shortfalls, nominal interest component, and a \$20 per employee per quarter administration component);
2. penalties (known as 'Part 7 penalties') for failing to provide information or a statement

as required under the law, which can be up to 200% of the amount of the SG charge;
and

3. general interest charge imposed where the SG charge or Part 7 penalties are not paid by the due date.

Accordingly, an employer that fails to pay the required SG amount by the required time faces the SG charge, penalties and, where applicable, the general interest charge. The following example illustrates the substantial impact on an employer's cash flow from this current SG system:

Calculation of SG penalties based on the following assumptions:

Facts	Employee A	Employee B
Employee's ordinary time earnings ('OTE') for the FY (SG usually applies to OTE if paid on time)	50000	100000
Employee's salary and wages earnings for the FY (including AH work)	60000	120000
Minimum SG support 9.5% – shortfall is based on salary and wages	5700	11400
SG is based on a quarterly cycle, however, we will assume an annual period		
Assume the employer provides the contribution one day late, on 29th day after the quarter		

Example calculation (but simplified with several assumptions)

The following is payable		
– The SG shortfall amount	5700	11400
– 10% pa payable from the beginning of each quarter (assume simple 10% without compounding for 12 months)	570	1140
– \$20 per employee admin fee	20	20
– Part 7 penalty – in general a minimum penalty of 50% will apply to employers who could have come forward during the amnesty but did not	2850	5700
– General interest charge at the usual rate – we have not inserted an amount as that depends on the time period		
Total amount	9140	18260
– Non-deductible – so gross the amount up by the company tax rate of 27.5% as a proxy for the equivalent pre-tax dollars required to discharge the amount	12607	25186

SG charge

Employers are broadly liable to pay the ATO an amount of SG charge equal to their SG shortfall for a quarter, which is the sum of the following for the quarter:

1. SG shortfall component, which is the total amount by which an employer has fallen short of contributing the minimum percentage for each respective employee;
2. nominal interest component, which is the amount of interest on the total of the

- employer's SG shortfalls for each respective employee for the quarter calculated from the beginning of the relevant quarter until the date SG charge is payable; and
3. administration component, which is \$20 per employee to which the SG shortfall applies for the quarter.

Broadly, SG charges are not tax deductible. This means that if you are late in paying the required SG to your employees, you will not be able to deduct that SG shortfall. You are also unable to deduct the nominal interest and administration components from the relevant SG charge.

Proposed Amnesty

The proposed Amnesty provides employers with an opportunity to rectify past SG non-compliance without penalty for a 12 month period. Under the proposal, an employer that has an SG shortfall amount that qualifies for the Amnesty is within any period from 1 July 1992 up to 31 March 2018 is provided with the following:

1. the ability to claim tax deductions in respect of SG charge payments made and contributions that offset the SG charge to the extent that the charge relates to the SG shortfall;
2. administrative component to the SG charge will not apply (ie, \$20 per employee to which the SG shortfall applies per impacted quarter); and
3. Part 7 penalties will not apply.

That being said, employers will still be required to pay all employee entitlements, which include the unpaid SG amounts and the nominal interest (calculated at 10% per annum) owed to employees as well as any associated general interest charge.

What is required to qualify for the SG Amnesty?

Eligibility

Broadly, the SG Bill states that an employer qualifies for the Amnesty for the employer's SG shortfall for a quarter if they satisfy all of the following:

1. during the Amnesty period the employer discloses to the ATO, using the approved form, information that:
 1. (a) relates to the amount of the employer's SG shortfall for the relevant quarter; and
 2. (b) was not disclosed to the ATO before the Amnesty period.
2. The relevant quarter where SG shortfall is disclosed is 28 days before the Amnesty period (ie, the last eligible quarter would be the quarter ending 31 March 2018).
3. the ATO has not previously advised the employer that the ATO is examining, or intends to examine, the employer's compliance with respect to SG charge payments for that quarter.

That being said, an employer may still qualify for the Amnesty if the employer has, prior to the Amnesty period, made disclosures about their SG shortfall for a quarter but comes forward with information about additional amounts of SG shortfall for the quarter.

This could occur where an employer has previously lodged an SG statement for the quarter which understated the amount of SG shortfall. If the employer otherwise met the qualifying criteria of the Amnesty, the employer can access the Amnesty to the extent of the additional SG short fall amounts.

Ceasing to qualify for the Amnesty

An employer may cease to qualify for Amnesty (or be taken to have never qualified for Amnesty) where the ATO gives notice to the employer that it has ceased to qualify for the Amnesty due to one of the following reasons:

1. the employer has not, on or before the day on which SG charge on the employer's SG shortfall for the quarter became payable, paid that SG charge and has not entered into an arrangement with the ATO that includes the payment of that SG charge; or
2. the employer has failed to comply with such an arrangement with the ATO.

Accordingly, once the Amnesty is accessed and disclosure has been made, the employer must follow through on payment of the relevant SG charges imposed due to SG shortfalls.

What is tax deductible from the SG Amnesty?

Deductions

Payments that are made within the Amnesty period in relation to SG charge imposed due to SG shortfalls disclosed under the Amnesty can be deducted against an employer's assessable income in accordance with the deductibility rules in the *Income Tax Assessment Act 1997* (Cth) ('ITAA 1997').

These payments can be deducted regardless of whether or not the ATO applies the payment to satisfy an employer's liability to pay the SG charge imposed on the SG shortfall that qualifies for the Amnesty.

This ensures that employers that already had an outstanding SG charge debt prior to accessing the Amnesty are able to claim deductions for payments they make despite the ATO first applying their payments to clear their existing debt.

Payments made in relation to eligible SG charges imposed due to SG shortfalls can be deducted up to the amount of the SG charge. Therefore, an employer that has negotiated a payment arrangement with the ATO can claim deductions for part payments up to the value of the total SG charge eligible for the Amnesty.

How do we access the Amnesty?

If the SG Bill is finalised as law, employers will first need to calculate the relevant amounts of SG charge payable. Afterwards, employers can apply to access the Amnesty in one of two ways.

Full payment to relevant employee's super fund

If an employer can make full payment of the SG shortfall and nominal interest amount for each relevant period and those periods qualify for Amnesty, the employer should:

- (a) pay the relevant amounts directly to the relevant employee's super fund (or funds); and
- (b) complete and lodge the SG Amnesty Fund payment form (NAT 9599) with the ATO.

The form should be lodged on the same day the relevant SG amount is paid. This option is the simplest way to pay outstanding SG shortfall amounts, with general interest charge typically not charged.

Enter into a payment plan with the ATO

Alternatively, where the employer would like to access the Amnesty but is unable to pay the SG charge amount owing in full, the employer should:

- (a) complete and lodge the approved form, SG Amnesty ATO payment form (NAT 9599), with the ATO; and
- (b) pay the amount owing to the ATO pursuant to a payment plan.

If there will be difficulties in paying the full amount, a payment plan can be set up with the ATO to pay the amount owing over an agreed period. After the form is submitted, the ATO will contact the employer to set up a payment plan.

Are employers still required to pay all employee entitlements, this includes the unpaid SG amounts owed to employees and the nominal interest

If the Amnesty announcement does not get finalised as law, the *“employers are still required to pay all employee entitlements. This includes the unpaid SG amounts owed to employees and the nominal interest”*.

Thus, as noted in the example, an employer would generally need to calculate any SG shortfall based on salary and wages (rather than ordinary times earnings).

Further, the Amnesty does not extend to other employee/wage related events such as payroll or work cover.

Potential risks

Whether certain quarters do not qualify for Amnesty due to ATO examination

The explanatory memorandum of the SG Bill refers to the ATO's views on the meaning of 'examination' explained in the ATO's ruling in MT 2012/3. The ruling states that the term 'examination' is very broad and covers not only traditional audits which the ATO undertakes to ascertain an entity's tax-related liability but any examination of an entity's affairs.

A range of compliance activities undertaken by the ATO may involve an examination of an entity's affairs, including reviews, audits, verification checks, record keeping reviews/audits and other similar activities. This means that any of those compliance activities may disqualify an employer from being eligible to access the Amnesty for that relevant quarter.

Accordingly, expert advice should be obtained before attempting to access the Amnesty.

Excess concessional contribution and smoothing of carry forward rules for employees

Contributions made under the Amnesty would broadly be considered concessional contributions and may cause employees to exceed their \$25,000 annual concessional contributions cap.

Generally, employees are not subject to tax on their concessional contributions. However, concessional contributions in excess of the concessional contributions cap are included in the employee's assessable income. The employee could also be liable to pay excess concessional contributions charge.

The Amnesty partly circumvents this where contributions are made by the ATO on behalf of the employer by streamlining the exercise of the ATO's discretion to disregard contributions in relation to a financial year where contributions are made by the ATO on behalf of the employer due to the Amnesty.

However, the exception does not apply where the employer has made the contributions directly to an employee's fund under the Amnesty and has used those contributions to offset their SG charge liability.

Accordingly, where employers make direct contributions to employee funds under the Amnesty, the employee may be subject to:

1. those concessional contributions being included as assessable income;
2. excess concessional contributions charge; and
3. an adjusted carry forward concessional contributions amount.

Conclusions

The proposed Amnesty still has to be passed as law before it will have actual effect. Further, there are still a number of serious modifications required to be made in order to make the Amnesty an appropriate basis for employers to come forward with legal certainty. Indeed, it would be preferable for the law to be introduced and passed before an amnesty of this nature is announced. We also recommend that the Government make the SG regime and penalty system more aligned to modern business practices rather than applying the current inflexible and substantial penalties even where an employer is only one day late.

* * *

This article is for general information only and should not be relied upon without first seeking advice from an appropriately qualified professional.

Note: DBA Lawyers hold SMSFCPD training at venues all around Australia and online. For more details or to register, visit www.dbanetwork.com.au or call Marie on 03 9092 9400.

18June 2018

Any information provided on this website (including any blog posts) are mere summaries and general information provided for educational purposes only. This is no substitute for expert advice. Anyone seeking to rely on this content should obtain expert advice to confirm particular issues especially as the law is subject to ongoing changes and substantial penalties can be imposed.

As a law firm DBA Lawyers Pty Ltd is not licensed to give financial product advice under the *Corporations Act 2001* (Cth).