



**TAKING UP THE  
AMNESTY FOR  
SUPERANNUATION  
GUARANTEE  
UNDERPAYMENTS**

CLAYTON UTZ



## BACKGROUND

Employers now have until 7 September 2020 to take up the Superannuation Guarantee amnesty (**SG Amnesty**), with the *Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019* recently passing both Houses of Parliament, and receiving Royal Assent on 6 March 2020.

The SG Amnesty gives employers a one-off temporary amnesty to self-correct historical superannuation guarantee (**SG**) non-compliance. Employers must make a voluntary disclosure to the Commissioner of Taxation (**Commissioner** or **ATO**).

There are clear incentives to take up the SG Amnesty. The legislation also imposes harsher outcomes for employers with SG shortfalls who do not make voluntary disclosures in the amnesty period.

This is consistent with the ATO's current approach to superannuation compliance, which focuses on supporting employers who seek to engage the ATO in meeting their SG obligations, while taking firmer action towards employers who are unwilling to meet their obligations. With the rollout of mandatory Single Touch Payroll (**STP**), the ATO now has a vast information source to analyse and conduct real-time review of employer obligations, including superannuation. The ATO's ability to detect non-compliance has never been stronger.

Given this compliance environment, employers should:

- ▶ undertake a legal review of superannuation compliance to check historical and current compliance;
- ▶ be aware that some contractors are also entitled to SG;
- ▶ use the amnesty to remediate any historical non-compliance and make back payments; and
- ▶ correct any current/ongoing non-compliance.

**"Superannuation is not "set and forget".** Even where there is no legislative change, the ATO can, and does, change its view of parts of the law and this has knock-on effects for employers and their superannuation obligations.

***The superannuation amnesty prompts employers to check their superannuation compliance, both historical and current.***"

### Superannuation Guarantee obligations generally

Broadly, employers must pay SG contributions equal to 9.5% of an employee's ordinary time earnings (**OTE**). Non-complying employers risk exposure to:

- ▶ The superannuation guarantee charge (**SGC**) comprising the SG shortfall, nominal interest component (10% p.a.) and a \$20 administration fee (per employee per quarter);
- ▶ a penalty of up to 200% of the SGC, via an administrative penalty under Part 7 of the *Superannuation Guarantee (Administration) Act 1992 (Part 7 Penalty)*; and
- ▶ a concurrent, further administrative penalty of up to 95% of the shortfall (although this additional penalty may be waived in all but the most serious cases).

There is no limitations period on the obligation to pay superannuation; the obligation to backpay SG does not expire.

The SG Amnesty does not apply to underpaid above-SG superannuation obligations, but a review of SG obligations is a good time to also review compliance with above SG superannuation obligations.



## THE AMNESTY FOR SG UNDERPAYMENTS

The SG Amnesty provides a one-off temporary amnesty to incentivise eligible employers to disclose non-compliance to the ATO, using both a “carrot” and a “stick”.

### SG Amnesty eligibility

To be eligible, employers need to:

- ▶ make a voluntary disclosure to the ATO within the amnesty period (between 24 May 2018 and 6 September 2020), and
- ▶ not have been under investigation by the ATO in respect of superannuation obligations for the relevant quarter, prior to the voluntary disclosure. (An employee/contractor complaint to the ATO will trigger an investigation.)

### The Carrot

Under the SG Amnesty, qualifying employers will generally:

- ▶ be able to claim a tax deduction for the SGC if paid during the amnesty period (normally not deductible);
- ▶ not be liable for the administration fee component of the SGC; and
- ▶ not be liable for a Part 7 Penalty.

### The Stick

Broadly, employers who could have qualified for the SG Amnesty but do not voluntarily disclose their non-compliance will later face a mandatory penalty of at least 100% of the SGC under Part 7, effectively at least doubling their liability, unless there are exceptional circumstances.

### Quarters covered by the SG Amnesty

The SG Amnesty applies to quarters from the time the SG system commenced on 1 July 1992, until the quarter ending 31 March 2018, where there is an SG shortfall and a voluntary disclosure is made to the ATO within the amnesty period of 24 May 2018 and 7 September 2020.

## ATO'S CHANGED VIEW ON ANNUAL LEAVE LOADING

The SG Amnesty has passed in the context of the ATO recognising that there is uncertainty over its view on whether employers have to pay SG on Annual Leave Loading.

The long-standing view was that SG was not paid on Annual Leave Loading. The ATO changed its view some time ago, but recognises that this change in view has not been recognised in a number of sectors.

The ATO has released a statement about its views.

### Pre June 2019

If employers have self-assessed that Annual Leave Loading is not ordinary time earnings (and have therefore not paid SG on Annual Leave Loading), the ATO's current position is that the ATO will not apply their compliance resources to scrutinise the issue where:

- ▶ “the employer self-assessed that the annual leave loading was not OTE, with the reasonable position that their annual leave loading was for a notional loss of opportunity to work overtime
- ▶ there is no evidence less than five years old (the statutory period employers are expected to keep records relating to their SG affairs) that suggests the entitlement was for something other than overtime.”

If you have not paid SG on Annual Leave Loading for quarters up to June 2019, you should:

- ▶ consider whether it is reasonable to take the position that the Annual Leave Loading was for a notional loss of opportunity to work overtime; and
- ▶ undertake a search for evidence from the prior 5 years that suggests that Annual Leave Loading was not in respect of a lost opportunity for overtime. Evidence might include the terms of Enterprise Agreements.

If you have paid Annual Leave Loading to employees who had no entitlement to overtime, or who never took up overtime, and you did not pay SG on the Annual Leave Loading, we suggest you should seek advice.



## Post June 2019

For employers not paying SG on Annual Leave Loading for quarters from July 2019 onwards, the ATO has given guidance on the evidentiary requirements that would allow the ATO to be satisfied that SG is not payable. The ATO will be looking for evidence that the entitlement to Annual Leave Loading was demonstrably referable to a lost opportunity to work overtime, and therefore not subject to SG.

The ATO's evidentiary requirements could be satisfied:

- ▶ "if the wording in the relevant instrument clarifies the reason for the entitlement
- ▶ by other written evidence (for example, a documented policy) that clarifies the reason for the entitlement, and reflects the mutual understanding of both parties to the agreement that gives rise to the entitlement."

If employers do not have this evidence, then the ATO expects employers to obtain the evidence as soon as possible, and if it cannot be obtained, then the ATO expects the employer to pay SG on Annual Leave Loading.

Employers should be aware that:

- ▶ ATO guidance on superannuation matters is not binding on the ATO; and
- ▶ the ATO can change its view, with retrospective effect.

Given the above and the harsher penalties to come into force at the end of the SG Amnesty, employers who have not paid SG on Annual Leave Loading should:

- ▶ undertake a legal review of their superannuation compliance at least in relation to Annual Leave Loading; and
- ▶ if reasonable, prepare a statement of facts demonstrating the reasonableness of the non-payment of SG on Annual Leave Loading and setting out the evidence; or
- ▶ take up the SG Amnesty and remediate non-payment of SG on Annual Leave Loading.

**"With STP reporting now up and running for most employers, *the ATO can see if superannuation guarantee payments are being made, nearly in real time.* This allows the ATO to take immediate action to investigate employers' compliance with their SG obligations. If the ATO picks up an issue first, employers may no longer be entitled to take up the SG Amnesty, meaning higher penalties and a higher total liability."**



## OUR PROCESS

In general terms, making a voluntary disclosure, including under the SG Amnesty, is an unprompted self-notification to the ATO and payment of any calculated shortfall (including administration fee charge, interest and penalties). From our experience in assisting employers in making voluntary disclosures, the process often involves the following steps:



# GET IN TOUCH

## TAX



**Amber Agustin**  
Partner  
T: (03) 9286 6322  
M: 0434 152 913  
aagustin@claytonutz.com



**David Lee**  
Senior Associate  
T: (03) 9286 6382  
M: 0434 652 332  
dalee@claytonutz.com

## Workplace Relations, Employment & Safety



**Saul Harben**  
NPGL WRES  
T: (08) 9426 8219  
M: 0407 478 648  
sharben@claytonutz.com



**Anna Casellas**  
Partner  
T: (08) 9426 8413  
M: 0411 144 790  
acasellas@claytonutz.com



**Hedy Cray**  
Partner  
T: (07) 3292 4224  
M: 0407 119 599  
hcray@claytonutz.com



**Shae McCartney**  
Partner  
T: (07) 3292 4224  
M: 0434 152 915  
smccartney@claytonutz.com



**Christy Miller**  
Partner  
T: (07) 3292 4224  
M: 0434 651 078  
cmiller@claytonutz.com



**Stuart Pill**  
Partner  
T: (03) 9286 4224  
M: 0408 994 144  
spill@claytonutz.com



**Cilla Robinson**  
Partner  
T: (02) 9353 4624  
M: 0400 100 557  
crobinson@claytonutz.com



**Dan Trindade**  
Partner  
T: (03) 9286 4224  
M: 0402 226 315  
dtrindade@claytonutz.com



**Jennifer Wyborn**  
Partner  
T: (02) 2679 4069  
M: 0412 272 926  
jwyborn@claytonutz.com

Clients praise the team's deep bench, describing them as ***"responsive and timely"*** and able to ***"address and understand the needs of the client and the risks."***

Chambers Asia Pacific Tax 2018

**Sydney**

Level 15

1 Bligh Street

Sydney NSW 2000

+61 2 9353 4000

**Melbourne**

Level 18

333 Collins Street

Melbourne VIC 3000

+61 3 9286 6000

**Brisbane**

Level 28

Riparian Plaza

71 Eagle Street

Brisbane QLD 4000

+61 7 3292 7000

**Perth**

Level 27

QV.1 Building

250 St Georges Terrace

Perth WA 6000

+61 8 9426 8000

**Canberra**

Level 10

NewActon Nishi

2 Phillip Law Street

Canberra ACT 2601

+61 2 6279 4000

**Darwin**

17–19 Lindsay Street

Darwin NT 0800

+61 8 8943 2555

**Disclaimer**

Clayton Utz communications are intended to provide commentary and general information. They should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from this communication. Persons listed may not be admitted in all States and Territories.

© Clayton Utz 2020

[www.claytonutz.com](http://www.claytonutz.com)