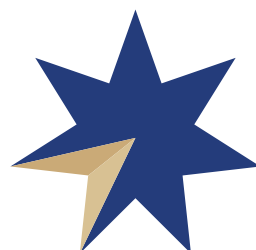


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Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018 – Submission to the Senate Economics Committee

June 2018



Australian
Chamber of Commerce
and Industry



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Summary of recommendations

The Australian Chamber of Commerce and Industry welcomes the opportunity to submit to the Senate Economics Legislation Committee about the *Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018* and thanks the Committee. As explained in the following submission the Australian Chamber's interest in the bill is with schedules 1 and 2 which deal respectively with a one-off amnesty for undeclared missed superannuation guarantee contributions and addressing unavoidable breaches of the concessional contribution cap by some employees who have more than one employer.

The Australian Chamber of Commerce and Industry has for some time advocated for a superannuation guarantee amnesty to allow employers who have missed contributions to catch up and rectify the missed contribution without facing the full operation of the SG charge system. The reality is that the superannuation guarantee charge is one of the reasons for low levels of self assessment and disclosure, which together with past poor visibility of the system, leads to poor recovery rates.

The proposed amnesty will improve the amount of missed contribution which is recovered over what is otherwise likely, and the Australian Chamber believes that it will make a significant improvement because most unrecovered missed contribution is from small businesses and the amnesty addresses the primary problem for recovery – the escalation of the debt and actual cost of full compliance.

The amnesty addresses existing missed contribution, not future superannuation guarantee shortfalls in the future, but its timing with respect to other changes in the superannuation guarantee system and visibility are very relevant to its timing and its potential.

The Australian Chamber also raised the issue of the lower concessional cap for employees with multiple employers with Treasury and the ATO following the announced cap reduction in the 2017 Budget. It welcomes and supports the Schedule 2 amendments which provide the employee with the capacity to obtain an "employer shortfall exemption certificate" which, if granted by the Commissioner, reduces that employee's maximum contributions base for the named employer to zero.

The Australian Chamber supports passage of both Schedules and would encourage the Committee to recommend the bill's expeditious passage. The amnesty period has commenced, but cannot properly operate until the enabling legislation is in effect.

Recommendation

Recognising that there may need to be technical amendments to Schedules 3 and 4 of the bill that the Committee recommend expeditious passage of the bill.



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1 Introduction

1. The Australian Chamber of Commerce and Industry (**Australian Chamber**) thanks the Senate Economics Legislation Committee (**Committee**) for the opportunity to comment on the *Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018 (bill)* which is currently before it.
2. The bill proposes a number of amendments to the
 - a. *Income Tax Assessment Act 1997 (ITA Act)* and the *Superannuation Guarantee (Administration) Act 1992 (SG(A) Act)* to provide for an amnesty to allow self-rectification of missed SG charge (Schedule 1);
 - b. SG(A) Act to address unavoidable contributions caps breaches by employees with multiple employers (Schedule 2);
 - c. ITA Act to clarify the treatment of income from assets subject to non-arm's length expenditure (Schedule 3);
 - d. ITA Act to include fund assets held under a limited recourse loan arrangement in the calculation of a member's total superannuation balance (Schedule 4).
3. This submission addresses Schedules 1 and 2. The Australian Chamber has advocated for both the proposed amnesty to assist employers to self-correct missed contributions and a solution to some employee's unavoidable breach of the concessional contributions cap.

1.1 The Australian Chamber's interest in the superannuation system

4. The Australian Chamber's interest in superannuation arises from the system's regulation and impact on employers. The superannuation system is clearly an important part of the national system of social protection supporting the retirement incomes of older employees, but it is also a significant on-cost. Employers' and the national economy's interests are best served by an efficient superannuation system which maximises members' retirement income streams, and these are mainly accumulated from employers' contributions and subsequent earnings.
5. Timely contributions, allocation and investment contribute to this objective.
6. System efficiency also reduces employee dissatisfaction with or disengagement from their superannuation. Disengagement supports a number of superannuation system problems including the perceived value of the system and contribution errors. Employers and employees share a common economic interest in an efficient superannuation system.
7. The Australian Chamber has had a long involvement with the superannuation system, its regulation and its impact on employers. It was a member of the Cooper Committee review of the governance, efficiency, structure and operation of the Australian superannuation



system which was commissioned in 2009 by the then Minister for Superannuation and Corporate Law. The Australian Chamber has been active in the implementation of policies arising from that report and subsequent major system changes.

8. Today's superannuation system is a major financial sector in its own right and there are many material interests. The Australian Chamber itself does not have material interest in any RSE, nor system service provider, and it does not nominate to any RSE board or group of trustees.
9. The Australian Chamber has a diverse membership of multi industry chambers of commerce and industry, industry organisations and individual businesses. Some Australian Chamber members may have direct involvement with the superannuation system or have nominating rights with respect to an RSE, others do not. Some members may wish to make their own submissions to the Committee.

1.2 The Superannuation Guarantee

10. For employers the superannuation guarantee (SG) is primarily regulated by the SG(A) Act. The SG, as its name implies, was directed to encouraging employers to provide a minimum level of superannuation support for employees. Providing superannuation support meant making the required minimum contribution for the contribution period to a complying fund.
11. Under the SG(A) Bill the required minimum level of support was the prevailing percentage (**charge percentage**) of the employee's earnings base. The policy objective of the SG was then, and remains, timely sufficient contributions to a fund.

Purpose of the Bills

The Superannuation Guarantee (Administration) Bill 1992 and the Superannuation Guarantee Charge Bill 1992 implement the Government's decision, announced in the 1991-92 Budget, to impose a tax on an employer where the employer provides superannuation support below a minimum level. The purpose of the Bills is to encourage employers to provide a minimum level of superannuation support for employees.¹

12. Now superseded, in 1992 an employee's earnings base depended on the employer's pre-20 August 1991 arrangements with the relevant fund, an employee's award or in their absence, not less than the employee's ordinary time earnings (OTE). Many, but not all, awards containing superannuation obligations identified contributions on the basis of OTE, but in fact there were a variety of earnings bases which applied to different employees some of which were higher than OTE, but there was no single standard.
13. The *Superannuation Guarantee (Administration) Bill 1992* was not just legislating the SG, it was also phasing in an increase to the charge percentage from the generally prevailing 3% to 9%. The rate of phase-in was dependent on the size of the employer's operations,

¹ P 1, Explanatory Memorandum, *Superannuation Guarantee (Administration) Bill 1992, Superannuation Guarantee Charge Bill 1992*



determined by the employer's annual national wages bill, which was measured by its total salary or wages bill at the time.

14. Under the bill the tax (**SG charge**) was calculated on the basis of salary or wages which was unlikely to undercut anyone's notional earnings base. As now, at that time some employees received contributions on the basis of their salary or wages. Most did not and do not.
15. The 1992 bill provided that a SG shortfall arose when the minimum support was not provided by the due time for the contribution period. The shortfall comprised the employee's salary or wages for the period multiplied by the percentage of support which had not been achieved, an interest component, which was intended as a proxy for superannuation fund earnings and an administration fee. The SG charge arising from the shortfall was distributed to the fund for the member except for the administration charge and any subsequent penalty for delay or non-compliance.
16. The notional earnings base was later superseded by statutory OTE but these other features continue.

2 Schedule 1

2.1 An Amnesty

2.1.1 The reason for the proposed amnesty

17. The Explanatory Memorandum advises that Schedule 1 introduces a one-off 12 month amnesty to encourage employers to self-correct SG non-compliance.² The amnesty seeks to improve recovery of missed contributions many of which will otherwise be lost to the system.
18. Non-payment of superannuation guarantee contributions is a significant issue. The amounts involved are significant. Non-payment affects the level of retirement income assets and future demands on public spending. It impacts individuals rather than the superannuation system as a whole and it is a source of unfair competition.
19. The ATO's 2017 estimate of the gap between SG contributions made and those which should be made was a net amount of \$2.85B (5.2% of total contributions) for 2014-15. Later figures are not yet available.³

TABLE 2.14 Net gap estimates – Programs we administer, 2011–12 to 2016–17^{(a)(b)(c)}

| | | Reliability assessment | 2011–12 | 2012–13 | 2013–14 | 2014–15 | 2015–16 | 2016–17 |
|---------------------------------|--------|------------------------|---------|---------|---------|---------|---------|---------|
| Administered programs | | | | | | | | |
| Superannuation Guarantee | Medium | % | 5.9 | 4.8 | 4.7 | 5.2 | na | na |
| | | \$m | 2,780 | 2,360 | 2,480 | 2,850 | na | na |
| PAYG withholding ^(d) | Medium | % | 4.1 | 2.9 | 2.7 | 1.9 | na | na |
| | | \$m | 6,060 | 4,480 | 4,360 | 3,130 | na | na |
| Fuel tax credits ^(e) | Medium | % | 0.7 | 0.7 | 0.7 | -0.5 | -0.3 | na |
| | | \$m | 40 | 40 | 40 | -30 | -20 | na |

20. Tax debt, which includes recognised unpaid SG charge, is a small business issue.

At 30 June 2017, small businesses owed nearly \$13.9 billion in collectable tax debt, an increase of 7% from last year. Small businesses accounted for around 67% of total collectable debt⁴

21. Recovery of missed SG contribution is poor and reduces with time passed. Only about half the identified outstanding SG charge is recovered, by far the lowest recovery rate for any missed tax payment. In 2016-17 \$603.5M SG charge was raised but only \$282.9 M (47%) was collected.⁵ The ATO also reported that at 30 June 2017 it had \$1.5B SG debt on hand of which \$167.0 was not pursued because it was not recoverable or uneconomic to

² P 3, Explanatory Memorandum

³ P 88, Table 2.14, *Annual Report 2016-17*, Commissioner of Taxation, October 2017.

⁴ P 25, *Annual Report 2016-17*, Commissioner of Taxation, October 2017

⁵ P 116, table 2.21, Commissioner of Taxation, *Annual Report 2016-17*, October 2017.



- do so. Between 2013-14 and 2016-17 the debt of unpaid charge has increased by about \$200M per year.⁶
22. There are cases of wilful and even egregious contribution non-compliance but more often missed contribution is associated with small businesses, error and cash flow. Missed contribution is also unequally distributed across industries.⁷
 23. Poor recovery and the growing gap is attributable to a number of factors. These include
 - a. The amount of SG charge escalates rapidly if not declared and paid.
 - b. A lack of clarity about compliance points which can mean that error-based non-compliance goes unrecognised for many quarters. Key technical compliance points are the boundary between deemed employee and contractor and the proper composition of OTE.
 - c. Until now funds have reported incoming contributions on a financial year basis, no later than 31 October each year. Missed contributions for individuals could go undetected by the ATO for long periods.
- 2.1.2 The approach to the amnesty
24. Compliance is affected by the legitimacy of the obligation. An obligation which is seen to be arbitrary or unfair does not encourage compliance. Whether a requirement can be complied with and how easy it is to comply with in practice affect the level of compliance and affect the legitimacy of the requirement.
 25. Many small employer missed payments arise because of cash flow, which is a constant and ongoing problem for many otherwise sustainable businesses. Cash flow difficulties can arise because of the seasonality of the industry, key contract dependence and slow customer payment as well as because a business may be in decline, or an employer's inadequate appreciation of true labour costs.
 26. Missed payments can also arise because of natural disasters and system outages.
 27. Because SG charge compliance is so onerous, the current penalty nature of the SG charge is a source of continuing breach and non-rectification. It does not assist with rectifying cash flow caused delays. Part of the amount of unrectified missed contribution is attributable to the fact that the SG charge is arbitrary and punitively expensive, so that for many, full statutory compliance following a missed or under-payment is not a viable option.⁸

⁶ P 76, table 2.21, Commissioner of Taxation, *Annual Report 2015-16*, October 2016 and P 116, table 2.21, Commissioner of Taxation, *Annual Report 2016-17*, October 2017

⁷ Pp 7 – 8, paras 2.5 – 2.10, especially para 2.6, *Cross Agency Superannuation Guarantee Working Group – Interim Report*, January 2017

⁸ Pp 39-40, para 1.18, *Promoting Compliance with Superannuation Guarantee Obligations – ATO*, Australian National Audit Office, 2015

28. In its 2015-16 annual report the ATO said

[...] because we know that willing participation in our tax system is heavily reliant on the perceived fairness of the system and our administration.⁹

and in its 2016-17 annual report the ATO said

Our program of reinvention is improving the client experience and supporting willing participation in the tax and superannuation systems. Research shows that most Australians have an understanding of why they pay tax and make an effort to meet their obligations. Personal circumstances and perceptions of fairness can also affect attitudes and behaviour in complying with tax and super obligations.

We are focused on improving client interactions by taking into consideration individual circumstances, [...]¹⁰

29. These comments draw attention to the ATO's change in practice in the 2014-15 financial year to one of "differentiated risk treatment for employers" which allowed employers which made honest mistakes to rectify them by paying directly to the employee's fund (with interest) and without a SG charge being raised. The employer was not formally penalised and the employee's interest was protected.¹¹

30. Risk differentiated treatment meant that recovery figures changed significantly between 2013-14 and 2014-15. Employer self-corrected payments are not recorded as SG raised nor is their payment recorded. Self-corrected contributions do not show up as voluntary disclosures because the charge statement is not lodged. An additional \$106M was paid by self-correction in 2016-17 and these self-corrected contributions impact the contributions gap. In 2016-17 there was a significant reduction in the number of employers whose investigation resulted in a liability being raised.

The overall number of superannuation guarantee complaints received from employees increased by approximately 25% on 2015–16.

As a result, we placed a greater emphasis on allowing employers to self-correct and pay directly to the correct super fund (with interest) rather than lodging a superannuation guarantee charge (SGC) statement. The value of superannuation guarantee self-corrected via payment direct to the employee's fund was \$106 million in 2016–17. This approach had an impact on reported results with respect to superannuation guarantee liabilities being raised (as instances of self-correction are not reported as liabilities raised in the results), collected and distributed to individuals or superannuation funds.

⁹ P viii, Commissioner of Taxation, *Annual Report 2015-16*, October 2016

¹⁰ P 19, Commissioner of Taxation, *Annual Report 2016-17*, October 2017.

¹¹ P 56, Table 2.18, *Annual Report 2014-15*, Commissioner of Taxation, October 2015



While the overall number of superannuation guarantee complaints received increased, the total number of superannuation guarantee complaints that resulted in an audit case declined by around 14% relative to 2015–16 while the number of employers whose records were checked also declined by around 9%.

The proportion of employees with super guarantee entitlements raised through voluntary disclosures is 52.6% compared to 54% in the prior year. Overall the reported total number of employees who have had super guarantee entitlements raised has declined by 28% compared to the prior year. This result will have been significantly influenced because:

- *the figure for employees who had entitlements raised as a result of compliance activities does not include those where the employer paid direct to fund (and therefore is significantly lower than reported in 2015–16)*
- *our emphasis on self-correction (publicised on our website) resulted in less voluntary SGC statements lodged (employers who would otherwise have made a voluntary disclosure paid direct to fund rather than lodging an SGC statement and paying via the ATO).*

The growth in debt on hand for super guarantee charges results from the cases being pursued having a lower likelihood of recovery and lower write-off rates than in recent years.¹²

31. The amnesty is structured around this approach.

2.1.3 The amnesty is not a substitute for the compliance regime

32. The Explanatory Memorandum also advises that Schedule 1 complements the reforms which are proposed by the *Treasury Laws Amendment (2018 Measures No. 4) Bill 2018 (No. 4 Measures bill)* which is currently before the Committee.

33. The No.4 Measures bill draws on recommendations of the Superannuation Guarantee Cross-Agency Working Group and also, with respect to the expansion of mandated Single Touch Payroll reporting to small business, to the report on the Single Touch Payroll small business pilot.

34. The No. 4 Measures bill is directed towards improving system visibility and increasing the Commissioner's capacity to follow undeclared SG charge and if possible recover it where there are obstacles. As already noted unpaid SG charge is difficult to recover and unacceptably low rates of missed payments are remediated. In this respect the SG charge does not work well to achieve or support its policy objective. The thrust of the No 4 Measures bill is not well directed to recovery of past missed contributions where cash flow is a legitimate issue, nor where there is underserved arbitrary outcomes.

¹² P 117, *Annual Report 2016-17*, Commissioner of Taxation, October 2017



35. The No 4 Measures provisions may allow better follow-up on wilful offenders and permit better identification and perhaps prevention of missed payments but it will not recover the bulk of the existing missed contribution. The proposed amnesty should assist improved recovery of past missed contributions which is its policy objective, but it does not address the underlying defects in the current SG shortfall system for the future. The amnesty is a one-off process intended to improve recovery of existing undeclared missed contribution.
36. The proposed amnesty also contains its own motivating penalty threat. The Explanatory Memorandum advises

1.15 To further incentivise take-up, if the Commissioner identifies that an employer has an SG shortfall after the amnesty concludes, the Commissioner will take into account the employer's ability to access the amnesty when determining any remission of the Part 7 penalty. The Commissioner must consider the particular circumstances of each case, however, in general a minimum penalty of 50 per cent would be applied to employers who could have come forward during the amnesty but did not do so. The Commissioner's considerations for remission in cases following the amnesty will be outlined in ATO guidance materials.¹³

37. Remission of Part 7 penalties is a two step process. The first step requires the ATO officer to assess the employer's attempt to comply. Under current guidance rules unless the employer made at least a moderate attempt to comply the standard remission could not exceed 50% of the outstanding SG charge.¹⁴ Subject to the facts of a particular post-amnesty estimate of additional SG charge it would be unlikely that the employer's efforts to comply would be moderate or better.

2.1.4 The amnesty period coincides with a significant system change

38. The transparency of SG transaction is a key contextual consideration for the Committee's assessment of this schedule. The Australian Chamber's submission to the Committee's review of the No.4 Measures bill emphasised how under the combined impact of STP reporting and fund events-based reporting¹⁵ the SG transaction system is becoming increasingly visible to the Commissioner in much closer to real time. The Australian Chamber also advised that while it recognised the system benefit of much better system visibility that it remained concerned that the dual nature of the SG charge would continue to impact recovery and reduce the perceived equity of the system.

2.2 What the Schedule does

¹³ P 10, Explanatory Memorandum

¹⁴ Para 19, PS LA 2011/28

¹⁵ The 'Reporting of event based transfer balance account information in accordance with the Taxation Administration Act 1953' Legislative Instrument (F2017L012373) was registered on 28 September 2017 to apply from 1 October 2017. It requires superannuation providers to report transactions which credit or debit a member's transfer balance account within 10 days of the month.



39. The SG charge is a tax supported by a compliance penalty regime. As a tax its payment should be treated as is payment of other taxes. However, the SG charge is distinctive from other general taxes in two respects.
- a. The SG charge is not intended to be incurred nor collected. Putting aside the compliance regime to encourage payment or recovery when it is triggered, the SG charge itself contains internal penalties. Paying the tax is more expensive than making the SG contributions it is intended to motivate.
 - b. The purpose of the SG charge is to recover and remedy the missed payment as well as to motivate the SG contribution in the first place. Because the SG charge provides the remedy for the individuals whose contributions were missed, the SG charge is not discretionary, including the internal penalties within. Its external penalties are discretionary – they are dependent on the circumstances of the case.
40. The recovery component (the calculated shortfall from the missed contribution, interest and any penalty interest – not a true representation of the actual loss from missed payment) is intended to be paid into the member’s account to make-up the missed contribution and compensate for lost access to earnings. The administration/penalty components (administration fee, Part 7 penalties) are intended to be paid into consolidated revenue.
41. The proposed amnesty operates to suspend those parts of the SG charge which would otherwise go into consolidated revenue, but to treat the make-up contribution as a contribution. The amnesty does not deprive the member of any of the compensatory aspects of the SG charge as currently legislated. Equally no “tax” component of the SG charge attracts deductibility. Member compensation under the amnesty includes the windfalls from the calculating the missed contribution from salary or wages, rather than the amount of missed contribution, the rate and application date of the “nominal” interest and the rate of the general interest charge.

2.3 Establishing the amnesty

42. Item 13 inserts a new s 74 into the SG(A) Act which provides for an amnesty period commencing 24 May 2018 and ending 23 May 2019 to address unremediated SG non-compliance which arose prior to the amnesty being announced.
43. Proposed s 74 applies the amnesty to any relevant unaddressed SG shortfall. The amnesty does not alter its character and a failure to contribute at least the relevant charge percentage of the employee’s OTE in time will still lead to a SG shortfall coming into existence. The conversion of a SG shortfall into a SG charge under the *Superannuation Guarantee Charge Act 1992* is not affected. Rather proposed s 74 operates to identify the amnesty period and coverage and impose some qualification conditions. It also allows disqualification from the amnesty for non-compliance under it.
44. Item 11 amends s 32 of the SG(A) Act to exclude the administration charge from individual SG shortfalls for employees who are first identified in a disclosure under the amnesty



(newly included employees). Under s 19 SG(A) Act individual SG shortfalls arise in any quarter where minimum contribution is not achieved for the employee. Newly included employees are those for whom a quarter's unremediated missed payment is not already before the Commissioner.

45. Item 12 inserts a new s 60 into Part 7, *Additional Superannuation Guarantee Charge*, of the SG(A) Act. Section 59 of the SG(A) Act makes an employer which fails to provide a SG statement or the basis of calculations in a SG statement liable for a penalty equal to double the SG charge for the quarter. Section 62 requires the Commissioner to assess the amount of additional SG charge owed by the employer but permits remission. Proposed s 60 would amend s 62 to exclude liability under Part 7 for disclosures about undeclared SG charges, but only to the extent that the disclosure is about SG charge which the Commissioner does not know about.
46. Items 11 and 12 would also commence from 24 May 2018 following Assent.
47. On Assent items 10 – 13 an amnesty would run 24 May 2018 – 23 May 2019. The amnesty would apply to pre-amnesty SG shortfall which was newly disclosed to the Commissioner and paid under the amnesty or paid under an arrangement with the Commissioner to pay the shortfall down within the amnesty period. SG shortfalls dealt with in whole or in part; already known to or being acted on by the Commissioner; arising after the announcement of the amnesty or not remedied under the amnesty do not attract the amnesty nor fall within it. They remain and will remain subject to current SG(A) Act rules.
48. Items 10 – 13 excise the administration fee and any Part 7 penalty from amnesty make-up payments (the "tax" components), and confine make-up pay to its contribution remedy components, but they do not address the treatment of make-up contributions for tax purposes.

2.4 Tax treatment of the amnesty

2.4.1 Employers

49. Items 1 – 9 of Schedule 1 amend the ITA Act so that the remedial make-up contributions under the amnesty provided for by the amendments to the SG(A) Act are tax deductible in the same way as the contributions which were missed would have been. Under the bill tax deductibility extends only to those payments which are paid or would be transferred by the Commissioner into the member's fund under the amnesty rules.
50. Division 290, *Contributions to superannuation funds*, of the ITA Act provides at s 290-60 that employer contributions made to a complying fund or RSA for an employee's



- superannuation benefit is deductible in the income year that it is made. A SG contribution is made when the contribution money is received by the fund.¹⁶
51. Irrespective of the quarter where there was a missed contribution, make-up contributions under the amnesty will be made in the 2018-19 financial year. Deductibility means the cost of make-up contributions under the amnesty is lower and consequently less likely to tip a small business into administration, liquidation or bankruptcy. Missed contributions are more likely to be recovered.
 52. Section 290-95 of the ITA Act provides that a contribution which is made to offset a SG charge is not deductible. Section 23A of the SG(A) Act provides that an employer which makes a contribution after a shortfall has arisen (28 days after the end of the quarter) but before a SG statement is lodged or a default assessment is issued may direct the contribution to offset the SG charge. Offset is advised to the fund when the contribution is made to it and the employer must also disclose the election to have the contribution paid against the charge in its SG statement.
 53. Division 26 of the ITA Act, *Some amounts you cannot deduct, or cannot deduct in full*, provides at s 26-5 that penalties cannot be deducted and s 26-95 includes SG charge as an amount which cannot be deducted. The rule means that the amount of SG charge which is paid does not reduce the employer's assessable income and income tax is also payable on the amount. Non-deductibility is appropriate treatment for a tax, and a penalty, but it is less clear that it is appropriate treatment for remedial contributions.
 54. Item 2 amends s 26-95 of the ITA Act so that a make-up contribution which is made under the amnesty and during the amnesty period is not subject to the s 26-95 rule. Item 2 suspends the operation of the non-deductibility rule for these make-up contributions.
 55. Items 3 – 5 amend s 290-95 of the ITA Act so that its rule preventing deduction of an offsetting contribution does not apply. This suspends the operation of the non-deductibility rule for these make-up contributions. The combined effect of items 2 – 5 is that deductible make-up contributions and disclosure under the amnesty can take place in either of two ways. An employer making make-up contributions under the amnesty can
 - a. pay the fund, advising it of the shortfall which is being rectified and advise the Commissioner (direct remedy) or
 - b. advise and pay the Commissioner who transfers the payment to the fund (indirect remedy).
 56. In both cases receipt of the make-up contribution is confirmed with the ATO by fund reporting. Indirect remedy provides the way for the Commissioner and an employer to set

¹⁶ Para 13, TR 2010/1. Under SuperStream most contributions are transferred electronically. The contribution is made when the funds are credited to the fund's bank account. If the contribution is paid in money it is made when the cash is received. If paid by cheque, it is made when the cheque is received so long as not subsequently dishonoured.



up a pay-down arrangement; direct remedy is more fast-track from the Commissioner's perspective.

2.4.2 Employees

57. Incoming contributions are attributed to the quarter they are paid in respect of irrespective of when they are received. Nonetheless in 2018-19 under the amnesty some employees will receive a significant amount of make-up contribution. Remedial contributions within the SG charge are in all cases greater than the underlying missed contribution, and depending on the circumstances, may be much greater. An undetected miscalculation of OTE or employment status can persist for many quarters. Make-up contributions are concessional contributions and subject to the concessional contributions cap.
58. Some employees may be subject to Division 293 tax (Division 293 of the ITA Act) which doubles the tax on incoming contributions made for or by those earning over the "high income threshold". Division 293 tax commenced for contributions for quarters from 1 July 2012. The high income threshold was lowered from \$300,000 to \$250,000 for quarters from 1 July 2017.
59. Division 291, *Excess Concessional Contributions*, of the ITA Act establishes the rules for concessional contributions caps. Section 291-465 provides the Commissioner with a discretion to disregard some or all concessional contributions in a financial year, or reallocate them to another financial year, when determining an individual's excess concessional contributions. The Commissioner's discretion is triggered by application.
60. Item 6 proposes to amend s 291-465 ITA Act to allow the Commissioner to make a determination to disregard make-up contributions (s)he has received under the amnesty for an employee and transferred to the affected member's fund without requiring the member to apply for the Commissioner's determination. The amendment applies only to indirect remedy contributions under the amnesty - make-up contributions under the amnesty transferred to a fund by the Commissioner.
61. The current s 291-465 rule will continue to apply to direct remedy contributions. An employee application will be required for the Commissioner to make a determination to disregard a make-up contribution in assessing the concessional contributions cap.
62. Item 7 proposes to amend s 293-30 ITA Act so that the addition to the member's concessional contributions for the year made by the make-up contribution does not trigger or increase a Division 293 tax liability. The effect of the item 7 amendment is confined to make-up contributions under the amnesty, but it applies to direct and indirect remedy contributions.

2.4.3 Operation of Schedule 1

63. Item 9 provides that the amendments to the ITA Act apply for the 2017-18 income year and future income years. Cl 2 of the bill provides that items 1 – 9 commence with the beginning of the first quarter after the Royal Assent. Items 1 – 9 will commence and operate with



retrospectivity with the effect that the Commissioner's transfers of recovered SG charge in 2017-18 and late contribution offsets can be disregarded for the concessional contributions cap under the streamlined approach.

64. The starting date and period of operation of the amnesty is independent of the timing of the bill through the Parliament. Cl 2 of the bill provides that were the bill given the Royal Assent item 13 would commence retrospectively from 24 May 2018.



3 Schedule 2

65. Schedule 2 amends the SG(A) Act to address the issue of unavoidable breaches of the concessional contribution cap by an employee with more than one employer. These concessional contribution cap breaches are unavoidable because each employer has an independent obligation under the SG(A) Act to make a contribution of at least 9.5% of the employee's earnings, or lodge a SG statement and pay the SG charge (resulting in a considerably higher concessional contribution than the underlying OTE-based contribution).
66. Each employer's contribution obligation is limited by the maximum contribution base (s 19(3) of the SG(A) Act) which is the maximum amount of salary or wages in a quarter which is used to calculate a SG shortfall. The maximum contributions base (currently \$52,760 per quarter, increasing to \$54,030 per quarter for 2018-19) ensures that each individual employer is not obliged to breach the cap.
67. The concessional contribution cap applies to all concessional contributions made in a financial year to any fund. Individual funds may not be aware of a member's total contributions and funds cannot prevent excess contributions being made.
68. Breach of the cap requires the employee to pay additional income tax at his or her marginal rate (less the 15% paid by the fund on the incoming contribution) and the employee is liable for a shortfall interest charge because of a resulting late payment of the additional income tax (s 280- of the ITA Act). The Commissioner has power to remit a shortfall interest charge (s 280-160 of the ITA Act), but the conditions for remission may not cover all circumstances of unavoidable breach. The employee has no capacity to prevent his or her cap from being exceeded by the combined employers' contributions streams.
69. Unavoidable breach became a much more significant issue from the 2017-18 financial year because the concessional contributions cap was reduced to \$25,000 p.a. from its previous \$30,000, or more usually for affected employees, \$35,000 p.a.
70. Schedule 2 inserts three new sections (ss 19AA – 19AC) into Part 3, *Liability of employers other than the Commonwealth and tax exempt Commonwealth authorities to pay superannuation guarantee charge*, of the SG(A) Act. The effect is that if the Commissioner has issued an employer shortfall exemption certificate (**certificate**) for a quarter to an employee who has applied for it in relation to a named employer the certificate allows the employer to treat that employee's maximum contribution base as zero for that quarter.

3.1.1 Protection of SG system integrity

71. The employee must make an application for a certificate at least 60 days' before the quarter begins which must specify a current employer and the specific quarter for which the certificate is sought and contain required information. In determining the application the Commissioner must be satisfied that the applicant employee



- a. has at least one other employer which is liable for a SG shortfall for the same quarter (or would be but for making contributions)
 - b. is likely to exceed his or her concessional contributions cap in the financial year.
72. The Commissioner's consideration is to be informed by other certificates issued to or applied for by the applicant employee and may extend to the employee's past tax and contributions records.
73. Once issued the Commissioner cannot revoke or vary the certificate. The Commissioner must give notice of the certificate to the applicant and to the specified employer and the notice must identify the employee, the employer and the quarter it applies to. Certificates can only apply in the hands of the specified employer for that employee and for the identified quarter. Each quarter requires a different certificate.

3.1.2 Protection of employees

74. The Commissioner can only consider applications which are made by employees.
75. A failure to respond within 60 days implies the Commissioner has declined to issue a certificate. Although application lodgement times can be waived the Commissioner's decision (implicit or explicit) will usually be made at or before the time that the requested quarter begins. A SG shortfall does not crystallise until after the quarter which the certificate was applied for but a review of a decision can usually commence in advance of or close to the quarter's beginning.
76. The applicant is not obliged to advise the relevant employer(s) of an application and the Commissioner is not required to advise any employer of a refusal to issue a certificate.
77. The Commissioner must give both the applicant employee and the specified employer notice of issuing a certificate, but the certificate is issued to the employee only. The employee is not obliged to give the certificate to the employer.

3.1.3 Protection of employers

78. A certificate reduces the employee's maximum contributions base to zero so that the employer cannot attract a SG charge for that employee for that quarter. The employer is not prevented from making contributions during the quarter which the certificate covers.
79. The certificate cannot be altered during the course of the quarter.

3.1.4 Operation of Schedule 2

80. Item 3 provides that Schedule 2 will apply to quarters starting on or after 1 July 2018 and cl 2 of the bill provides that Schedule 2 comes into effect at the beginning of the first quarter after the Royal Assent. The effective benefit is prospective.





4 About the Australian Chamber

The Australian Chamber of Commerce and Industry is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.



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