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Treasury Laws Amendment (2018 Measures No. 4) Bill 2018 – Submission to the Senate Economics Legislation Committee

May 2018

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and Industry

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Summary of recommendations

The Australian Chamber of Commerce and Industry does not generally oppose the *Treasury Laws Amendment (2018 Measures) No. 4 Bill) 2018* (**bill)** and its recommendations are written in that context. It draws attention to the fact that if, as is proposed by the bill, mandatory single touch payroll reporting is extended to all employees, that, particularly in conjunction with funds' move to events-based reporting, The Commissioner's visibility, including strongly inferential visibility of pre-STP operations and obligations, will be enormously enhanced. Inferred SG charge will be easier and more closely cover the field. This will result in many more estimates being issued and greatly impact the speed and accuracy of estimates. It also suggests that the differential treatment of failure to report a SG charge in some of the more serious penalties may not be as necessary.

The Australian Chamber of Commerce and Industry's organisational interest is on the impact of the superannuation system on employers and its comments and recommendations address those aspects of the bill. It has not expressed an organisational position with respect to a number of schedules or parts thereof. This submission addresses Schedules 1 – 3, Part 2 of Schedule 4, Schedules 5 and 6 and Part 1 of Schedules 7 and 8.

The Australian Chamber of Commerce and Industry supports measures designed to improve the efficiency and transparency of the superannuation system and its compliance structure. These are interests which employers clearly share with employees.

Broadly speaking the bill's superannuation oriented amendments fall into two classes, those directed towards reducing the amount of missed contribution which is not recovered and those supporting the implementation of greater real time transparency of the transactional system. The first class of amendments are directed toward outliers, employers who are not generally moved to do the right thing. In the context of 800,000 or more employing businesses these are a small minority.

The second class of amendments are systemic and will make a far greater contribution in terms of the amount of contribution which is not lost to the system than the first. The bill does not address another key piece of compliance reform – the need to distinguish remediation of missed contribution so that the employee does not lose because of late payment from penalties for late payment. Penalties need to be redesigned to fit the circumstances of the case. The changes to system visibility make this more important.

Recommendation 1

Should it be satisfied with the proposed offenses the Committee may wish to consider whether given the effective retrospectivity triggered by the issue of an estimate shortly after commencement whether there should be a transitional arrangement concerning the duty to take all reasonable steps to comply with the estimate.

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Recommendation 2

The Committee might wish to consider whether it is appropriate that failure to comply with an education direction is an appropriate offense under s 8C of the TA Act.

Recommendation 3

The Committee may wish to consider whether, before approaching individuals reasonably understood to be an employer's non-complainant employees or former employees, the Commissioner approach the employer to advise his/her intention to disclose. In the event that the Commissioner reasonably believed that such advice would jeopardise the investigation of the employer, the proposed obligation to advise could be confined advising proposed disclosure to individuals whose status as employees is disputed, but not resolved.

Recommendation 4

In its consideration of amendments to expand the coverage of mandatory STP to small business from 1 July 2019, the Committee might wish to note the effectiveness for orderly transition of the current transitional arrangements for STP. It may also wish to recommend the Government consider a scheme to provide compensation for micro businesses to assist their transition into STP.

Recommendation 5

The Committee may wish to note that the amendment seeks to make mandatory the STP reporting of OTE which may not be a figure which some payroll systems aggregate or STP software providers have designed into their systems, and consider whether there should be stronger capacity for such employers and suppliers to be relieved of that reporting responsibility.

Recommendation 6

The Committee may wish to consider whether, if they were to proceed on the proposed basis, there is sufficient balance in the Part 2 amendments.

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Australian Chamber of Commerce and Industry

1 Introduction

The *Treasury Laws Amendment (2018 Measures) No. 4 Bill) 2018* (**bill**) was referred to the Senate Economics Legislation Committee (**Committee**) for review on 10 May 2018. The bill contains a number of extensions of strict or absolute liability, or reversal of onus, which the Committee was invited to consider. The Australian Chamber of Commerce and Industry (**Australian Chamber**) thanks the Committee for the opportunity to comment.

1.1 The Australian Chamber's interest in the SG

The Australian Chamber's interest is on the employer experience of the superannuation system.

The superannuation system as a whole is very complicated with many working parts. Few understand it fully and few are confident of their understanding. Many interests are at play. Employers have a significant role in the system which is not confined to making social contributions on behalf of their employees and the superannuation system impacts employers in many ways. Employers share with employees a strong interest in system efficiency and transparency. Because the superannuation system is so complicated, economically huge, underlying risk is so important to outcomes and across the system there is fairly regular change, system transparency is truly important to foster efficiency, engagement and confidence.

The Australian Chamber has no organisational interest in any particular fund, or fund type. It has no nominating rights to any RSE trustee and it.

The Australian Chamber's membership comprises multi-industry chambers of commerce and industry organisations which collectively have members across a wide range of Australian industry. Some but not all of the Australian Chamber's member organisations do nominate to RSE trustee boards or committees. Some of these organisational Australian Chamber members may wish to comment upon the bill.

The other component of the Australian Chamber's membership is its Business Leaders Council. Council members are direct employers, some of whom may nominate, or be nominated through organisational membership, to RSE trustees which may oversee corporate funds, superannuation schemes or multi industry public offer funds. Some of these members may wish to comment on the bill.

1.2 Background to the SG

The Superannuation Guarantee (**SG**), which is for employers primarily legislated by the *Superannuation Guarantee (Administration) Act 1992* (**SG(A) Act**), is complicated, primarily for constitutional reasons. The Australian Parliament has limited capacity to legislate for private pension systems. As noted in the Explanatory Memorandum, there is no statutory requirement on an employer to make SG contributions.[1]

A consequence of this is that it is not unlawful to make no contribution. An employer is obliged to pay a tax, the SG charge, for eligible employees. Unhelpfully the SG charge is a mix of the money

[1] Para 1.9, Explanatory Memorandum, *Treasury Laws Amendment (2018 Measures No. 4) Bill 2018*

which will make up the contribution, which was lawfully not paid, and other components, but its "contribution" component comprises 9.5% of an employee's salary or wages for a quarter together with a punitive interest component – called "nominal interest". The nominal interest component is intended as compensation for earnings in the fund foregone because the contribution was not made earlier. The nominal interest component applies from the beginning of the quarter which, after it concludes, will attract the SG charge.

An employer can avoid incurring the tax, the SG charge, by reducing the percentage of salary or wages which will need to be paid to, or below 0%. If contributions have been made during a quarter, or within 28 days of the quarter ending, the amount of outstanding percentage is determined by identifying the percentage of the employee's ordinary time earnings (**OTE**) that the contributions represented and subtracting that percentage from 9.5. Where the resulting percentage is positive the employer must assess the amount of SG charge to be paid; declare the amount to the Commissioner (SG statement) and pay it within one month after the 28th day following the end of the quarter. Where there is no residual percentage because at least 9.5% of the eligible employee's OTE has been contributed the employer does not lodge a SG statement.

In the event that the Commissioner believes an employer to have an undeclared SG charge (s)he can require the employer to provide information. The Commissioner can also make and issue a default assessment, which is, unless discharged or amended, a valid assessment of the liability.

Failure to declare a SG charge attracts penalties of up to 200% of the underlying SG charge. The *Taxation Administration Act 1953* (**TA Act**) also provides penalties for failures in relation to the SG charge. Late payments can attract penalties and the General Interest Charge. The SG charge is supported by a significant comprehensive penalty regime.

1.3 The bill

The bill comprises 9 schedules, 8 of which address SG matters, or do so in part. Its superannuation schedules or parts primarily amend the TA Act. Many of the amendments flow from the Government's response to the recommendations of the Superannuation Guarantee Cross-Agency Working Group (**Working Group**) which lodged its final report[2] with the Minister in March 2017.

The Working Group was commissioned to report "…on the operation, administration and extent of non-compliance in the SG system" and "…to develop options for improving SG compliance."[3]

Although estimates of the SG contributions gap are contested it is undeniable that the level of missed superannuation contributions is far too high and the amount of identified missed payment which is not recovered is far too high. Unremediated late payment reduces the amount of a person's retirement income asset and increases future demands on public spending for social support. Unrecovered missed payment is a source of unfair competition. Ensuring the superannuation contributions system is a matter of significant legitimate public concern and it has been so for some time.

[2] *Superannuation Guarantee Non-compliance*, Superannuation Guarantee Cross-Agency Working Group, 31 March 2017
[3] P 4, *Superannuation Guarantee Non-compliance*, Superannuation Guarantee Cross-Agency Working Group, 31 March 2017

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SG compliance encompasses more than the SG charge. It is clear that non-payment of SG charge is a significant problem in its own right but the identification, assessment and collection of SG charge is not the system's objective. The system seeks to promote timely contributions into eligible employees' funds and for the incoming contributions to be allocated and invested on behalf of the fund's members in a timely way. This is best achieved through contributions rather than the SG charge.

Not only are the recovery rates of missed contribution poor but recovery rates reduce 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.[4] 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 do so. Between 2013-14 and 2016-17 the debt of unpaid charge has grown by about $200M per year.[5]

It is helpful to understand the nature of the compliance problem with the SG when considering the bill's provisions. There are cases of wilful and even egregious contribution non-compliance. Contributions avoidance is at times associated with serial offenders and phoenixing but this does not explain why the SG charge performs so poorly against other taxes.[6] Missed contribution is associated with small businesses, cash flow and error. Non-contribution is also unequally distributed across industries.[7] The Working Group reported

> *4.75 […] The small business sector has the highest amount of superannuation guarantee charge collectable debt.*
>
> *4.76 […ATO] support will be improved following the introduction of more frequent superannuation fund reporting of contributions information and Single Touch Payroll as the ATO will have better data to determine support needs and mechanisms. This may mean that the ATO can commence debt collection activities closer to when non-payment has occurred (mitigating, but not overcoming, one of the challenges surrounding collection).*
>
> *4.77. The ATO recognises that employers in viable well-run businesses may occasionally experience short-term cash flow issues. There are benefits in giving people a 'hand up' with payment arrangements tailored to their circumstances. In 2015-16, the ATO granted around 6,000 payment plans worth almost $250 million for superannuation guarantee charge debts.*[8]

Poor recovery is attributable to a number of factors.

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[4] P 116, table 2.21, Commissioner of Taxation, *Annual Report 2016-17*, October 2017. Employer self-corrected payments are not recorded as SG raised nor is their payment recorded in this context. Self-corrected contributions do not show up as voluntary disclosures because the charge statement is not lodged.

[5] 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

[6] P 36, Para 4.81, *Superannuation Guarantee Non-compliance*, Superannuation Guarantee Cross-Agency Working Group, 31 March 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 34 – 35, *Superannuation Guarantee Non-compliance*, Superannuation Guarantee Cross-Agency Working Group, 31 March 2017

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The amount of SG charge escalates rapidly if not paid whether because of deliberate avoidance or technical mistake. Cause is immaterial. For cash-strapped small business, flying under the radar can too often be an economic imperative, particularly if the business does not become aware of its outstanding liability until some quarters later when it then faces a potential charge which is significantly higher than the amount of outstanding contribution.

A lack of clarity about compliance points which can mean that 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.

2 Schedule 1 – Directions and penalties

Schedule 1 provides a new power for the Commissioner to issue directions to employers who have not paid a SG charge or a related liability. Directions can be to pay the charge or an estimate of it (Part 1 of Schedule 1), to complete a course of approved training (**education direction**) – Part 2 of Schedule 1, or both. The Commissioner may determine to issue an education direction if (s)he reasonably believes that the employer has failed to pay an SG charge or estimate, has failed to provide requisite information or to keep records under the SG(A) Act or has breached the SG(A) Act in some other way.

The Explanatory Memorandum advises that the Schedule 1 amendments are based on Recommendation 6 of the Superannuation Guarantee Cross-Agency Working Group (Working Group).[9] Recommendation 6 proposed that

> *Ensure the penalty framework surrounding superannuation guarantee is sufficiently flexible to appropriately deal with the spectrum of employer culpability in non-compliance.*[10]

This recommendation needs to be understood in its context. Recommendation 6 and Recommendation 7, which is to apply nominal interest only after there is a debt, not before it arises, emerged from the Working Group's analysis

> *5.1. Chapter 4 outlined key changes that will boost compliance with superannuation guarantee obligations. These compliance measures will be supported where the superannuation system is perceived to be fair by the community and is easier to engage with for employers and employees.*
>
> *5.2. The existing penalty regime is inflexible. A better-targeted approach would support compliance and build confidence in the system. Key changes involve making sanctions better aligned with the degree of employer culpability and preventing arbitrary outcomes that can arise through the calculation of interest amounts.*
>
> *[…]*
>
> *5.5. Strong penalties are an important deterrent against non-compliance. However, the penalty regime must also be sufficiently flexible to accommodate different degrees of*

[9] P 7, para 1.8, Explanatory Memorandum, *Treasury Laws Amendment (2018 Measures No. 4) Bill 2018*
[10] P 9 and p 43, *Superannuation Guarantee Non-compliance*, Superannuation Guarantee Cross-Agency Working Group, 31 March 2017

> *employer behaviour and culpability. It is also important that the penalty regime does not act as a disincentive to rectifying non-compliance by voluntarily disclosing errors and undertaking corrective action.* [11]

In its response to the Working Group's report and package of recommended measures to improve the integrity of the SG system, the Government said[12]

> *The package includes measures to:*
>
> 1. *Require superannuation funds to report contributions received more frequently, at least monthly, to the ATO. This will enable the ATO to identify non-compliance and take prompt action;*
> 2. *Bring payroll reporting into the 21st century through the rollout of Single Touch Payroll (STP). Employers with 20 or more employees will transition to STP from 1 July 2018 with smaller employers coming on board from 1 July 2019. This will reduce the regulatory burden on business and transform compliance by aligning payroll functions with regular reporting of taxation and superannuation obligations;*
> 3. *Improve the effectiveness of the ATO's recovery powers, including strengthening director penalty notices and use of security bonds for high-risk employers, to ensure that unpaid superannuation is better collected by the ATO and paid to employees' super accounts; and*
> 4. *Give the ATO the ability to seek court-ordered penalties in the most egregious cases of non-payment, including employers who are repeatedly caught but fail to pay superannuation guarantee liabilities.*
>
> *The package reflects the key recommendations in the Final Report of the SG Cross-Agency Working Group released on 14 July 2017, which was established by Minster O'Dwyer late last year. The Government did not accept the Working Group's recommendations to soften penalties for non-compliant employers.*

The Australian Chamber respectfully disagrees with the characterisation of the Working Group's recommendation as proposing a softening of penalties for non-complying employers. The Working Group was proposing that penalties be better tailored to the circumstances of the unpaid SG charge.[13] The Working Group's recommendation is supported by the Australian Chamber.

2.1 Part 1 of Schedule 1

Part 1 of Schedule 1 proposes to amend the TA Act to provide a new capacity for the Commissioner to issue directions to employers to pay an outstanding SG charge (new subdivision 265-C).

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[11] P 43, *Superannuation Guarantee Non-compliance*, Superannuation Guarantee Cross-Agency Working Group, 31 March 2017
[12] Media release, 29 August 2017
[13] Pp 43 – 44, paras 5.2 – 5.7, especially para 5.5, *Superannuation Guarantee Non-compliance*, Superannuation Guarantee Cross-Agency Working Group, 31 March 2017

A SG charge is currently a tax and a collectable debt. The Part 1 amendments are intended to address recalcitrant employers who are intentionally failing to address their SG obligations. The Explanatory Memorandum states

> *1.15 In other cases, there are recalcitrant employers who have intentionally failed to provide their employees with their superannuation guarantee entitlements and repeatedly disregarded their obligations and continuously failed to pay their superannuation liabilities.*

Unpaid SG charge is recoverable, the proposed power to issue a direction is an additional process which would be quicker than recovery through the court but it also provides for up to 12 months' gaol if not complied with. Under proposed subsection 265-90(2) the Commissioner must have regard to the employer's history of tax and superannuation compliance, the outstanding amount and steps taken to reduce the amount of the liability when (s)he is determining whether to issue a direction to pay. A direction must allow at least 21 days for payment.

Proposed subsection 265-95 creates an offence of non-compliance with the direction and establishes penalties of 50 penalty units, 12 months' gaol or both. The offence is one of strict liability. A defence of taking *all reasonable steps* to comply with the direction and to ensure that the liability was discharged before the direction was issued is a high test which the Explanatory Memorandum explains as "*…protect[ing] the employer from criminal charges for failing to comply with a direction to pay where they are genuinely unable to do so.*"[14] It also presumes a high level of knowledge and capability.

The defence has two components: taking all reasonable steps as a result of the direction and also taking all reasonable steps before the direction. Item 2 of Part 1 of Schedule 1 provides that the new subdivision 265-C applies to SG charge or an estimate of a SG charge which is first payable on or after 1 July 2018. Particularly in the case of an estimate it may be that the second leg of the defence is effectively not available for employers subject to directions issuing not long after commencement.

Recommendation 1

Should it be satisfied with the proposed offenses the Committee may wish to consider whether given the effective retrospectivity triggered by the issue of an estimate shortly after commencement whether there should be a transitional arrangement concerning the duty to take all reasonable steps to comply with the estimate.

2.2 Part 2 of Schedule 1

Part 2 of Schedule 1, also directed at recalcitrant employers, inserts a new Division 285 into the TA Act. Division 285 allows the Commissioner to issue a direction to an employer to undertake approved education if the Commissioner reasonably believes it has failed to pay a SG charge or an estimated SG charge; provide a statement or information under the SG(A) Act or keep records required under the SG(A) Act.

[14] P 15, para 1.53, Explanatory Memorandum, *Treasury Laws Amendment (2018 Measures No. 4) Bill 2018*

Item 3 inserts a new para 8C(1)(fa) into the TA Act so that failure to attend approved training in time is an offense of absolute liability. Failure to comply is an offense unless the person could not comply and attracts graduated penalties of 20 – 50 penalty units, 12 months' gaol or both. Complying with an education direction requires proof of attendance and completion to be provided to the Commissioner within the required time.

Paragraphs 1.104 – 1.111 of the Explanatory Memorandum advise that failure to comply with an education direction is of the same order offense as the other matters dealt with by s 8C, such as failing to provide requested information or to attend before the Commissioner or other person.

> *Applying the existing section 8C penalty framework to education directions ensures that the consequences of not complying with a direction are consistent with the existing framework for other failures. The existing penalties will assist in ensuring that employers who have already failed to comply with their obligations under the SGAA and the TAA face appropriate sanction for not fulfilling the further obligation under the TAA in respect of education courses.*[15]

It seems open to question whether failure to comply with an education direction is of the same order as offences currently addressed by s 8C TA Act, particularly, as noted in the Explanatory Memorandum, a person who is issued with an education direction is already in breach of other obligations which potentially attract these penalties. The Australian Chamber understands that the intention behind the power to issue education directions is remedial rather than punitive, that is, education directions are intended to assist employers who have been getting it wrong to avoid making future mistakes.

Recommendation 2

The Committee might wish to consider whether it is appropriate that failure to comply with an education direction is an appropriate offense under s 8C of the TA Act.

3 Schedule 2 – Disclosure of information about non-compliance

Schedule 2 of the Bill is based on the Working Group's Recommendation 3 which proposed

> *The ATO should inform employees of its actions to collect their superannuation guarantee, including in ATO-initiated cases where this communication is currently constrained by current secrecy provisions. The ATO and Treasury will advise of the administrative and legal changes needed to inform employee that have not self-reported suspected non-payment to the ATO.*[16]

[15] Para 1.111, Explanatory Memorandum, *Treasury Laws Amendment (2018 Measures No. 4) Bill 2018*
[16] P 9 and 22, *Superannuation Guarantee Non-compliance*, Superannuation Guarantee Cross-Agency Working Group, 31 March 2017

Recommendation 3 is located in chapter 4, *Improving compliance and collection of debt*, of the Working Group's report and arose out of its analysis of the implications the increasingly timely information because of the implementation of (real time) Single Touch Payroll (**STP**) and fund reporting in closer to real time.

> *4.8. The Working Group considers that better and more timely data is fundamental to improved superannuation guarantee compliance. The most effective and efficient mechanism for improving compliance is through improved visibility to both employees and the ATO as regulator. This can be achieved by applying Single Touch Payroll to all employers and requiring more frequent and detailed superannuation fund reporting.*
>
> *4.9. These initiatives will strengthen both the employee's and the ATO's capacity to monitor compliance and to identify non-compliance when it occurs, as well as to improve strategies to prevent it.*[17]

Item 2 inserts a new item 7A (row 10) in subsection 355-65(3) of Schedule 1 of the TA Act which allows the Commissioner to disclose to an individual who has notified a suspected SG non-compliance by his or her employer to the ATO. Currently the Commissioner is able to report back about his/her response to the complaint (existing item 7 (row 9) of subsection 355-65(3) of Schedule 1).

The proposed new row 7A expands on this in two significant ways. Reportable information is not confined to the Commissioner's response. No individual need be a complainant. The Commissioner can report information to an individual about a failure, or a failure which the Commissioner reasonably suspects, on the part of his or her employer or former employer, as well as any response to it. Item 4 applies the expanded disclosure power to disclosures made on or after 1 July 2018 which can be about events which took place before 1 July 2018.

Item 4 applies the new disclosure powers retrospectively and without limit. This seems potentially excessive.

Disclosed information in the hands of the Commissioner remains protected in other ways but it is subject to no specific protection in the hands of an individual whom the Commissioner understands to be an affected employee or former employee. The great majority of complainants will be motivated by subjectively reasonable belief on their part but it is not clear that employees and former employees notified under the proposed new provisions will start from that basis. Proposed subsection 355-65(9) clarifies that coverage of complainants (existing item 7) and non-complainant affected employees (proposed item 7A) includes individuals whose status as an employee is uncertain, or has been in dispute. This may be appropriate for complainants, but seems less so for non-complainants.

Recommendation 3

The Committee may wish to consider whether, before approaching individuals reasonably understood to be an employer's non-complainant employees or former employees, the

[17] Pp 22 – 23, *Superannuation Guarantee Non-compliance*, Superannuation Guarantee Cross-Agency Working Group, 31 March 2017

Commissioner approach the employer to advise his/her intention to disclose. In the event that the Commissioner reasonably believed that such advice would jeopardise the investigation of the employer, the proposed obligation to advise could be confined advising proposed disclosure to individuals whose status as employees is disputed, but not resolved.

4 Schedule 3 – Single touch payroll reporting

The implementation of Single Touch Payroll (**STP**) will significantly alter the transparency of the superannuation transactional system by making employer contributions data available to the Commissioner in real time. Taken in conjunction with changes to fund reporting, the Commissioner's supervision of the transactional system and capacity to achieve higher levels of contributions and SG compliance will significantly improve, as will system efficiency.

The Working Group's Recommendation 1 proposed

> *That subject to the findings of the current small business pilot being conducted by the ATO, to improve the ATO's visibility of superannuation obligations it is recommended by the Working Group that all businesses (including small business) comply with Single Touch Payroll.*[18]

The Working Group said of the introduction of STP

> *4.14 The Government is due to consider the extension of Single Touch Payroll to small business in the latter half of 2017. The timing of extending Single Touch Payroll to small business is best considered through the Government approval processes, but could occur at the earliest by 1 July 2019 to provide businesses sufficient time to adapt systems.*
>
> *4.15. Implementation of Single Touch Payroll means the ATO will be in a better positon to identify non-compliance with greater certainty and in a timelier manner. It will improve employer engagement by ensuring that superannuation obligations are front of mind at each payroll cycle.*
>
> *4.16. Single Touch Payroll will also allow the ATO to implement preventative measures for employers, such as: adopting 'nudge' strategies; sending SMS payment reminders; and contacting them when a predicted payment is missed. The ATO could also take compliance action where an employer has a shortfall and has yet to lodge a Superannuation Guarantee Charge Statement.*[19]

Recommendation 1 was made in the context of a potential change to the fund reporting regime, moving from the current Member Contribution System which requires funds to report on the

[18] Pp 8 and 22, *Superannuation Guarantee Non-compliance*, Superannuation Guarantee Cross-Agency Working Group, 31 March 2017

[19] Pp 23 – 24, *Superannuation Guarantee Non-compliance*, Superannuation Guarantee Cross-Agency Working Group, 31 March 2017

previous financial year by 31 October each year to an events based report of changes to member holdings.[20] The Working Group said

> *4.20 Such action would ensure that the ATO receives timely reporting of all employer contributions, including in relation to small businesses. For employers, it would mean that Single Touch Payroll obligations in respect of contributions information would be satisfied by superannuation funds.*[21]

Schedule 3 of the Bill proposes to amend the TA Act in two significant ways. It proposes to broaden the application of STP obligations to cover small employers from 1 July 2019 and also to include a requirement to separately report salary sacrifice contributions. This latter change is subject to the passage of another bill, the *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017* which is currently before the Senate.[22]

4.1 The expansion of STP

Part 1 of Schedule 3 of the bill expands STP reporting under Division 389 of the TA Act to apply it to employers of any size by removing the exclusion of small employers with effect from 1 July 2019 for employers not already reporting. The current transitional provisions which apply to substantial employers will then apply to small employers.

STP was enacted by Schedule 23 of the *Budget Savings (Omnibus) Act 2016* which came into effect on 1 October 2016. Schedule 23 amended the TA Act to require "substantial" employers (employers with 20 or more employees on 1 April 2018) to report under STP from 1 July 2018. In her announcement of the forthcoming legislation, *Streamlining business reporting with single touch payroll*, the Minister advised that "…*business reporting of tax and superannuation will be simplified with the implementation of Single Touch Payroll*."

The intention was that businesses with 20 or more employees would be reporting to the ATO using STP enabled software from 1 July 2018 and that the government would undertake a pilot to demonstrate the deregulation benefits with a focus on small business. Its decisions about rolling out STP for small business would await the results of the pilot.

> "*To assist with the transition the Government will provide businesses, with a turnover of less than $2 million, a $100 non-refundable tax offset for SBR enabled software*,"

This offset was provided in the 2017-18 Budget but was not well supported by those participating in the pilot. The report of the pilot recommended replacing the $100 offset with a better targeted incentive for microbusinesses to become early adopters.[23]

The statutory STP regime had two objectives. STP was introduced on the basis that it provided "…*a new modern reporting regime for providing payroll and superannuation information to the*

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[20] Recommendation 2, pp 8 and 22, Superannuation Guarantee Non-compliance, Superannuation Guarantee Cross-Agency Working Group, 31 March 2017

[21] P 24, Superannuation Guarantee Non-compliance, Superannuation Guarantee Cross-Agency Working Group, 31 March 2017

[22] The Committee reported on the *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017* on 23 October 2017.

[23] Pp 5 and 22, *Single Touch Payroll Small Business Pilot, Final Report, June 2017*

ATO"[24] and the Schedule 23 amendments also supported modernisation of TFN validation and choice of fund procedures for incoming new employees.

> *Collectively, these amendments are designed to reduce the compliance costs for employers of meeting their PAYG withholding and superannuation obligations, whilst also improving the ATO's ability to monitor employer compliance with their SG obligations.*[25]

The STP legislation provided for both opt-in (early adoption) and additional data reporting.

It is clear that implementation of the Schedule 23 amendments has some way to go. On the basis of ABS figures there were a little over 56,000 substantial private sector businesses[26]. It seems likely that many of these employers will not be STP reporting for pay events by 1 July 2018. Transitional implementation was anticipated. STP requires additional software to be introduced onto existing digital payroll/accounting systems to report from the relevant data which the existing system generates. Payroll/accounting systems differ widely and do not all generate the same data.

> *Under STP reporting, substantial employers must report information that is produced as part of their payroll processes to the Commissioner in the approved form.*
>
> *In practice, currently the ATO anticipates that this will require substantial employers to report using SBR-enabled software. SBR-enabled software allows employers to automatically report information that is already produced by an employer as part of their payroll processes to the Commissioner at the time the relevant process is undertaken*.
>
> *[…] the legislation deliberately restricts the type of information to be reported to provide entities with legislative certainty about how Parliament intends the Commissioner to administer the new regime.*[27]

Section 389-10 gives the Commissioner discretion to exempt or defer on an individual or class basis so that a payroll or software provider can seek deferral or exemption of the basis of a product. This will accommodate product upgrade times but it also allows products with large numbers of users to feed users into the STP system over time rather than in a single tranche.

The converse of this is that where there are small and substantial employers using the same payroll product, small employers can be early adopters. Small business is very diverse and they exhibit a diversity of capacities. Not all small businesses will be able to be early adopters, and particularly those not using IT based payroll systems.[28] As is the case with SuperStream, transitional arrangements will be required. The amendments do not alter the operation of s 389-10.

Recommendation 4

[24] P 253, Revised Explanatory Memorandum, *Budget Savings (Omnibus) Bill 2016*
[25] P 253, Revised Explanatory Memorandum, *Budget Savings (Omnibus) Bill 2016*
[26] Table 13, ABS Cat 8165.0, Counts of Australian Businesses, including entries and exit, June 2013 to June 2017, (released 20 February 2018). It reports 56,164 businesses operating at 30 June 2017. A business
[27] P 254, Revised Explanatory Memorandum, *Budget Savings (Omnibus) Bill 2016*
[28] The pilot report estimated that 45% of small businesses were directly or indirectly using payroll software, but 14% appeared to have no reporting software. This was least likely (18%) for employers with 1-2 employees. Those using payroll software tended to use one of three products (78% used the three main products). P 9, *Single Touch Payroll Small Business Pilot, Final Report, June 2017*

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In its consideration of amendments to expand the coverage of mandatory STP to small business from 1 July 2019, the Committee might wish to note the effectiveness for orderly transition of the current transitional arrangements for STP. It may also wish to recommend the Government consider a scheme to provide compensation for micro businesses to assist their transition into STP.

4.2 New data requirements

Under the current STP reporting provisions a substantial employer is required to report an employee's "salary or wages" or the employee's OTE, less reported withholdings, no later than the day that the employee is paid[29] and a contribution made by or on behalf of the employer to reduce the employer's superannuation guarantee percentage by or on the day that the contribution is made.[30]

Part 2 of Schedule 3 proposes to amend the table at subsection 389-5(1) of the TA Act in two ways, by replacing item 2 (reporting the employee's "salary or wages" or OTE) and inserting a new item 2A (reporting salary sacrifice contributions). Relatedly, Schedule 4 proposes to remove item 3 (reporting SG contributions).

The current requirement under item 2 (row 2) of the table would be substituted by a requirement to report OTE and/or sacrificed OTE for employees by the day they are paid. The new requirement inserted as item 2A (row 3) under the bill would require reporting an employee's "salary or wages" and/or sacrificed "salary or wages" by the day (s)he is paid. This is explained by the Explanatory Memorandum

> *3.24 These amendments permit any combination of ordinary time earnings and sacrificed ordinary time earnings to be reported as a single (total) amount or as separate amounts. This ensures the Commissioner is able to work out the employer's superannuation guarantee liability for an employee. This is achieved by the reference to an amount that consists of 'either or both' of an amount of ordinary time earnings or a sacrificed ordinary time earnings amount.* **[Schedule 3, item 14, table item 2 in the table in subsection 389-5(1) in Schedule 1]**
>
> *3.25 Similarly, the amendments permit any combination of salary or wages and sacrificed salary and wages to be reported as a single (total) amount or as separate amounts. Again, this is achieved by the reference to an amount that consists of 'either or both' an amount of salary or wages or a sacrificed salary or wages amount.* **[Schedule 3, item 14, table item 2A in the table in subsection 389-5(1) in Schedule 1]**
>
> *3.26 To simplify the provisions, the amendments separate the reporting requirements for ordinary time earnings and salary and wages into separate table items. However, the reporting of these amounts is unaffected as they were already required to be*

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[29] S 389-5, Table Item 2, TA Act

[30] S 389-5, Table Item 3, TA Act

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> *reported separately. The amendments simply move the requirement into two separate items.*[31]

As noted by para 3.26 these amendments require reporting both "salary or wages" and OTE and linking any salary sacrifice as defined by the SG(A) Act with one or other of these reports. However, this appears based on an understanding of the current STP reporting requirements which may not be correct. The Explanatory Memorandum advises

> *3.20 The Single Touch Payroll reporting rules require employers report any amounts that constitute ordinary time earnings that are paid to an employee. Employers are also required to report any amounts that constitute salary and wages that are paid to an employee.*[32]

As enacted by item 1 Schedule 23 of the *Budget Savings (Omnibus) Act 2016* item 2 Column 2 requires reporting of

> *An amount (other than an amount covered by item 1) paid by the entity that constitutes:*
>
> *(a) the salary or wages (within the meaning of the Superannuation Guarantee Administration) Act 1992) of a person who is the entity's employee (within the meaning of that Act but disregarding subsection12(3) of that Act); or*
>
> *(b) the ordinary time earnings (within the meaning of that Act) of such an employee*

Reports must be in the approved form and subsection 389-5(3) allows the Commissioner to determine further reportable amounts. However, it was not intended that such a capacity should operate to provide incremental increases to STP reporting obligations, or to extend them beyond Parliament's intention.

Recommendation 5

The Committee may wish to note that the amendment seeks to make mandatory the STP reporting of OTE which may not be a figure which some payroll systems aggregate or STP software providers have designed into their systems, and consider whether there should be stronger capacity for such employers and suppliers to be relieved of that reporting responsibility.

5 Schedule 4 – Fund reporting

Schedule 4 proposes to amend the TA Act as a consequence of a move to more timely fund reporting and most of its amendments fall outside the Australian Chamber's legitimate interest.

Part 2 (item 6) repeals the requirement for STP reporting employers to report contributions when made (Table at subsection 389-5(1) item 3 (row 3)) and item 7 applies the amendment for

[31] P 41, Explanatory Memorandum, *Treasury Laws Amendment (2018 Measures No. 4) Bill 2018*
[32] P 40, Explanatory Memorandum, *Treasury Laws Amendment (2018 Measures No. 4) Bill 2018*

contributions made from 1 July 2018. Under the events-based fund reporting system commencing on 1 July 2018 funds will report contributions allocated into member accounts and the originating employer which makes the employer contribution report unnecessary. Fund reporting allocation better reflects the policy objective, indirectly alerts to possible allocation issues and confines the obligation to many fewer reporters and reporting systems.

Particularly for small employers whose SG contributions are least likely to coincide with payday, this will remove a separate reporting obligation and reduce the number of system messages.

6 Schedule 5 – Compliance measures

Schedule 5 seeks to amend the TA Act to alter aspects of the director penalty regime (Parts 1 and 2) and to increase the Commissioner's capacity to obtain security for forthcoming PAYG or SG charge liabilities (Part 3). This is drawn from Recommendation 4

> *To improve the overall framework for superannuation guarantee compliance and the collection of superannuation guarantee charge debts, enhancements should be made to the Director Penalty Notice regime and to the Security Bonds Regime.*[33]

6.1 Part 1 of Schedule 5

Part 1 of Schedule 5 amends the treatment of estimated under the director penalty regime. Estimates are dealt with under Division 268 of the TA Act. The objective of Division 289 is to enable the Commissioner to take prompt and effective action to recover unpaid PAYG withholding or SG charge. The Commissioner may make an estimate which (s)he believes is reasonable based on the information to hand.

Director penalties are dealt with under Division 269 of the TA Act which has the object of ensuring company compliance with the PAYG withholding obligations under the TA Act and SG obligations under the TA or SG(A) Acts. Division 269 was expanded to include SG obligations in 2012.

Section 269-15 imposes a personal liability on directors of a corporation for its obligation to pay withheld PAYG, SG charge, an estimate of the underlying liability where the company has not declared the amounts, or to place the company into administration or liquidation within 3 months. Until that 3 month period expires the liability can be remitted by placing into administration or liquidation.

An estimate is payable on the day which notice is given.

It is a separate liability (and may be a different amount) from the underlying liability of which it is an estimate, and the Commissioner could pursue either or both liabilities, but a payment serves to reduce or discharge both liabilities. As this implies, estimates may be inaccurate, but they remain payable even if so, although they can be corrected. Section 268-25 provides that an estimate remains payable even if the underlying liability were already fully paid or never existed. Section 268-35 allows the Commissioner to reduce or revoke an estimate, with effect from the date of issue

[33] Pp 9 and 34, *Superannuation Guarantee Non-compliance*, Superannuation Guarantee Cross-Agency Working Group, 31 March 2017

of the original estimate and s 268-40 allows a person subject to an estimate to lodge a statutory declaration of affidavit that the underlying liability is discharged or less than estimated which revokes or reduces the estimate.

Where the Commissioner is required to make an estimate (because the company has not advised the underlying liability) the estimate necessarily issues significantly later than the underlying liability came into existence. In the absence of an assessed liability director liability cannot be engaged until the estimate is issued and the 3 month period does not commence until that time.

The primary effect of the Part 1 amendments is to bring forward the date from which the estimated PAYG or SG liability commences and for SG obligations the date by which the obligation cannot be remitted. Item 3 alters the commencement of the estimated liability to the day of the underlying liability in the case of withheld PAYG and the last day of the relevant quarter in the case of SG obligations which is before the underlying SG charge liability establishes. Item 4 expressly extends the director obligation to have the estimate discharged independently of the underlying obligation. Doing this also has implications for directors' defences because it requires a director to take all reasonable steps to pay the estimate before there is such an obligation.

The Explanatory Memorandum states

> *5.31. These amendments treat a director as having an obligation to cause the company to pay a Division 268 estimate before the company has an actual obligation to pay the estimate. However, this approach is justified on the basis that the company's obligation to pay the estimate relates directly to the company's obligation to pay the underlying liability relating to that estimate. Therefore, it is appropriate that the directors presiding over the company at the time the underlying liability arose also have an obligation to ensure their company complies with any estimate of that underlying liability issued later in time. This is the outcome these amendments are designed to achieve.*
>
> *[…]*
>
> *A director has a defence with respect to a director penalty for an unpaid estimate where they can show that during their time as a director, they took all reasonable steps to ensure that they caused the company to pay the estimate, as well as the underlying liability to which the estimate relates.* **[Schedule 5, item 5, subsections 269-35(3AA) and (3AB) in Schedule 1]**[34]

Item 6 provides that the amendments would apply to estimates which are made on or after 1 July 2018. Section 268-55 of the TA Act provides that if an estimate is revoked or reduced that alteration applies from the date of the original estimate, and s 268-10 provides that there can only be a single estimate of an underlying liability. There is pre 1 July 2018 retrospectivity of unpaid SG charge but not for estimates.

6.2 Part 2 of Schedule 5

Part 2 of Schedule 5 primarily amends the table in subsection 269-30(2) of the TA Act by inserting a new item 4 which removes the 3 month period during which a company can be put into

[34] P 77 and 79, Explanatory Memorandum, *Treasury Laws Amendment (2018 Measures No. 4) Bill 2018*

administration or liquidation where the company has not reported the underlying SG liability before the date that the underlying liability falls due. This has the effect that the director penalty is not remitted in these circumstances.

This is a significant amendment because it means that on the day that the SG charge becomes overdue and the SG statement becomes late a director has no way of avoiding the personal liability of the company is insolvent.

Schedule 5 is to commence at the beginning of the first quarter after Assent. Item 13 applies the amendments to estimates made or underlying liabilities which arose on or after 1 July 2018 but estimates can be of underlying liabilities which arose before that date.

Recommendation 6

The Committee may wish to consider whether, if they were to proceed on the proposed basis, there is sufficient balance in the Part 2 amendments.

6.3 Part 3 of Schedule 5

Division 255 of the TA Act deals with recovery of tax related liabilities and subdivision 255-D provides for security deposits. The Commissioner may require a security deposit if (s)he believes a person with a tax related liability or a future tax related liability intends to cease carrying on the business and reasonably believes the security deposit is appropriate in the circumstances. It is an offence to disregard the notice to provide a security deposit with a penalty of 100 penalty units.

Part 3 of Schedule 5 amends subdivision 255-D to insert a new s 255-115 into Schedule 1 of the TA Act providing for court orders to comply on application by the Commissioner. The order can include directions to comply with other requirements which can be made under taxation law if the court considers them necessary to ensure the requirement to meet the security deposit is met effectively. Proposed s 255-120 creates an offence of strict liability for not complying with a court order of 50 penalty units, 12 months gaol, or both. It is a defence if a person is not able to comply with the order.

Item 15 provides that these amendments will apply to a notice to provide a security deposit given on or after 1 July 2018.

7 Schedule 6 – Employee commencement

Part 1 of Schedule 6 amends the TA Act by provides the capacity for the Commissioner to disclose an individual's Tax File Number (**TFN**) to an employer, or pre-fill an individual's TFN on the electronic version of the individual's TFN declaration where the individual has given permission on or after 1 July 2018.

Parts 2 and 3 enable the Commissioner to disclose information about an individual's withholding rates, following a request by the individual to do so, and information about the individual's superannuation accounts to assist with fund selection.

These amendments are intended to allow pre-filling of TFN declaration and Standard Choice forms, permission to disclose is required of the individuals and the employer is not obliged to engage with pre-filled forms, although where there is capacity to do so there are administrative benefits.

8 Schedule 7 – Information sharing

Schedule 7 is in two parts. Part 1 would amend the *Income Tax Assessment Act 1936* by inserting a new s 203 which would permit the Commissioner to share, verify and where relevant remediate a TFN with another Commonwealth agency. It would have effect from the beginning of the first quarter after Assent.

Although the amendment is not confined to TFN declaration forms lodged after any particular date, the capacity is not dissimilar to the capacity the Commissioner has with respect to employers seeking to verify an (often incoming new) employee's TFN.

9 Schedule 8 – Miscellaneous amendments

Part 1 proposes to clarify the commencement of the *Superannuation Legislation Amendment (MySuper Core Provisions) Act 2012* which contained an error in its proclamation. This, in turn, impacts a number of contingent amendments. The Australian Chamber sees no difficulty in this proposed amendment.

10 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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