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Senate Standing Committees on Economics
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Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019.

The Housing Industry Association (HIA) provides the following in response to the inquiry into the *Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019* (**Bill**) referred to the Senate Standing Committees on Economics on 19 September 2019.

HIA supports the Bill.

HIA understands that, if passed, the Bill would legislate an amnesty during which time employers can self-correct unpaid superannuation guarantee (SG) contributions. During this time the Bill provides that an employer, found to be owing SG contributions, will not be subject to:

- The administrative charge; and
- The Part 7 penalty charge.

Under the Bill a contribution made during the amnesty period is tax deductable and will continue to include:

- A shortfall payment based on 9.5 percent of salary or wages rather than ordinary time earnings;
- The nominal interest component of 10%; and
- The general interest charge.

HIA does not support employers or businesses deliberately avoiding their superannuation obligations and failing to pay their superannuation entitlements, however, it is clear that the consequences for the non-payment of superannuation under the current laws are significant. In HIA's view the proposed amnesty would provide relief to some employers from largely unjustified additional administrative costs and penalties.

The Residential Building Industry

The residential building industry is principally comprised of small businesses and self-employed independent contractors. Some of these businesses may have obligations as employers to pay superannuation and in other cases these businesses may have entitlements to receive superannuation as a result of complex laws that 'deem' independent contractors to be treated as employees in certain circumstances.

While the ATO provides a list of factors that they consider when assessing whether an individual is an employee or independent contractor this assessment has moved beyond the common law and provides that if a person works under a contract that is wholly or principally (more than half) for the labour of the person, the person is deemed to be an employee of the other party to the contract.

While subsequent case law and Superannuation Guarantee Rulings have elucidated a contract for a result was outside the scope of the description 'a contract that is wholly or principally for the labour of a person', there remains considerable uncertainty about who is an employee and who is a contractor for superannuation purposes.

Introduced in 1992, the Superannuation Guarantee Scheme requires employers to contribute a minimum level of superannuation support for employees to assist in creating funds for their retirements.

The superannuation framework obliges employers to contribute 9.5 percent of the 'ordinary time earnings' (OTE) of their eligible employees as a superannuation contribution. In general, OTE is salary and wages paid less bonuses, overtime and termination payments related to unused annual leave. However the calculation of OTE can be complex, particularly in an environment where wages, allowances and other entitlements are set out in Modern Awards.

The *Building and Construction General Onsite Award 2010* (Onsite Award) applies to employers and employees in the residential building industry. The Onsite Award provides for a range of additional entitlements that may or may not be considered OTE, for example, allowances paid because of working conditions, for example allowances for dirty work or working at heights should be included in OTE calculations whereas expense reimbursements for, for example, meals when working beyond a certain number of hours are not.

In some cases, the specific nature of the additional amount must also be considered. Under the Onsite Award a 'fares allowance' is paid regardless of whether or not an employee incurs any expense related to that travel. These amounts have been held to have no relationship to the actual cost of the travel incurred by the employee and is therefore not an 'expense' in the sense of being a reimbursement for costs incurred. In this case the 'fares allowance' was therefore considered to be part of an employee's OTE.[1]

A more recent example of these complexities is the treatment of annual leave loading for the purpose of OTE and the calculation of superannuation.

Most Modern Awards include provisions for the payment of annual leave loading. This is generally an additional payment of 17.5 percent provided to an employee on top of their base rate of pay during periods of annual leave.

Recently the ATO clarified there approach to the treatment of annual leave loading for the purposes of the calculation of superannuation on the basis that there had been uncertainty for employers in applying paragraph 238 of the Superannuation Guarantee Ruling SGR 2009/2 which states:

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[1] SGR 2009/2 paragraph 262-263

> *"By way of exception an annual leave loading that is payable under some awards and industrial agreements is not OTE if it is demonstrably referable to a notional loss of opportunity to work overtime. However, the loading is always included in 'salary or wages'."*

To date, employers have not made superannuation contributions in respect of annual leave loading entitlements. This was because historically the justification for annual leave loading was that it compensated employees on annual leave for a lost opportunity to work overtime and therefore was not treated as OTE.

The ATO have revised their position. Annual leave loading payments will now be treated as OTE and therefore subject to superannuation guarantee contributions. The ATO believes that there must be evidence that the purpose of the annual leave loading being paid to employees is "referable to a notional loss of opportunity to work overtime" in order to be excluded from OTE and the calculation of a superannuation liability.

An employer may introduce a policy specifically setting out the reason for annual leave loading. This must *"reflect the mutual understanding of both"* employee and employer regarding the reason for the payment of annual leave loading.

If employers determine that they have SG shortfalls for past quarters, (for example there is evidence to suggest their annual leave loading entitlement was for something other than overtime), the employer would be required to lodge a Super Guarantee Charge (SGC) statement.

The ATO does not have any power to waive any of the components of the SGC, which as outlined above includes an interest component and administration charge. The proposed amnesty may support employers disclosing shortfalls for past quarters.

HIA supports the broad policy intent of a compulsory superannuation scheme to provide an adequate level of retirement income, relieve pressure on the aged pension and increase national savings, however it is important to recognise that the SG Scheme has placed additional regulatory obligations upon employers to ensure that the correct amount is paid to their 'employees' at the right time, to the chosen fund and in the right manner.

It is HIA's position that the current administrative arrangements do not assist in ensuring the timely payment of SG contributions nor do they encourage employers to rectify missed contributions.

The Superannuation Guarantee Cross-Agency Working Group similarly observed that the current SGC and penalty regime may prevent employers from coming forward and could have the effect of harshly penalising 'honest employers' who make an inadvertent mistake, thereby discouraging reporting and rectification of underpayment.[2]

In HIA's experience, the majority of employers in the residential building industry do their best to meet these obligations whilst managing the additional red tape and monetary costs that the SG Scheme imposes on a business.

Application and operation of the amnesty under the Bill

HIA understands that to qualify for the amnesty under the Bill, the disclosure must:

- be made before the end of the amnesty period being 6 months from the date of Royal Assent;
- contain information that has not previously been disclosed to the ATO;
- be made in the approved form, which will generally include the super guarantee charge statement;
- relate to the March 2018 and earlier quarters; and

[2] *Superannuation Guarantee Non-compliance: A report to the Minister for Revenue and Financial Services Final Report* (31 March 2017) pg. 32

- be made before the ATO advises of any review or audit of super guarantee charge obligations (commonly referred to as an 'employer's obligations' audit).

HIA have two concerns with these amnesty criteria.

HIA understands that in order to target historical non-compliance the proposed amnesty would not apply to certain time periods.

The Bill proposes that the amnesty period would begin on 24 May 2018 and end six months after the legislation receives Royal Assent. It is also proposed that beneficial treatment provided by the amnesty is available for a quarter that ends at least 28 days before the start of the amnesty period (proposed clause 74(1)(b) of the Bill) but will not be available to quarters within the amnesty period.

The Explanatory Materials highlight that:

> *"This means that the beneficial treatment provided by the amnesty is available in relation to the quarter starting on 1 July 1992 (which is the day the Superannuation Guarantee Charge Act 1992 commenced) and all subsequent quarters until and including the quarter starting on 1 January 2018. An employer will not be able to benefit from the amnesty for SG shortfall relating to the quarter starting on 1 April 2018 or subsequent quarters."*[3]

There is now a longer period of time than originally envisaged that the amnesty will **not** apply to.

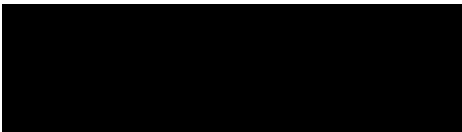
Employers who may have taken advantage of the amnesty when the legislation was first introduced on 24 May 2018 should now not be disadvantaged due to the failure of the Bill to pass the Senate and the lapsing of the Bill due to the Federal election. HIA sees no detriment in allowing more current non-payment periods to be captured by the amnesty.

HIA recommends that in a similar approach to that taken in May 2018, the amnesty apply for a period of 12 months from 19 September 2019, the day the Bill was introduced, and apply to a quarter that ends at least 28 days before the start of the amnesty period being up to and including the quarter starting on 1 April 2019. An employer would not be able to benefit from the amnesty relating to a quarter starting on 1 July 2019 or subsequent quarters.

As outlined above it is HIA's view that the current administrative arrangements do not assist in ensuring the timely payment of SG contributions nor do they encourage employers to rectify missed contributions. Therefore HIA sees no reason why the amnesty should not apply to quarters within the amnesty period, particularly if the amnesty period is to commence from 24 May 2018.

HIA asks that the Committee recommend that the Bill be passed.

Yours sincerely
HOUSING INDUSTRY ASSOCIATION LIMITED



Melissa Adler
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[3] Paragraph 1.27