Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019

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Date introduced: 18 September 2019
House: House of Representatives
Portfolio: Treasury
Commencement: Schedule 1, items 1 to 9 commence on the first 1 January, 1 April, 1 July or 1 October following Royal Assent.
Schedule 1, items 10 to 12, and item 14 commence on 24 May 2018.
Schedule 1, item 13 commences six months after Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at February 2020.
Purpose of the Bill
The Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019 (the Bill) proposes amendments to superannuation and related tax laws to encourage the recovery of unpaid Superannuation Guarantee (SG) by introducing a temporary amnesty from late payment penalties for employers who disclose that they have underpaid SG in the past.

History of the Bill
The Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018 (the 2018 Bill) was introduced into Parliament on 24 May 2018. It passed the House of Representatives and was introduced into the Senate, before lapsing at the dissolution of the 45th Parliament on 1 July 2019. The 2018 Bill contained four schedules. The second, third and fourth schedules have been subsequently legislated by the Treasury Laws Amendment (2018 Superannuation Measures No. 1) Act 2019 which gained assent on 2 October 2019. Further details about these schedules can be found in the Library’s Digest for the Bill for that Act.1

The Bill reintroduces the first schedule from the 2018 Bill, and is not substantively different to Schedule 1 of the 2018 Bill. A Bills Digest was prepared for the 2018 Bill.2 Much of the material in this Bills Digest has been sourced from that earlier Digest.

Structure of the Bill
The Bill contains one schedule, which proposes amendments to the Income Tax Assessment Act 1997 (ITAA97) and the Superannuation Guarantee (Administration) Act 1992 (SGAA) to introduce an amnesty from certain penalties for employers who inform the Australian Taxation Office (ATO) that they have a historic SG shortfall.

Committee consideration

Senate Standing Committee on Economics
The 2018 Bill was referred to the Senate Economics Legislation Committee for inquiry. Details of the inquiry are at the Inquiry homepage. Former Schedule 1 was heavily discussed and there were differing views from submitters to the inquiry on the need for the proposed amnesty.3 Australian Labor Party (ALP) members of the Committee issued a Dissenting Report, recommending that Schedule 1 of the Bill be rejected, arguing that the amnesty had not been requested by stakeholders and could be ‘counterproductive to broader compliance efforts’.4

The Bill was also referred to the Senate Economics Legislation Committee for inquiry and report by 7 November 2019. Details of the inquiry are at the Inquiry homepage. The Committee’s final report recommended passage of the Bill, together with the development by the ATO of a ‘communication strategy to maximise employer awareness and engagement with the superannuation guarantee amnesty’.5 In their Dissenting Report, the ALP Senators on the

4. Ibid., pp. 17–24.
Committee disputed that the amnesty would lead to change in behaviour by non-complying employers and recommended that the Bill be opposed.  

**Senate Standing Committee for the Scrutiny of Bills**

The Senate Standing Committee for the Scrutiny of Bills (the Scrutiny Committee) considered the Bill in its **Scrutiny Report** of 17 October 2019. The Scrutiny Committee had no comments in regards to the Bill.

**Policy position of non-government parties/independents**

In speaking on the 2018 Bill, the ALP indicated that it does not support the proposed amnesty for employers who have unpaid SG amounts, arguing that employers who have done the wrong thing should face penalties. The ALP has continued its opposition to the reintroduced Bill, in particular noting the advantage gained by businesses who have unpaid superannuation over extended periods of time when compared with businesses doing the right thing.

In the House of Representatives, all independent members voted in favour of the Bill. Australian Greens MP Adam Bandt voted against the Bill.

In the House of Representatives, Centre Alliance MP Rebekha Sharkie supported the introduction of the amnesty; however, she noted that Centre Alliance would further consider the position of the Bill in the Senate and ultimately did not participate in the final vote in the House of Representatives.

The policy position of other non-Government parties and independents is not known at the time of writing.

**Position of major interest groups**

The Senate Economics Legislation Committee inquiry received 12 submissions on the Bill. These submissions are discussed below in the **Key issues** section.

**Financial implications**

According to the Explanatory Memorandum to the Bill these measures are expected to increase revenue by $99 million over the 2018–19 Budget forward estimates period. Treasury estimates that the proposed amnesty (in conjunction with supporting measures such as extra powers to the ATO and Single Touch payroll) will result in an additional $230 million of SG being paid, over and above usual compliance activities, to around 50,000 employees.

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11. Ibid.


Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

Parliamentary Joint Committee on Human Rights

The Parliamentary Joint Committee on Human Rights considers that the Bill does not raise any human rights concerns.

Schedule 1 – Superannuation Guarantee Amnesty

Background

The Bill introduces a one-off amnesty for employers that disclose to the Commissioner of Taxation (the Commissioner) that they have an outstanding unpaid SG amount for their employees (an ‘SG shortfall amount’). The amnesty is available from 24 May 2018 until six months after the Bill receives Royal Assent.

The amnesty provides relief from penalties that could otherwise be imposed on employers who fail to meet their SG obligations. The employer to which the amnesty is provided is still obliged to pay the SG shortfall amount (meaning that the employee still receives their superannuation) as well as an interest amount applied to the shortfall.

The Superannuation Guarantee (SG)

The SG is the minimum amount that employers are required to contribute to the superannuation accounts of their employees. It is currently set at 9.5 per cent of the employee’s ordinary time earnings (OTE) and is scheduled to progressively increase to 12 per cent by 2025–26. An employer is required to make payments of SG amount to their employee’s superannuation fund at least quarterly.

Like salary and wages expenses, SG amounts paid by an employer are generally deductible expenses for income tax purposes.

The Superannuation Guarantee Gap (SG Gap)

The SG Gap represents the difference between the amount of SG that employers are legally required to pay and the actual amount paid into employees’ superannuation funds.

The ATO has estimated that the SG Gap in 2016–17 was $2.3 billion, representing 3.9 per cent of the total SG payments that employers were required to make.

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15. The Statement of Compatibility with Human Rights can be found at page 27 of the Explanatory Memorandum to the Bill.
The Superannuation Guarantee Charge (SGC)

If an employer has failed to pay their SG liability for the quarter on time then the employer may have to lodge a Superannuation Guarantee Charge (SGC) statement, or following an audit, the ATO may raise a SGC liability against that employer. The SGC amount is made up of:

- the SG shortfall amount for the quarter, which is transferred by the ATO to the employee’s superannuation account
- interest on the shortfall amount, currently charged at ten per cent per annum, also paid to the employee’s superannuation account and
- an administration fee of $20 (per employee, per quarter) paid to the ATO.\(^{22}\)

Unlike SG amounts, SGC amounts are not deductible expenses for income tax purposes.\(^{23}\)

In addition, penalties may apply to employers who do not meet their SG obligations. These penalties include:

- the general interest charge, currently 7.91 per cent per annum, which is imposed if the SGC is not paid by the due date\(^ {24}\) and
- penalties under Part 7 of the SGAA, of up to double the amount of SGC, including for failing to keep records and failing to lodge a SGC statement.\(^ {25}\)

In addition, the Treasury Laws Amendment (2018 Measures No. 4) Act 2019—which received assent on 1 March 2019—introduced increased penalties, including possible prison terms, for failing to comply with SG obligations.\(^ {26}\)

**Key provisions**

**Relief provided by the amnesty**

The granting of an amnesty provides employers relief from the following penalties:

- section 26-95 of the ITAA97, which prevents the deduction of SGC penalties from assessable income for tax purposes does not apply, meaning that SGC amounts to which the amnesty applies are deductible (proposed subsection 26-95(2) of the ITAA97, at item 2 of Schedule 1 to the Bill)
- the administration component of the SGC does not apply to the shortfall amount covered by the amnesty (proposed subsection 32(2) of the SGAA, at item 11 of Schedule 1) and
- the employer is not liable for any Part 7 penalties in respect of an amount of SG shortfall that qualifies for the amnesty (proposed section 60 of the SGAA, at item 12 of Schedule 1).\(^ {27}\)

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27. Explanatory Memorandum, Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019, p. 16.
However the amount of the SGC that is a SG shortfall amount or the interest on that shortfall amount is still payable by the employer to ensure that the employee still gets their full SG entitlement.\textsuperscript{28}

The amnesty period

The amnesty period is the period starting on 24 May 2018 (the day the SG amnesty was first announced) and ending six months after the Bill receives Royal Assent (proposed subsection 74(3) of the SGAA, at item 14 of Schedule 1).

Qualifying for an amnesty

Item 14 inserts proposed section 74 into the SGAA to provide an amnesty in relation to historic shortfalls in SG liability in a quarter (‘the shortfall quarter’). In order to qualify for an amnesty:

- an employer must disclose to the Commissioner, during the amnesty period, that they have a ‘superannuation guarantee shortfall’ for a historic amount. The amount cannot have been previously disclosed to the Commissioner before the start of the amnesty period (proposed paragraph 74(1)(a) of the SGAA)
- the amnesty period must have started after the end of the period of 28 days following the end of the relevant shortfall quarter (proposed paragraph 74(1)(b) of the SGAA) and
- the Commissioner has not, at any time before the disclosure, informed the employer that the ATO is examining or intends to examine a SG shortfall amount for that shortfall quarter (proposed paragraph 74(1)(c) of the SGAA).

If the employer would have had an SG shortfall without the disclosure (for example, they have already been assessed as having such a shortfall) the amnesty only applies to the amount of additional SG shortfall that was declared by the employer in seeking the amnesty (proposed subsection 74(2) of the SGAA).

Ceasing to qualify for an amnesty

The Commissioner may notify an employer that they cease to qualify for an amnesty and are taken to have never qualified for an amnesty if:

- the employer has not paid the SGC amount to which the amnesty applies on or by the day that the SGC becomes payable (proposed subparagraph 74(5)(a)(i) of the SGAA) and
- has not entered into an arrangement with the Commissioner that includes payment of the outstanding SGC amount (proposed subparagraph 74(5)(a)(ii) of the SGAA) or
- the employer has entered into such an arrangement and has failed to comply with it (proposed paragraph 74(5)(b) of the SGAA).

The result of an amnesty no longer applying would be that penalties which would have applied but for the amnesty would again apply (as if the amnesty were never granted). The Explanatory Memorandum states that the Commissioner can unwind any benefits provided under the amnesty by amending the assessments of the employer, which could result in the employer owing the ATO an amount of tax.\textsuperscript{29}

\textsuperscript{28} Ib\textit{id.}, p. 12.

\textsuperscript{29} Ib\textit{id.}, p. 13.
Limits on remission for non-disclosure

Subsection 62(1) in Part 7 of the SGAA requires the Commissioner to make an assessment of the additional SGC payable by an employer who fails or refuses to provide a statement or information as required under the Act, and to give written notice of the assessment to the employer as soon as practicable. The maximum amount of additional SGC payable (referred to as a Part 7 penalty) is 200 per cent of the amount of SGC payable for the relevant quarter. The Commissioner has discretion to remit all or part of the Part 7 penalty.

Item 13 inserts proposed subsections 62(4) and (5) into the SGAA to limit the Commissioner’s ability to remit a Part 7 penalty payable for periods covered by the amnesty, where the employer has failed to disclose, in the amnesty period, information relevant to an amount of SG shortfall. Item 13 commences six months after the Bill receives Royal Assent—that is, immediately after the amnesty period has concluded. This amendment was not included in the 2018 Bill. The Explanatory Memorandum to the Bill states that the amendment:...

...strengthens the operation of the amnesty by providing employers with higher minimum penalties for failing to come forward during the amnesty in relation to historical SG shortfalls.

In situations where an employer is liable to pay a Part 7 penalty for a quarter that started on or before 1 January 2018 and did not, during the amnesty period, disclose to the Commissioner information relevant to the amount of the employer’s SG shortfall for that period, or only disclosed the information after being informed that their SG compliance was going to be examined, then the Commissioner may remit no more than half the Part 7 penalty. That is, the Commissioner cannot remit a Part 7 penalty below 100 per cent of the SGC payable.

This limitation on the Commissioner’s power does not apply if the Commissioner is satisfied that the employer faced exceptional circumstances that prevented them from disclosing the information in the amnesty period (proposed subsection 62(5) of the SGAA). ‘Exceptional circumstances’ are not defined in the Bill, but the Explanatory Memorandum notes that ‘there has been extensive judicial commentary on the meaning of the phrase ‘exceptional circumstances’ and words of like import in various different legislative contexts’, which will be relevant to the interpretation of the phrase in the context of remission of a Part 7 penalty.

Key issues

Support for the amnesty

The submissions to the Senate Economics Legislation Committee inquiry into the Bill disagree on the need for an amnesty.

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31. Ibid., subsection 62(3).
33. Proposed subsection 62(4) of the SGAA at item 13 of Schedule 1 to the Bill.
34. Explanatory Memorandum, Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019, p. 17.
35. Ibid., p. 19.
Representatives of industry and employers, including the Housing Industry Association Ltd (HIAL) and the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) support the amnesty.\textsuperscript{36}

The Association of Superannuation Funds of Australia supports the proposed amnesty.\textsuperscript{37} Industry Superannuation Australia (ISA) supports the intention of the amnesty, but suggests the amnesty needs to be accompanied by strong penalties and clear messaging that there would be no further amnesties.\textsuperscript{38}

The Australian Council of Trade Unions (ACTU) argues against the amnesty, in particular highlighting that the amnesty does not provide any benefit for workers whose super was unpaid by now insolvent or wound-up companies.\textsuperscript{39} The ACTU also noted that, as businesses only needed to keep records for five years, the amnesty was unlikely to recover historical outstanding superannuation.\textsuperscript{40} Unions Tasmania made a similar submission which noted that it supports the submission made by the ACTU.\textsuperscript{41}

Law firm Hall & Wilcox supported the amnesty, but noted that when an employer seeks to amend a past SG assessment that leads to an increased liability to SGC, they may be subject to an additional penalty under Subdivision 284-B of Schedule 1 to the \textit{Taxation Administration Act 1953} for making false or misleading statements to the Commissioner.\textsuperscript{42} The submission urges further amendments to the Bill to provide protection from Subdivision 284-B penalties under the amnesty, or that the Commissioner amend administrative guidance to specify that such penalties will be remitted in relation to employers eligible for the amnesty.\textsuperscript{43} The Senate Economics Legislation Committee sought clarification on this issue from The Treasury, which advised:

\begin{quote}
The ATO has advised that in all but the most egregious cases (for example, where an entity has intentionally made repeated false statements which result in very large SGC shortfall amounts), where an employer makes a voluntary Amnesty disclosure as provided for under the Bill, s284-75 penalties will not be applied by the Commissioner - they will be remitted in full.\textsuperscript{44}
\end{quote}

\textsuperscript{36} See \underline{Submissions} to the Senate Economics Legislation Committee, \textit{Inquiry into the Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019}.

\textsuperscript{37} Ibid.

\textsuperscript{38} Industry Superannuation Australia, \underline{Submission} to the Senate Economics Legislation Committee, \textit{Inquiry into the Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019}, [Submission no. 7], October 2019, p. 1.

\textsuperscript{39} Australian Council of Trade Unions, \underline{Submission} to the Senate Economics Legislation Committee, \textit{Inquiry into the Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019}, [Submission no. 9], October 2019, p. 3.

\textsuperscript{40} Ibid., p. 2.

\textsuperscript{41} Unions Tasmania, \underline{Submission} to the Senate Economics Legislation Committee, \textit{Inquiry into the Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019}, [Submission no. 4], October 2019, p. 1.

\textsuperscript{42} Hall and Wilcox, \underline{Submission} to the Senate Economics Legislation Committee, \textit{Inquiry into the Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019}, [Submission no. 12], 7 October 2019, p. 2.

\textsuperscript{43} Ibid., p 3.

\textsuperscript{44} The Treasury, \textit{Re: Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019}, 14 October 2019, p. 1.
Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019