2019

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

TREASURY LAWS AMENDMENT (RECOVERING UNPAID SUPERANNUATION) BILL 2019

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Housing and Assistant Treasurer, the Hon Michael Sukkar MP)
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The following abbreviations and acronyms are used throughout this Explanatory Memorandum.

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Definition</th>
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<tbody>
<tr>
<td>ATO</td>
<td>Australian Taxation Office</td>
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<tr>
<td>Commissioner</td>
<td>Commissioner of Taxation</td>
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<tr>
<td>ITAA 1997</td>
<td><em>Income Tax Assessment Act 1997</em></td>
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<tr>
<td>SG</td>
<td>Superannuation guarantee</td>
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<tr>
<td>SGAA 1992</td>
<td><em>Superannuation Guarantee (Administration) Act 1992</em></td>
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General outline and financial impact

Superannuation guarantee amnesty

The Superannuation guarantee amnesty provides for a one-off amnesty to encourage employers to self-correct historical SG non-compliance.

The amendments also limit the Commissioner’s ability to remit penalties for historical SG non-compliance, where an employer fails to disclose information relevant to their historical SG shortfall. This is intended to strengthen the operation of the amnesty through legislated minimum penalties on employers who fail to come forward.

This complements the Government’s package of reforms to improve SG compliance, which were recently enacted through the Treasury Laws Amendment (2018 Measures No. 4) Act 2019. The recent reforms improve the visibility of SG payments to the ATO, introduce stronger penalties for non-compliance and ensure more reliable collection of liabilities for unpaid SG in the future.

Date of effect: The amendments generally apply from 24 May 2018.

Proposal announced: The majority of the amendments in this Schedule were previously introduced on 24 May 2018 in the House of Representatives as part of the Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018. The amendments ensuring a minimum penalty applies for employers that do not voluntarily disclose historical SG non-compliance during the amnesty period were announced on 14 November 2018 during an address by the then Assistant Treasurer, the Hon Stuart Robert MP to the Association of Superannuation Funds of Australia. The amendments extending the original 12-month amnesty period have not previously been announced.

Financial impact: The measure is estimated to result in a gain to the budget of $99 million in fiscal balance terms over the period 2018-19 to 2022-23, with the following profile:

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<tr>
<td></td>
<td>$43m</td>
<td>-$10m</td>
<td>$32m</td>
<td>$22m</td>
<td>$12m</td>
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Human rights implications: This Bill does not raise any human rights issue. See Statement of Compatibility with Human Rights — Chapter 2, paragraphs 2.1 to 2.6.

Compliance cost impact: Nil.
Chapter 1
Superannuation guarantee amnesty

Outline of chapter

1.1 The Superannuation guarantee amnesty provides for a one-off amnesty to encourage employers to self-correct historical SG non-compliance.

1.2 The amendments also limit the Commissioner’s ability to remit penalties for historical SG non-compliance, where an employer fails to disclose information relevant to their historical SG shortfall. This is intended to strengthen the operation of the amnesty through legislated minimum penalties on employers who fail to come forward.

1.3 This complements the Government’s package of reforms to improve SG compliance, which were enacted through the Treasury Laws Amendment (2018 Measures No. 4) Act 2019. The recent reforms improve the visibility of SG payments to the ATO, introduce stronger penalties for non-compliance and ensure more reliable collection of liabilities for unpaid SG in the future.

1.4 All legislative references in this chapter are to the SGAA 1992 unless otherwise stated.

Context of amendments

1.5 The SG rules are set out in the SGAA 1992. These rules ensure that employees have a minimum level of superannuation contributions in respect of their employment. The rules achieve this by imposing a tax (the SG charge) on employers who fail to contribute a minimum percentage of their employees’ ordinary time earnings into superannuation. Avoiding a liability to this charge provides employers with an incentive to make contributions on behalf of their employees.

1.6 Employers are liable to pay to the Commissioner an amount of SG charge equal to their ‘SG shortfall’ for a quarter, which is worked out by adding together the following amounts for the quarter:

- the total of the employer’s individual SG shortfalls (which are amounts representing the amount by which an employer has fallen short of contributing the minimum percentage for a particular employee);
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- the employer’s nominal interest component, which is the amount of interest on the total of the employer’s individual SG shortfalls for the quarter calculated from the beginning of the relevant quarter until the date SG charge is payable; and
- the employer’s administration component, which is $20 per employee in respect of whom the employer has an individual SG shortfall for the quarter.

1.7 Generally, an employer can deduct from their assessable income contributions they make on behalf of their employees that reduce the employer’s SG shortfall. However, consistent with the treatment of other taxes, SG charge is not deductible. Late contributions that an employer has elected to offset against their SG charge liability are also not deductible.

1.8 Failure to contribute a minimum percentage of their employee’s ordinary time earnings to a complying superannuation fund for the benefit of the employee by the required time under the SGAA 1992 can result in liability to pay the following amounts to the Commissioner:

- SG charge (composed of the total of individual SG shortfalls, nominal interest, and the $20 per employee per quarter administration component – described above);
- penalties (known as ‘Part 7 penalties’) for failing or refusing to provide a statement or information as required under the SGAA 1992, which can be up to 200 per cent of the amount of the underlying SG charge; and
- general interest charge imposed where SG charge or Part 7 penalties are not paid by the due date.

1.9 The SGAA 1992 includes rules to ensure that components of SG charge reflecting an individual employee’s SG entitlement collected from employers by the Commissioner and any related general interest charge on unpaid amounts of SG charge are applied for the employee’s benefit. For example, the Commissioner is generally required to pay to the relevant employee’s superannuation account the individual SG shortfall for the employee for the quarter, any nominal interest component for the quarter and any related general interest charge that has accrued at that time.

Summary of new law

1.10 The amendments encourage employers to voluntarily disclose historical SG non-compliance and pay an employee’s full entitlement including the employee’s individual shortfall, nominal interest, and any related general interest charge on unpaid amounts of SG charge.
1.11 They achieve this outcome by providing a one-off amnesty to allow employers to claim tax deductions for payments of SG charge or contributions made during the amnesty period to offset SG charge, as well as reducing penalties and fees that may otherwise apply in relation to historical SG non-compliance to nil.

1.12 In general terms, to qualify for the amnesty an employer must disclose to the Commissioner information related to an SG shortfall for a quarter that ends at least 28 days before the start of the amnesty period.

1.13 The Commissioner may notify an employer that they have ceased to qualify for the amnesty if the employer fails to pay, or enter into and comply with arrangements to pay, any SG charge imposed on the disclosed shortfall for the quarter. This means the employer will lose all benefits from the amnesty.

1.14 From the day after the amnesty period ends, the amendments limit the Commissioner’s ability to remit Part 7 penalties in certain circumstances. This limit ensures that the Commissioner cannot remit penalties imposed under section 59 below 100 per cent of the amount of SG charge payable by the employer for a historical quarter that was covered by the amnesty where the employer did not disclose the shortfall as part of the amnesty.

1.15 The restriction of the Commissioner’s general discretion to remit penalties 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.

Comparison of key features of new law and current law

<table>
<thead>
<tr>
<th>New law</th>
<th>Current law</th>
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<tbody>
<tr>
<td><strong>Deductibility of payments of SG charge and contributions offset against SG charge</strong></td>
<td></td>
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<tr>
<td>To the extent that SG charge is imposed in relation to SG shortfall qualifying for the beneficial treatment under the amnesty, payments in respect of that SG charge made during the amnesty period are deductible.</td>
<td>SG charge and contributions offset against SG charge are not deductible.</td>
</tr>
<tr>
<td>To the extent that contributions are offset against SG charge imposed in relation to SG shortfall qualifying for the beneficial treatment under the amnesty, contributions made during the amnesty period are deductible.</td>
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**Administration component of SG charge**

| An employer is liable to pay SG charge equal to their SG shortfall. However, where an employer qualifies for the amnesty, their SG shortfall for a quarter does not include an administrative component for employees in respect of whom the employer has an individual SG shortfall that was only identified because of a disclosure under the amnesty. | An employer is liable to pay SG charge equal to their SG shortfall. An employer’s SG shortfall for a quarter includes an administrative component of $20 per employee in respect of whom the employer has an individual SG shortfall for the quarter. |

**Liability to pay penalties under Part 7**

| An employer’s liability to pay penalties calculated under Part 7 for a quarter is reduced by the extent to which the employer qualifies for the amnesty for the quarter. | An employer that fails or refuses to provide a statement or information as required under the SGAA 1992 may be liable for a penalty under Part 7. The maximum amount of penalty payable is equal to double (200 per cent of) the amount of SG charge payable by the employer for the relevant quarter. |

**Commissioner’s ability to remit Part 7 penalties**

| Generally, the Commissioner cannot remit penalties imposed under section 59 below 100 per cent of the amount of SG charge payable by the employer for a historical quarter covered by the amnesty. This restriction of the Commissioner’s general discretion to remit penalties applies starting from the end of the amnesty period where the employer has failed to disclose to the Commissioner information that is relevant to the amount of the employer’s SG shortfall for a historical quarter covered by the amnesty. The Commissioner’s ability to remit a Part 7 penalty will be unaffected where the Commissioner is satisfied that ‘exceptional circumstances’ prevented an employer from disclosing information relevant to the amount of the employer’s historical SG shortfall after the start of the amnesty period. | The Commissioner has the power to remit all or part of the Part 7 penalty payable by an employer. |
Detailed explanation of new law

1.16 These amendments provide a one-off amnesty with reduced penalties and fees to encourage employers to disclose historical SG non-compliance and pay any SG charge imposed in relation to the disclosed SG shortfall. To further encourage payment of SG, the amnesty allows employers who qualify for the amnesty to claim tax deductions for payments of SG charge and contributions made to offset SG charge made during the amnesty period.

1.17 Specifically, an employer that qualifies for the amnesty in relation to their SG shortfall for a quarter:

• has no administrative component in respect of employees in respect of whom the employer has an individual SG shortfall that was only identified because of a disclosure under the amnesty;
• has no penalties under Part 7 in respect of amounts of SG shortfall that qualify for the amnesty; and
• can deduct payments made in relation to SG charge imposed on the SG shortfall, or contributions that are offset against the SG charge, that are made during the amnesty period.

1.18 To further incentivise take-up, these amendments limit the Commissioner’s ability to remit Part 7 penalties in certain circumstances, which ensures employers have higher minimum penalties for failing to come forward during the amnesty in relation to historical SG shortfalls.

1.19 This limitation ensures that the Commissioner cannot remit penalties imposed under section 59 below 100 per cent of the amount of SG charge payable by the employer for the relevant quarter other than in exceptional circumstances.

Requirements for an employer to qualify for the amnesty in relation to historical amounts of SG shortfall

1.20 An employer qualifies for the beneficial treatment provided by the amnesty in relation to the employer’s SG shortfall for a quarter covered by the amnesty if:

• during the amnesty period the employer discloses to the Commissioner, in the approved form, information that relates to the amount of SG shortfall for the first time; and
• the Commissioner has not, at any time before the disclosure, informed the employer that the Commissioner is examining (or that the Commissioner intends to examine), the
employer’s compliance with an obligation to pay SG charge for the quarter; and

• the employer has not been disqualified from the beneficial treatment under the amnesty. [Schedule 1, item 14, subsections 74(1) and (4)]

1.21 However, if despite the disclosure, an employer would still have had an SG shortfall for the quarter, the employer’s SG shortfall is covered by the amnesty only to the extent that it resulted in the SG shortfall being increased. [Schedule 1, item 14, subsection 74(2)]

1.22 This reflects the fact that an employer has a single SG shortfall for a quarter. In some cases, an employer may have already been assessed as having an SG shortfall for a quarter prior to the amnesty. Where this occurs, it would be inappropriate for a disclosure that resulted in an employer having a greater amount of SG shortfall for the quarter obtaining the benefit of the amnesty in respect of the original amount of SG shortfall.

Disclosures must be made in the amnesty period

1.23 To qualify for the amnesty, a disclosure must be made during the amnesty period. [Schedule 1, item 14, paragraph 74(1)(a)]

1.24 The amnesty period is the period that started on 24 May 2018 and ends 6 months after the day this Act receives the Royal Assent. [Schedule 1, item 14, subsection 74(3)]

1.25 The amnesty was first publically announced on 24 May 2018, which is the day the Bill that originally contained the amnesty measure (Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018) was introduced into the House of Representatives.

Disclosure must relate to quarters covered by the amnesty

1.26 The beneficial treatment provided by the amnesty is available for a quarter that ends at least 28 days before the start of the amnesty period. [Schedule 1, item 14, paragraph 74(1)(b)]

1.27 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.

1.28 This ensures that the amnesty addresses historical non-compliance and is not available for non-compliance that occurs after the amnesty is announced.
Examination of compliance with obligation to pay SG charge

1.29 For a disclosure in respect of a quarter to qualify for the amnesty, the Commissioner must not have, at any time before the disclosure, informed the employer that they are examining, or intend to examine, the employer’s compliance with their obligation to pay SG charge in relation to the quarter. [Schedule 1, item 14, paragraph 74(1)(c)]

1.30 This timing requirement reflects that the amnesty is only available to employers that come forward about their non-compliance and is not intended to provide protection for non-compliance identified through other ATO compliance activity.

1.31 For the purposes of these amendments, ‘examination' takes its ordinary meaning. The Australian Oxford Dictionary, 2004 Oxford University Press, Melbourne (the Australian Oxford Dictionary), defines 'examination' as meaning 'the act or an instance of examining'. 'Examine' is in turn defined in the Australian Oxford Dictionary as meaning to 'inquire into the nature or condition etc. of', 'look closely or analytically at'.

1.32 The Commissioner’s views on the meaning of ‘examination’ in the context of disclosures more generally is explained in the ATO’s ruling ‘MT 2012/3 Administrative penalties: voluntary disclosures’. That is, the term 'examination' is very broad and covers not only traditional audits the Commissioner undertakes to ascertain an entity's tax-related liability but any examination of an entity's affairs. A range of compliance activities undertaken by the Commissioner may involve an examination of an entity's affairs including reviews, audits, verification checks, record-keeping reviews/audits and other similar activities.

First time disclosure has occurred

1.33 To qualify for the amnesty, the disclosure must relate to an amount of SG shortfall that has not previously been disclosed to the Commissioner. [Schedule 1, item 14, subparagraph 74(1)(a)(ii)]

1.34 An employer that has come forward before the start of the amnesty period will not benefit from the amnesty by disclosing an amount of SG shortfall that has previously been disclosed to the Commissioner (that is, by disclosing an amount included in an existing SG charge assessment). These amendments are designed to provide employers with an incentive to come forward with information about historical underpayment of superannuation, rather than provide reduced penalties or charges for past disclosures made by an employer.

1.35 An employer may still qualify for beneficial treatment under the amnesty if the employer has previously made disclosures about their SG shortfall for a quarter but comes forward with information about additional amounts of SG shortfall for the quarter. This could be the case
where an employer has previously lodged a SG statement for the quarter which understated the amount of SG shortfall. If the employer otherwise met the qualifying conditions of the amnesty, the employer could obtain beneficial treatment in relation to the additional matters disclosed under the amnesty.

**Disclosure must be in the approved form**

1.36 To qualify for the beneficial treatment under the amnesty, an employer must make the disclosure in the approved form. *[Schedule 1, item 14, paragraph 74(1)(a)]*

1.37 Requiring the disclosure to be in the approved form allows the Commissioner to specify the information and manner of providing the information that is necessary for the disclosure to be effective.

1.38 The approved form for the disclosure is expected to include a SG statement. Under the SGAA 1992, the first SG statement for a quarter has effect as an assessment of the employer’s SG shortfall for the relevant quarter and the SG charge payable on the shortfall.

**Paying SG charge or making contributions to offset liability to SG charge**

1.39 Generally, under the SGAA 1992, SG charge (imposed on SG shortfall disclosed under the amnesty) is due and payable on the day the SG statement is lodged. If an employer qualifies for the amnesty for a quarter, the SG charge for that quarter will comprise the total of individual shortfalls and the nominal interest.

1.40 Where an employer has the capacity to pay on the day they make the disclosure and does not have an existing SG charge assessment for the quarter, the employer may choose to make contributions (of the employee’s individual shortfall and nominal interest) directly into an employee’s superannuation account and elect to offset these amounts against their liability for SG charge in accordance with section 23A.

1.41 Employers who have an existing SG charge assessment for the quarter, or are otherwise unable to contribute directly into their employee’s superannuation accounts, will need to pay the SG charge (or amounts equal to the SG charge) to the Commissioner.

1.42 Employers must pay the components of the SG charge imposed on the disclosed amount that reflect their employees’ SG entitlements (individual SG shortfall for relevant employees and nominal interest), as well as any general interest charge imposed on overdue SG charge. This allows the Commissioner to deal with such amounts for the benefit of employees to ensure employees would still be paid their full SG entitlement.
1.43 Employers that have difficulty paying SG charge by the due date can negotiate with the Commissioner to pay the amount under a payment arrangement.

**Disqualification for failing to pay SG charge or enter into and comply with payment arrangement**

1.44 The Commissioner may, by written notice, disqualify an employer from the beneficial treatment provided by the amnesty if the employer has failed to:

- pay to the Commissioner amounts equivalent to any SG charge (imposed on the disclosed SG shortfall) on or before the day the SG charge becomes payable; or
- enter into a payment arrangement in relation to that amount; or
- comply with such a payment arrangement. [*Schedule 1, item 14, subsection 74(5)*]

1.45 The effect of such a notice is that the employer ceases to qualify, and is taken to have never qualified, for the amnesty in relation to the relevant amount of SG shortfall. [*Schedule 1, item 14, subsection 74(4)*]

1.46 In such cases, the Commissioner can unwind any benefits that have accrued to the employer under the amnesty by amending the assessments of the employer.

1.47 Requiring the Commissioner to issue a notice provides employers with certainty as to which quarters they cease to qualify for the amnesty.

1.48 For the purposes of working out whether the Commissioner may notify an employer that they have ceased to qualify for the amnesty, an employer is taken to have paid the SG charge that was disclosed under the amnesty if they have paid an amount equal to the amount of the SG charge that was disclosed. [*Schedule 1, item 14, subsection 74(6)*]

1.49 This ensures that employers that already had an outstanding SG charge debt prior to making a disclosure under the amnesty are not required to first clear that debt before having payments count for the purposes of the amnesty (which would otherwise be the case under the method for allocating payments under PSLA 2011/20 Payment and credit allocation). This approach ensures that employees who have been waiting longer for their unpaid superannuation will receive their unpaid superannuation first, but still provides an incentive for employers with an existing debt to come forward during the amnesty.

1.50 If an employer fully offsets their liability for SG charge by making contributions directly into an employee’s superannuation account (refer above), no SG charge will become payable. In this situation, the
Commissioner will not have the ability to disqualify an employer from qualifying for the amnesty.

1.51 Employers who enter into a payment arrangement with the Commissioner will not cease to qualify for the amnesty provided that they comply with the terms of the arrangement. [Schedule 1, item 14, subparagraph 74(5)(a)(ii) and paragraph 74(5)(b)]

1.52 Decisions of the Commissioner to disqualify an employer from the amnesty are not subject to merits review under the standard objection processes for tax administration decisions set out in Part IVC of the Taxation Administration Act 1953.

1.53 Generally, decisions involving the exercise of administrative discretion that may materially affect an individual’s interest should be subject to merits review. However, in this context disqualification can only occur based on objective circumstances. That is, an employer should cease to qualify for the amnesty if the employer has failed to pay or enter into and comply with a payment arrangement. These conditions are purely factual and there is no determination or opinion that the Commissioner must form. The amendments provide the Commissioner with discretion about whether to issue a disqualification notice only where such objective circumstances are present.

1.54 In this context, the exercise of discretion may only be used in favour of an employer to avoid potentially harsh or unintended outcomes arising from a strict operation of the law. For example, an employer that pays SG charge one day after the due date would technically have failed to comply with a payment arrangement. Rather than automatically disqualify such an employer from the beneficial treatment provided by the amnesty, administrative flexibility is provided to allow the Commissioner to accommodate instances of minor or technical non-compliance with the conditions of the amnesty where those conditions have been complied with in substance. This provides practical flexibility for the ATO to administer arrangements for payment in a manner consistent with the ATO’s existing debt recovery policy.

**Beneficial treatment available under the amnesty**

1.55 An employer who has an amount of SG shortfall for a quarter that qualifies for the amnesty:

- can claim deductions in respect of payments made in relation to SG charge and contributions that offset the charge to the extent the charge relates to the SG shortfall; and

- does not have any additional administrative components in respect of the SG shortfall; and
• is not liable to any Part 7 penalties for a failure to lodge an SG statement in respect of the shortfall by the time that they were required to do so under the SGAA 1992.

**Deductibility of payments of SG charge and offsetting contributions**

1.56 The amendments allow payments made in relation to SG charge imposed on SG shortfall disclosed under the amnesty to be deducted from an employer’s assessable income in accordance with the general deductibility rules in the ITAA 1997. The payments must be made during the amnesty period. Payments made after the end of the amnesty period will not qualify for a deduction, even if they relate to SG shortfalls disclosed under the amnesty. [*Schedule 1, items 1 and 2, subsections 26-95(1) and (2) of ITAA 1997*]

1.57 The payments may be deducted whether or not the Commissioner applies the payment to satisfy an employer’s liability to pay the charge imposed on the SG shortfall that qualifies for the amnesty. [*Schedule 1, item 2, paragraph 26-95(2)(b) of the ITAA 1997*]

1.58 This ensures that employers that already had an outstanding SG charge debt prior to making a disclosure under the amnesty are able to claim deductions for payments they make even though the Commissioner will first apply their payments to clear their existing debt.

1.59 An employer may deduct payments made in relation to SG charge imposed on SG shortfall disclosed under the amnesty up to the amount of the charge. [*Schedule 1, item 2, subsection 26-95(2) of the ITAA 1997*]

1.60 This ensures that an employer that has negotiated a payment arrangement with the Commissioner is able to claim deductions for part payments made during the amnesty period up to the value of the total SG charge imposed on the SG shortfall disclosed under the amnesty. Payments made in accordance with a payment arrangement that are not paid until after the end of the amnesty period will not qualify for a deduction.

1.61 Allowing such payments to be deductible provides an incentive for employers to voluntarily disclose historical underpayment of superannuation under the amnesty and pay SG charge to the Commissioner during the amnesty period.

1.62 The amendments also allow contributions that an employer has elected to offset against SG charge imposed on the SG shortfall disclosed in accordance with the amnesty to be deducted from an employer’s assessable income in accordance with the general deductibility rules in the ITAA 1997. The contributions must also be made during the amnesty period. [*Schedule 1, items 3 and 5, subsections 290-95(1) and (2) of ITAA 1997*]

1.63 This ensures commensurate benefits are provided for employers who contribute directly to their employees’ funds when disclosing under
the amnesty to the benefits for those who make payments in relation to SG charge and leave it to the Commissioner to distribute the amounts to the relevant funds.

**Administration component**

1.64 An employer does not have an administration component included in their SG shortfall in respect of an amount of SG shortfall to the extent that the amount qualifies under the amnesty. [*Schedule 1, items 10 and 11, subsections 32(1), (2) and (3)]*

1.65 As the administration component is charged on an employee-by-employee basis, this rule prevents an employer from having additional administration components added to their SG shortfall for a quarter as a result of the disclosure.

1.66 However, if an employer already had an administration component in respect of an employee because of a previous assessment (for example, one that occurred prior to the amnesty), the amnesty does not affect the previous administration component.

**Example 1.1- previous administration components**

An employer with 100 employees for a quarter covered by the amnesty previously had individual SG shortfalls identified in respect of 40 of those employees for the quarter.

Prior to the amnesty, the employer’s SG shortfall (calculated in respect of the 40 employees) included an administration component for each of those employees.

During the amnesty, the employer discloses that they recently became aware of a small individual SG shortfall in respect of all 100 of their employees. For the original 40 employees, this amount was in addition to the individual SG shortfalls originally identified.

As this disclosure occurred under the amnesty, the employer does not have an administration component included in their (increased) SG shortfall for the quarter. However, the employer still has an administration component in respect of the original 40 employees.

**Part 7 penalties**

1.67 An employer is not liable to Part 7 penalties for a failure to provide an SG statement by the time they were required to do so in respect of an amount of SG shortfall that is covered by the amnesty. [*Schedule 1, item 12, section 60]*

1.68 Although the Commissioner already has the power to remit penalties under Part 7, legislating the exemption from such penalties provides employers with greater certainty about the result of making a disclosure under the amnesty.
1.69 As with the approach in respect of an employer’s administration component, the exemption from Part 7 penalties does not reduce any historical penalties that were imposed in respect of a previously assessed amount of SG charge. Instead, the protection provided under the amnesty in respect of penalties only applies in respect of any further amounts of Part 7 penalties that an employer would be liable to as a result of making a disclosure under the amnesty.

Ensuring higher penalties apply for employers that do not come forward about historical SG shortfalls

1.70 From the day after the amnesty period ends, these amendments limit the Commissioner’s ability to remit Part 7 penalties in certain circumstances. This limit ensures that the Commissioner cannot remit penalties imposed under section 59 below 100 per cent of the amount of SG charge payable by the employer for a historical quarter that was covered by the amnesty. [Schedule 1, item 13, subsections 62(4) and (5)]

1.71 The restriction of the Commissioner’s general discretion to remit penalties 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.

Circumstances where the Commissioner’s ability to remit is restricted

1.72 Generally, from the day after the amnesty period ends the Commissioner’s ability to remit Part 7 penalties is restricted where after the start of the amnesty period, the employer has failed to disclose to the Commissioner information that is relevant to the amount of the employer’s SG shortfall for a historical quarter covered by the amnesty.

Historical quarters covered by the amnesty

1.73 The Commissioner’s ability to remit an SG shortfall penalty is unaffected for SG shortfalls relating to the quarter starting on 1 April 2018 and later periods. The amendment only constrains the Commissioner’s ability to remit penalties in relation to historical SG quarters covered by the amnesty (quarters starting on or before 1 January 2018). [Schedule 1, item 13, paragraph 62(4)(a)]

Disclosures after start of amnesty period

1.74 The Commissioner’s ability to remit an SG shortfall penalty is unaffected where either under the amnesty or following its conclusion, the employer comes forward with information relevant to the amount of their SG shortfall for a historical quarter covered by the amnesty. [Schedule 1, item 13, subparagraph 62(4)(c)(i)]

1.75 However, the Commissioner’s discretion to remit an SG shortfall penalty is restricted if prior to the disclosure the employer has
been notified by the Commissioner that the Commissioner is examining, or intends to examine the employer’s compliance with an obligation to pay the SG charge for the quarter. The Commissioner is not considered to have relevantly informed an employer of an examination of the employer’s compliance if the examination has previously concluded and the disclosure relates to additional amounts of SG shortfall for the quarter that were not identified as part of the examination. *[Schedule 1, item 13, subparagraph 62(4)(c)(ii)]*

1.76 Limiting the Commissioner’s ability to remit an SG shortfall penalty applying to employers who disclose historical shortfalls (in circumstances where the disclosure is not prompted by ATO compliance activity) would discourage disclosure and adversely affect some workers. This reasoning applies equally to disclosures made during the amnesty period and disclosures made following the conclusion of the amnesty period.

1.77 Generally, where a disclosure has been made during the amnesty period, it will not be necessary to rely on the Commissioner’s remission power to reduce the SG shortfall penalty to nil. This is because employers that qualify for the amnesty will have their liability to pay additional SG charge for the quarter reduced to nil. *[Schedule 1, item 12, section 60]*

1.78 However, it may be the case that where such a disclosure is made, an employer does not qualify for the amnesty (or is disqualified from the amnesty). Some examples are where:

- the employer is disqualified from the beneficial treatment under the amnesty for failing to pay the SG charged imposed on the disclosed SG shortfall by the due date;
- the employer does not qualify for the amnesty because the information was previously disclosed to the Commissioner before the amnesty period.

1.79 It is appropriate that the Commissioner retain full discretion to remit an SG shortfall penalty in these situations to allow the Commissioner to flexibly manage outcomes for an employer that comes forward during the amnesty but fails to qualify for (or is later disqualified from) the amnesty.

**Partial disclosure situations**

1.80 If an employer has partially disclosed SG shortfall for a particular quarter (prior to any notification from the Commissioner about an examination), the Commissioner’s ability to remit Part 7 penalties for the quarter is preserved in relation to the penalty amount associated with the disclosed shortfall. These amendments only restrict the Commissioner’s ability to remit the amount of the penalty associated with SG shortfall that has either not been disclosed or not disclosed prior to a
notification from the Commissioner about an examination. [*Schedule 1, item 13, subsection 62(4)*]

1.81 This outcome is achieved by the amendments providing that the Commissioner’s ability to remit Part 7 penalties is limited ‘to the extent that’ an amount of additional SG charge relates to particular information. The particular information that is relevant is the information that should have been disclosed (but either has not been disclosed or has not been disclosed prior to a notification from the Commissioner about an examination).

**Exceptional circumstances**

1.82 The Commissioner’s ability to remit Part 7 penalties will also be unaffected where the Commissioner is satisfied that ‘exceptional circumstances’ prevented an employer from either:

- disclosing information relevant to the amount of the employer’s historical SG shortfall after the start of the amnesty period; or
- disclosing such information before the Commissioner has notified the employer of an examination into their SG compliance.

[*Schedule 1, item 13, subsection 62(5)*]

1.83 There has been extensive judicial commentary on the meaning of the phrase ‘exceptional circumstances’ and words of like import in various different legislative contexts.

1.84 The principles that emerge from the cases considering the phrase ‘special circumstances’ are that:

- it is not possible to lay down precise rules for what constitutes special circumstances;
- the core idea of special circumstances is that there is something unusual to take the case outside the ordinary course; and
- in determining whether there are special circumstances in the context of the exercise of a discretion a decision maker must bear in mind the purpose for which the discretion is given.

1.85 Whilst these principles are drawn from cases considering the phrase ‘special circumstances’, the principles also apply to considering whether ‘exceptional circumstances’ exist for the purposes of these amendments. However, in determining whether there are exceptional circumstances in the context of rules constraining the exercise of a discretion, rather than a decision maker bearing in mind the purpose for which the discretion is given, it is relevant for the decision maker to bear in mind the purpose of limiting the discretion.
Purpose of the discretion and the purpose of limiting the discretion

1.86 The purpose of the Commissioner’s discretion to remit Part 7 penalties is to allow the Commissioner to consider the circumstances of each case in determining the penalty amount. The Commissioner’s approach when considering remission of Part 7 penalties is contained in Practice Statement Law Administration PS LA 2011/28 (PS LA 2011/28).

1.87 PS LA 2011/28 indicates that a decision on the remission of Part 7 penalties must consider the circumstances of the case including any effort made by an employer to comply with the obligation to self-assess their liability for SG charge. It is appropriate to have regard to any attempt by the employer to comply with their SG obligations, the employer’s compliance history and other relevant facts and circumstances (such as natural disaster, ill health of the employer and incorrect advice or guidance provided by the ATO).

1.88 The purpose of these amendments is to constrain the Commissioner’s discretion to remit a Part 7 penalty where the employer has failed to disclose their SG shortfalls after the start of the amnesty period. In the context of these amendments, whether ‘exceptional circumstances’ are present involves considering whether something unusual has actively prevented an employer from either disclosing information relevant to their SG shortfall after the start of the amnesty period or disclosing such information prior to being notified about the Commissioner’s examination into their SG compliance.

1.89 It would not be necessary or sufficient for the Commissioner to be satisfied that exceptional circumstances have actively prevented an employer from either making a contribution in respect of their employee during the relevant quarter or complying with the consequent SG reporting obligations by the due date. The exceptional circumstances must be in relation to a failure, since the start of the amnesty period, to either disclose information relevant to the amount of an employer’s historical SG shortfall or disclose such information prior to a notification about the Commissioner’s examination into their SG compliance. [Schedule 1, item 13, paragraphs 62(5)(a) and (b)]

1.90 If an employer were prevented from complying with their SG obligations (for any reason, which may include reasons involving exceptional circumstances), it would be expected that the employer would come forward and disclose their non-compliance to the ATO. The Commissioner’s discretion to remit a Part 7 penalty would be unaffected in situations where such a disclosure is made.

1.91 It is expected that the Commissioner will generally apply an interpretation of ‘exceptional circumstances’ that is consistent with judicial interpretation of other similar phrases, adapting the interpretation to this context as appropriate.
1.92 It is expected that circumstances that would fail to constitute ‘special circumstances’ would also fail to be considered ‘exceptional circumstances’. For example, the case law on the meaning of ‘special circumstances’ indicates that poor judgement or ignorance of the law on a taxpayer’s part, or poor professional advice received by that taxpayer, do not in themselves constitute special circumstances. Justice McKerracher in *Liwszyc v Commissioner of Taxation [2014] FCA 112* at paragraph 355 summarised this position as follows:

- ‘An innocent mistake or ignorance of the law does not in itself constitute a “special circumstance” nor do simple errors, albeit innocent errors or other mistakes which are made in good faith. Equally, the fact that an error was made by another person does not in itself constitute “special circumstances”.’

1.93 Such commentary lends weight to the view that ‘special circumstances’ or ‘exceptional circumstances’ would not generally be expected to cover cases where the following factors in isolation are present for an employer:

- receiving poor professional advice;
- being unaware of having SG shortfall for a historical quarter; or
- being ignorant of the amnesty and associated penalties.

**Example 1.2 Natural disaster preventing disclosure may constitute exceptional circumstances**

In the quarter starting on 1 April 2010, an employer did not pay their employees their full SG entitlement for that quarter due to a payroll software coding error of which they were unaware.

On 1 November 2010, all of the employer’s payroll records are destroyed by a flood.

During the amnesty period, the employer attempts but is unable to recreate or review payroll records relating to 2010 to see if there is any historical SG shortfall to disclose.

On 14 July 2021, the Commissioner notifies the employer that the Commissioner intends to examine the employer’s compliance with their SG obligations during 2010. Prior to 14 July 2021, the employer was not aware of and therefore has not disclosed to the Commissioner their SG shortfall in relation to the quarter starting on 1 April 2010.

The Commissioner may consider that the destruction of relevant documents preventing the employer’s disclosure by flood constitute exceptional circumstances. If the Commissioner reaches this conclusion, the Commissioner’s ability to remit an SG shortfall penalty will not be affected.
Example 1.3 Natural disaster preventing SG compliance not sufficient to constitute exceptional circumstances

For the quarter starting on 1 April 2015, an employer did not make superannuation contributions for their employees because the employer was suffering severe financial hardship following a bushfire. Further, the employer did not fulfil their SG reporting obligations by providing the Commissioner with an SG Statement relating to that shortfall for that quarter by the due date.

On 5 December 2020, the Commissioner notifies the employer that the Commissioner intends to examine the employer’s compliance with their SG obligations during 2015. Prior to 5 December 2020, the employer has not disclosed to the Commissioner their shortfall in relation to the quarter starting on 1 April 2015.

It is not sufficient for the Commissioner to consider that exceptional circumstances existed in relation to the employer not making any superannuation contributions for the quarter starting on 1 April 2015 (due to financial hardship associated with the bushfire).

The employer is unable to establish that exceptional circumstances existed in relation to the employer’s failure to disclose their SG shortfall after the start of the amnesty period.

In this case, the Commissioner’s ability to remit the Part 7 penalty is restricted. It would be open to the Commissioner to partially remit the Part 7 penalty (below 200 per cent of the SG charge payable), taking into account the circumstances of the case. However, a penalty – at least equal to the amount of SG charge for the quarter starting on 1 April 2015 – would apply.

Consequential amendments

1.94 Schedule 1 makes consequential amendments to include a definition of ‘superannuation guarantee shortfall’ in subsection 995-1(1) of the ITAA 1997 and update a note in the ITAA 1997 so that it accurately reflects the law relating to the deductibility of SG charge.

1.95 The Schedule also includes amendments to ensure employees are not disadvantaged as a result of the amnesty.

Streamlining process to ensure employees will not be disadvantaged

1.96 The amnesty may result in employers paying to the Commissioner SG charge which represents late payments of SG covering a number of years. The Commissioner must pay these amounts to an employee’s superannuation account for the employee’s benefit in accordance with the SGAA 1992 (refer above). These contributions would
be considered concessional contributions and may cause employees to exceed their annual concessional contributions cap.

1.97 Employees may be disadvantaged by this. Generally, individuals are not subject to income tax on their concessional contributions. However, concessional contributions in excess of the cap (‘excess concessional contributions’) are included in the individual’s assessable income. Further, the employee would be liable to pay an ‘excess concessional contributions charge’.

1.98 However, the ITAA 1997 provides the Commissioner with the discretion to make a determination, for the purposes of working out an individual’s excess concessional contributions for a financial year, disregarding concessional contributions or allocating them to another financial year. The Commissioner may only make a determination if the individual makes an application and the Commissioner considers that there are special circumstances and that making the determination is consistent with the object of Division 291 of the ITAA 1997.

1.99 Issuing such a determination would allow the Commissioner to ensure employees are not disadvantaged by contributions representing late SG payments made on their behalf as a result of the amnesty.

1.100 These amendments provide an exception to the requirement for an individual to apply for the Commissioner to make a determination to disregard or reallocate a contribution. The exception applies where the Commissioner has made contributions on behalf of the individual and the contributions represent amounts recovered under the amnesty from the individual’s employer. [Schedule 1, item 6, subsection 291-465(2A) of ITAA 1997]

1.101 The amendments streamline the exercise of the Commissioner’s discretion to make a determination by allowing the Commissioner to make such a determination on the Commissioner’s own initiative in conjunction with making the contribution on behalf of the employer.

1.102 The exception does not apply where the employer has made the contributions directly to an employee’s fund and has used those contributions to offset their SG charge liability.

1.103 This reflects that in such cases, the potential breach of an individual’s cap has been caused by the employer rather than the Commissioner, and the Commissioner’s visibility of the actual contributions is reliant upon third-party reporting by funds.

1.104 Such individuals can still request that the Commissioner exercise the discretion under the existing power.
Ensuring employees will not be liable for additional tax under Division 293

1.105 Generally, individuals are not subject to income tax on their concessional contributions. However, if the sum of an individual’s income for surcharge purposes less reportable superannuation contributions (broadly their taxable income disregarding investment losses, plus any reportable fringe benefits) and their low tax contributions (broadly their concessional contributions) exceeds $250,000, the individual must pay tax at a rate of 15 per cent on the lesser of the amount by which that sum exceeds $250,000 or the individual’s low tax contributions under Division 293 of the ITAA 1997.

1.106 Currently, an employee’s ‘low tax contributed amounts’ would include any contributions made by the Commissioner for their benefit representing late SG payments as well as late SG contributions made by their employer to offset their liability to pay SG charge.

1.107 These amendments ensure that such contributions made as a result of the amnesty are excluded from the calculation of an employee’s ‘low tax contributed amounts’. [Schedule 1, item 7, paragraphs 29-30(4)(c) and (d) of ITAA 1997]

1.108 This will ensure that such contributions do not attract additional tax under Division 293 or cause other low tax contributed amounts to attract additional tax under Division 293.

Application and transitional provisions

1.109 Schedule 1 includes amendments to the SGAA 1992 relating to qualifying for the amnesty and providing that an employer’s administrative component of SG shortfall and penalties under Part 7 of that Act are reduced in respect of amounts qualifying for the amnesty. These amendments commenced on 24 May 2018, the day the SG amnesty was first announced. [Subsection 2(1) (table item 2) of Treasury Laws Amendment (Recovering Unpaid Superannuation) Act 2019]

1.110 An employer may only qualify for the amnesty in relation to disclosures that are made during the amnesty period and the disclosures must relate to certain historical quarters (refer above). [Schedule 1, item 14, paragraph 74(1)(b) and subsection 74(3)]

1.111 The amendments relating to the deductibility of payments of SG charge and offsetting contributions apply in relation to the 2017-18 income year and later income years. However, to be deductible the relevant payment or contribution must also be made during the amnesty period. [Schedule 1, items 2, 5 and 9, sections 26-95 and 290-95 of the ITAA 1997]
1.112 The consequential amendments to ensure employees are not disadvantaged as a result of the amnesty and to add a definition of superannuation guarantee shortfall in the ITAA 1997 (refer above) apply in relation to the 2017-18 income year and later income years. This ensures that:

- the exercise of the Commissioner’s discretion to make a determination to disregard concessional contributions or allocate them to another financial year can be streamlined for contributions made by the Commissioner in the 2017-18 income year and later years; and

- contributions made by the Commissioner and late contributions made by an employer to offset their liability to pay SG charge will not attract additional tax under Division 293 of the ITAA 1997 for the 2017-18 income year and later years. [Schedule 1, item 9]

1.113 Whilst the amendments apply to non-compliance of SG amounts in past years and in some cases commence retrospectively, the amendments are wholly beneficial for taxpayers. The amendments allow employers that qualify for the beneficial treatment provided by the amnesty to claim tax deductibility of their SG charge payments (and offsetting contributions) as well as have penalties and fees that may otherwise apply reduced. Under the amnesty, an employer must still pay to the Commissioner (or contribute to the employee’s superannuation account for the employee’s benefit) the employee’s SG entitlement in full. Therefore, the amendments will not affect the quantum of an employee’s entitlement to have unpaid SG amounts recovered by the Commissioner from a non-compliant employer applied for the employee’s benefit irrespective of whether or not the employer qualifies for the amnesty.

The amendments limiting the Commissioner’s ability to remit Part 7 penalties commences on the day after the amnesty period ends. The Commissioner’s ability to remit Part 7 penalties is unaffected prior to this date. [Subsection 2(1) (table item 3) of Treasury Laws Amendment (Recovering Unpaid Superannuation) Act 2019]
Chapter 2
Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Schedule 1 – Superannuation guarantee amnesty

2.1 The Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview

2.2 The Bill provides for a one-off amnesty to encourage employers to self-correct historical SG non-compliance.

2.3 The amendments also limit the Commissioner’s ability to remit penalties for historical SG non-compliance, where an employer fails to disclose information relevant to their historical SG shortfall. This is intended to strengthen the operation of the amnesty through legislated minimum penalties on employers who fail to come forward.

2.4 This complements the Government’s package of reforms to improve SG compliance, which were recently enacted through the Treasury Laws Amendment (2018 Measures No. 4) Act 2019. The recent reforms improve the visibility of SG payments to the ATO, introduce stronger penalties for non-compliance and ensure more reliable collection of liabilities for unpaid SG in the future.

Human rights implications

2.5 The Bill does not engage any of the applicable rights or freedoms.

Conclusion

2.6 The Bill is compatible with human rights as it does not raise any human rights issues.