

GMS Flash Alert



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Australia - Superannuation Guarantee Amnesty Announced

An announcement has been made for a 12-month Australian superannuation guarantee amnesty period. The amnesty has not yet been legislated, but it is intended to apply retrospectively from 24 May 2018 for 12 months.¹

WHY THIS MATTERS

This is a unique one-off opportunity being provided to employers to self-correct their past superannuation guarantee (SG) non-compliance without penalty, provided the outstanding contributions can be paid into the employees' accounts within the amnesty period.

Background

- SG is Australia's retirement savings scheme which puts the obligation on employers to contribute a minimum amount into employees' superannuation accounts each quarter. In a report to the Australian government in 2017, it was estimated that one-third of employers are not meeting their SG obligations on behalf of their employees.²
- The SG obligation generally applies in relation to all employees who are providing services in Australia, with limited exemptions only available where the individual is a "Senior Executive" on a temporary visa or where a Certificate of Coverage can be obtained under a totalisation agreement. There may also be a SG requirement where the employer is paying an Australian tax resident for work performed outside of Australia.
- There is no limitation on the time period for which the Australian Tax Commissioner can issue an SG charge assessment where an under-payment has been identified.

- The director penalty regime can also hold directors personally liable for unpaid superannuation, even if the liabilities arose prior to their appointment as a director.
- Where there is non-compliance, the non-deductible interest charges and penalties can become significant particularly as there is no statute of limitation.
- This amnesty period will provide employers with a unique opportunity to review their SG obligations and make sure that they have been compliant, or where any under-payment is identified, make a voluntary disclosure and therefore reduce the cost of the non-compliance.

Foreign Employers with Workers in Australia

The amnesty period will be particularly relevant for foreign employers with employees working in Australia and remaining on the foreign employer's payroll. The reason for this comes down to how they are managing their Australian pay-as-you-go (PAYG) withholding tax and employment tax obligations. For these employers, there are two mechanisms available for managing the Australian PAYG withholding obligations:

1. **Operate a shadow payroll in Australia** – An arrangement whereby the foreign employer continues to operate the payroll and pay its employees working in Australia, with all reporting on payroll and PAYG tax withholding processed by the Australian entity, generally in line with the standard Australian payroll process.

In this case, the employer should be also compliant for their employment tax obligations, including SG contributions as the arrangement mirrors the Australian payroll process.

2. **Employer obtains a PAYG Withholding Variation** – In certain circumstances, an application can be lodged with the ATO for approval to eliminate the foreign employer's obligation to withhold PAYG tax from specified employees' salary/wages for a fixed period of time. This requires the foreign employer to take responsibility for payment of employee income tax and any fringe benefits tax liabilities that may arise while the employees are in Australia.

This variation only applies to the PAYG withholding obligation, and as such, the employer is still required to effectively operate a shadow payroll so that it is meeting its SG obligations and other Australian employment tax obligations. As such, employers managing their employees' Australian income tax obligations through this arrangement have a high risk of non-compliance for their SG contribution obligations.

KPMG NOTE: Key Actions

All employers with employees working in Australia or who employ Australian resident taxpayers for work overseas should review their superannuation guarantee obligations and establish that contributions have been made (where necessary).

In particular, foreign employers with expatriates working in Australia and remaining on the foreign employer's payroll should review their superannuation guarantee contributions made and consider availing of the amnesty period to voluntarily declare any non-compliance.

FOOTNOTES:

1 See the ATO announcement at: <https://www.ato.gov.au/Super/APRA-regulated-funds/In-detail/News/Superannuation-Guarantee-Amnesty-announced/>.

2 As reported in *The Australian* (online), a cross-agency confidential report involving Treasury, the ATO, the Department of Employment and financial regulators the Australian Securities & Investments Commission and the Australian Prudential Regulation Authority, was submitted to Financial Services Minister Kelly O'Dwyer in March 2017 but was not publicly released. (See M. Roddan "Employers Face Super Gap Crackdown," *The Australian* (online), 14 July 2017.)

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