AUSTRALIAN GOVERNMENT

TREASURY

**TREASURY LAWS AMENDMENT (TAXATION AND SUPERANNUATION GUARANTEE INTEGRITY MEASURES) BILL 2018**

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1. **INTRODUCTION**

I thank Treasury for the opportunity to comment on its ‘Treasury Laws Amendment (Taxation And Superannuation Guarantee Integrity Measures) Bill 2018 exposure draft legislation. Superannuation non-compliance comes at the intersection of my present research interest in illegal phoenix activity and my earlier work on the protection of employee entitlements. I refer Treasury to my prior publications and submissions on superannuation, available from the phoenix project website: <http://law.unimelb.edu.au/centres/cclsr/research/major-research-projects/regulating-fraudulent-phoenix-activity>

**II. COMMENTS ON THE BILL**

Directions and penalties in relation to superannuation guarantee charge (SGC)

It will be beneficial to enhance the Commissioner’s powers in relation to issuing directions including education directions and directions to pay the SGC. However, it must be recognised that a corporate employer can liquidate to avoid the consequence of the directions and that the directors will likewise avoid personal liability via a director penalty notice (DPN) through the company’s liquidation. A resurrected ‘phoenix’ company will not bear any liability for the SGC nor be subject to the Commissioner’s directions to the defunct company.

As with all enforcement measures, a key element is detection of the failure to pay the superannuation liability or SGC, and a willingness by the ATO to pursue the perpetrator. The new offence appears confined to repeated non-payers well known to the ATO (Explanatory Memorandum (EM)[1.76]), so the reach of the new provision is likely to be limited.

Disclosure of information about non-compliance

This is a useful extension of the ATO’s powers to release information about actual or suspected non-compliance with superannuation and SGC obligations. Its benefit is that the ATO will now be able to keep the individual employee informed of developments in the recovery of their superannuation, which will encourage these employees to chase up the ATO at regular intervals. This will improve ATO accountability in following up unpaid super complaints and, once recovered, in remitting the money to the employee’s fund. These are both matters for which the ATO has been criticised

Single Touch Payroll reporting

The proposed measure does two very useful things: first, it extends the STP requirement to all employers regardless of the number of their employees; and second, it requires reporting of salary sacrifice amounts to the super fund. The latter comes after measures introduced in late 2017 to prevent employers from using salary sacrifice amounts in satisfaction of their SG obligations. Compounding the unfairness of this practice was the fact that employees were generally ignorant of the fact that this was taking place. This pair of salary sacrifice reforms are very welcome.

The STP issue is more complicated. On the one hand, the value of information about what superannuation is owing is very valuable to the ATO, and this point is considered further below under the heading ‘Fund Reporting’.

On the other hand, the measure as a purely reporting mechanism has an effect on the usefulness of the lockdown DPN as a means of making directors liable for their company’s unremitted liabilities. Lockdown DPNs, introduced in 2012, can be issued where the company’s withholding tax and superannuation liabilities are *both unreported and unpaid,* and it deprives the director of the ‘escape’ mechanism of liquidating the company or placing the company into voluntary administration within 21 days of receipt of the notice. This is superior to the pre-2012 era because the ATO will (hopefully) be able to match reported liabilities with actual non-payment, and commence recovery action. Standard DPNs, where the liability *is* reported but remains unpaid, can be avoided by the company’s prompt entry into liquidation or voluntary administration.

In other words, *reported* unpaid obligations are easier for the ATO to detect but harder to collect; *unreported* unpaid obligations are easier to collect but harder to detect.

I have two concerns. The first is volume. The original 20+ employees STP scheme covered 3% of employers. This extension brings on board the remaining 97%. The ATO’s submission to the Senate Economics References Committee in 2017 noted that ‘[s]ome 97 per cent of reports of unpaid super made to the ATO were against small business employers and this same group accounted for around 98 per cent of the liability raised by the ATO.’[[1]](#footnote-1)

The second issue is phoenix activity. Small companies, with less reputation to lose than larger ones, may well deliberately enter external administration to avoid a whole suite of liabilities – taxes, superannuation, employee entitlements, unpaid trade creditors and the director’s own DPN liability.

The solution in my opinion is to revert to the original conception of STP, which involved simultaneous reporting and payment. I acknowledge the cash flow concerns of small business but it must be recognised that the government acts as an unofficial lender by allowing significant delays between the liability for taxes and superannuation accruing and those liabilities being discharged.

Fund reporting

It would be useful for Treasury to clarify the reach of the new law in Chapter 4 Fund Reporting relating to entities *not* reporting SG information via STP: [4.16], given the apparently unequivocal extension of STP reporting in Chapter 3; [3.20], [3.25] etc.

While the EM contains little detail as to the proposed dispensation of employers using APRA regulated funds from STP reporting, I understand the exposure draft to relate to the Cross Agency Working Group recommendation, in its March 2017 report to the Minister at [4.17] – [4.25], especially [4.20], that the fund, not the employer, submit an ‘event report’ every time an employer makes a payment. This is a substitute for both the *employer’s* STP obligation and the *fund’s* annual member contribution statement (MCS) reporting.

If this is the case, then it misunderstands the value of STP reporting. STP reporting is about reporting *the obligation* to pay superannuation. The STP regime does not require simultaneous payment. As noted above, most small businesses would remit their super on a quarterly basis (ie, as late as legally possible) to hang onto this ‘working capital’ as long as they can, whereas they pay their wages on a fortnightly or monthly basis.

Therefore, the usefulness of STP reporting is in letting the ATO know what to expect, so that it can chase up non-compliant employers if the superannuation remittance is not paid when it is due to be paid.

*The proposed fund reporting will only tell the ATO what is paid, not what is missing.*

Even corporate employers that know the company may later struggle to pay that super have an incentive to comply with STP reporting: its directors will not face ‘lockdown’ DPNs. As discussed above, they will have 21 days to place the company into external administration if a DPN arrives in the mail.

There is no reason why employers cannot continue with STP reporting of obligations *and* funds can report ‘events’ such as payment. This would greatly improve matching what is owed with what is received in a timely manner.

Compliance measures

It is pleasing to see timing loopholes closed off in relation to DPNs.

Order to provide security

This is a useful step forward.

A bolder, and arguably more effective, way of utilising security deposits is to require *new* entities, controlled by the same people who caused previous losses of withholding taxes and superannuation, to pay a security deposit. Payment could be a condition of the new entity receiving an ABN. This would deter the use of a succession of companies which accrue liabilities, receive a security deposit notice from the ATO, then liquidate to prevent its enforcement, and meanwhile the business continues unaffected through a newly incorporated entity.

**III. CONCLUSION**

Generally the measures proposed by Treasury will be helpful in dealing with superannuation compliance. However, it must be recognised that they are relatively minor improvements, with little attention paid to the recommendations of the Senate Economics References Committee in 2017.

I would be pleased to assist Treasury, should you wish to speak to me further about the proposed laws.

1. Quoted in Senate Economic References Committee, *Superbad – Wage Theft and Non-compliance with the Superannuation Guarantee*, May 2017, [5.90]. [↑](#footnote-ref-1)