

Exposure Draft Treasury Laws Amendment (Taxation and Superannuation Guarantee Integrity Measures) Bill 2018 – Treasury Consultation

February 2018

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Summary of recommendations

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| Recommendation 1: Penalties for approved training non-compliance  Consideration could be given to not proceeding with proposed Schedule 1 Item 1 but instead providing specific pecuniary penalties and not proceeding with the condition of absolute liability for failure to attend and complete an approved training course within time. |

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| Recommendation 2: Clarifying self-corrected contributions  Consideration could be given to reconsidering Item 4 Schedule 1 and/or the material in the explanatory memorandum to advise that self-corrected contributions are not generally intended to be investigated. |

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| Recommendation 3: Penalties for directions to pay non-compliance  Consideration could be given to reconsidering the sanctions available for non-compliance with a direction to pay the whole of an undischarged SG charge or to provide some level of discretion which could be exercised on the penalty component of the charge. Alternatively the burden of strict liability could be reduced. Any modification from the current draft could be reviewed following a review of the current SG charge. |

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| Recommendation 4: Disclosures  Consideration could be given to a requirement that disclosures which are not triggered by employee notification are subject to prior contact with the affected employer and not proceeding with proposed item 3 Schedule 2. |

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| Recommendation 5: Salary sacrifice reporting  Consideration could be given to reviewing Item 15 Schedule 3 and/or the material in the explanatory memorandum in recognition of the possible relevant enactment times and system readiness for mandatory STP reporting. |

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| Recommendation 6: Late payments and SG charges under events-based reporting  Consideration could be given to addressing the issues of   1. payroll/accounting system and provider readiness, and 2. technical SG shortfalls   in the explanatory memorandum. |
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# Introduction

1. On 24 January 2018 the Treasury released an exposure draft bill, the *Treasury Laws Amendment (Taxation and Superannuation Guarantee Integrity Measures) Bill 2018*, and supporting explanatory memorandum for comment. These are the Australian Chamber of Commerce and Industry’s (Australian Chamber) observations on those drafts. The Australian Chamber thanks the Minister and the Treasury for the opportunity to make these comments.
2. The exposure draft bill mainly amends the Taxation Administration Act 1953 (TA Act) including parts of the TA Act which impact or support the *Superannuation Guarantee (Administration) Act* 1992 (SG(A) Act). The SG(A) Act is the main legislation regulating employers’ interaction with the superannuation system and it is this act which establishes the superannuation guarantee (SG), shortfall and the charge and provides much of the penalty regime which is associated with it.
3. Although it has the status of a tax, now comfortably confirmed by the courts, the SG charge is actually a mix of
   1. a tax which is intended to collect contributions not paid as contributions and address loss of potential earnings because the contributions it collects were not paid into the member’s fund in a timely way and
   2. a penalty which is intended to discourage the lawful payment of the tax in favour of making lawful contributions to avoid its payment.
4. This tax-penalty mix is a legacy of the introduction of the SG. Giving the SG charge this structure, and treating its penalty components as taxes beyond the discretion[[1]](#footnote-1) of the Commissioner of Taxation (ATO, Commissioner) may have been an appropriate way of legislating for what was a new (effectively) universal social protection contribution for employees but this is arguably no longer the case. The penalty component of the SG charge works against the objective of the tax component. For example, the SG charge is a tax identified by the taxpayer quantifying and reporting it. Declaring and paying a SG charge (full compliance) costs a lot more than semi-compliance, informally making up the contribution and not declaring the SG charge (the policy objective of the tax). As much missed contribution payment arises from small business cash-flow problems the statutory economic signal, or imperative, for these payers is to fly under the radar.
5. The likelihood of recovery of missed contribution declines with the length of time before it is noticed. There are a number of changes, technological and system process, which the exposure draft bill is seeking to support, that will bring contributions transparency much closer to real time. Subject to there being appropriate communication and transitional arrangements the Australian Chamber is supportive of these new processes and the legislative amendments required to support them. Subject to technical changes which Treasury and the Minister might wish to make, the Australian Chamber would wish to see these amendments continued in the bill which is settled for tabling.
6. One of the points which the Australian Chamber’s submission seeks to make is that ready compliance is supported by good law. By this, the Australian Chamber means legislation that is written to support its policy objective, is fair and legitimate and perceived to be so, is easy to understand and can be complied with practically. Penalties are a part of assisting compliance, but they too, need to pass the accessibility and fairness test and not operate in an arbitrary or unjust way.
7. The exposure draft bill also addresses aspects of the SG compliance and penalty regime which supports the SG charge. The Australian Chamber is more critical of a number of these proposals which appear to not properly assess many of the actual issues associated with non- compliance in all cases. The real solution to these systemic problems is to re-examine the SG charge and supporting penalty regime so as to make it better fit for purpose, but a review of this kind may fall outside the timing proposed for the bill.
8. The exposure draft explanatory memorandum advises that some of the compliance oriented provisions in the exposure draft bill are intended to give effect to recommendations in the report of the Superannuation Guarantee Cross-Agency Working Group (Working Group). On the Australian Chamber’s reading of the Working Group’s report the government’s response may have misconstrued a number of its recommendations. As well, the government’s response is broadly cast; allowing a range of different legislative responses which could equally be said to give effect to the policy response.
9. The Australian Chamber questions the appropriateness of the penalty structure proposed for the power to issue directions. It also raises questions about the interaction of a number of the proposed new provisions with current ATO enforcement practices.
10. The Australian Chamber also draws attention to the exposure draft bill’s proposed timing. Aside from Schedule 3 Part 2 and Schedule 6, the draft proceeds on the assumption that a final form of the legislation will be enacted before 1 July 2018. This may well be the case, but consideration might be given to those transitional provisions which are intended on their own terms to operate from 1 July 2018 in the event that the schedule does not commence until some later quarter.

## The Australian Chamber’s interest in the superannuation system

1. The Australian Chamber’s interest in superannuation arises from the system’s regulation and impact on employers. The superannuation system is clearly an important part of the national system of social protection supporting the retirement incomes of older employees, but it is also a significant on-cost. Employers’ and the national economy’s interests are best served by an efficient superannuation system which maximises members’ retirement income streams, and these are mainly accumulated from employers’ contributions and subsequent earnings. Timely contributions contribute to this objective.
2. System efficiency also reduces employee dissatisfaction with or disengagement from their superannuation. Apart from their joint interest in the best possible asset employers and employees share a common interest in an efficient superannuation system.
3. The Australian Chamber has had a long involvement with the superannuation system, its regulation and its impact on employers. It was a member of the Cooper Committee (Cooper Committee) review of the governance, efficiency, structure and operation of the Australian superannuation system which was commissioned in 2009 by the then Minister for Superannuation and Corporate Law. The Australian Chamber has been active in the implementation of policies arising from that report and subsequent major system changes.
4. Today’s superannuation system is a major financial sector in its own right and there are many material interests. The Australian Chamber itself does not have material interest in any RSE, nor system service provider, and it does not nominate to any RSE board or group of trustees. Some Australian Chamber members have nominating rights with respect to an RSE, others do not. Some members may wish to make submissions to the consultation.

# Background

1. Non-payment of superannuation guarantee contributions is a real issue. The amounts involved are significant. Non-payment affects the level of retirement income assets and future demands on public spending. It is a source of unfair competition.
2. The ATO’s August 2017 estimate of the gap between SG contributions made and those which should be made was a net amount of $2.84B (5.2% of total contributions) for 2014-15. Later figures are not yet available although there are reasons to expect that the rate of growth, if not the gap itself, is reducing.[[2]](#footnote-2)
3. Recovery of unpaid contribution is poor and reduces with time passed. Only about half the identified outstanding SG charge is recovered, by far the lowest recovery rate for any missed tax payment. In 2016-17 $603.5M SG charge was raised but only $282.9 M (47%) was collected.[[3]](#footnote-3) The ATO also reported that at 30 June 2017 it had $1.5B SG debt on hand of which $167.0 was not pursued because it was not recoverable or uneconomic to do so. Between 2013-14 and 2016-17 the debt of unpaid charge has grown by about $200M per year.[[4]](#footnote-4)
4. Poor recovery is attributable to a number of factors. These include
   1. The amount of guarantee charge escalates rapidly if not declared and paid. Although formally a tax, the SG charge is effectively a confusion between a tax and penalty, but there is no discretion to waive or reduce an unpaid declared charge, or even the penalty component within it. Particularly for small business, flying under the radar is an option and can too often be an economic imperative.
   2. A lack of clarity about compliance points which can mean that non-compliance goes unrecognised for many quarters. Key technical compliance points are the boundary between deemed employee and contractor and the proper composition of ordinary time earnings. Inadequate recognition of ordinary time earnings is exacerbated by poor record keeping, another small business characteristic.
   3. Currently funds report contributions received for members on a financial year basis, no later than 31 October each year. Missed contributions for individuals can go undetected by the ATO for long periods.
5. Non-payment disproportionately impacts the less well paid. Ensuring the superannuation contributions system is a matter of significant legitimate public concern and it has been so for some time. Changes are needed. However contribution non-payment has also become highly politicised. Politicisation has not assisted the development of responses appropriate to reduce the level of non-contribution or to improve recovery where there is overdue contribution. There is at times little analysis of causes.
6. There are cases of wilful and even egregious contribution non-compliance and contributions avoidance is at times associated with serial offenders and phoenixing. More often non-contribution is associated with small businesses and cash flow. Non-contribution is also unequally distributed across industries.[[5]](#footnote-5) These are important considerations.
7. Compliance with obligations is dependent on how easily compliance can be given practical effect. Obligations are more likely to be complied with when they are perceived to be reasonable and legitimate than if they are not, or if they are arbitrary. Legal obligations which are too hard to comply with, arbitrary or perceived to be unfair are less likely to be complied with. The system must be fair to support high levels of compliance.
8. In its 2016-17 annual report the ATO said

*Our program of reinvention is improving the client experience and supporting willing participation in the tax and superannuation systems. Research shows that most Australians have an understanding of why they pay tax and make an effort to meet their obligations. Personal circumstances and perceptions of fairness can also affect attitudes and behaviour in complying with tax and super obligations.*

*We are focused on improving client interactions by taking into consideration individual circumstances, […]*[[6]](#footnote-6)

and in its 2015-16 annual report the ATO said

*[…] because we know that willing participation in our tax system is heavily reliant on the perceived fairness of the system and our administration*.[[7]](#footnote-7)

1. An equally important consideration is the way in which the supervising regulator, in this case the ATO, approaches its obligations. Enforcement practices shape perceptions of fairness, but fair enforcement of poor legislation doesn’t make it good legislation, and poor legislation contributes to the overall perception of fairness.

# The exposure draft bill

1. The exposure draft bill is to some extent based on the recommendations of the Superannuation Guarantee Cross-Agency Working Group in its March 2016 report[[8]](#footnote-8). The Working Group comprised the key regulators of the superannuation system and Treasury. In coming to its recommendations the Working Group considered, and its report addresses, a number of other options which were being proposed at that time.
2. The exposure draft bill is also giving effect to the government’s response to the Working Group’s recommendations. The government said[[9]](#footnote-9)

*The package includes measures to:*

1. *Require superannuation funds to report contributions received more frequently, at least monthly, to the ATO. This will enable the ATO to identify non-compliance and take prompt action;*
2. *Bring payroll reporting into the 21st century through the rollout of Single Touch Payroll (STP). Employers with 20 or more employees will transition to STP from 1 July 2018 with smaller employers coming on board from 1 July 2019. This will reduce the regulatory burden on business and transform compliance by aligning payroll functions with regular reporting of taxation and superannuation obligations;*
3. *Improve the effectiveness of the ATO’s recovery powers, including strengthening director penalty notices and use of security bonds for high-risk employers, to ensure that unpaid superannuation is better collected by the ATO and paid to employees’ super accounts; and*
4. *Give the ATO the ability to seek court-ordered penalties in the most egregious cases of non-payment, including employers who are repeatedly caught but fail to pay superannuation guarantee liabilities.*

*The package reflects the key recommendations in the Final Report of the SG Cross-Agency Working Group released on 14 July 2017, which was established by Minster O’Dwyer late last year. The Government did not accept the Working Group’s recommendations to soften penalties for non-compliant employers.*

1. Three relevant observations arise from the government’s response. First, it is worded broadly rather than being explicitly directed towards specific recommendations. This is particularly true of point #4 in the response. Conversely, the response does not appear to address Recommendation 3

*The ATO should inform employee of its actions to collect their superannuation guarantee, including in ATO-initiated cases where this communication is currently constrained by current secrecy provisions. The ATO and Treasury will advise of the administrative and legal changes needed to inform employees that have not self-reported suspected non-payment to the ATO*

which is given effect by Schedule 2 of the exposure draft.

1. Second, the government’s response could be given effect in more than one way, that is, more than one type of amendment to the TA Act would address the government’s announced policy.
2. Finally, the Australian Chamber would observe that the government’s non-acceptance of recommendations 6 and 7 in the sense they were written (*The Government did not accept the Working Group’s recommendations to soften penalties for non-compliant employers*)is to be regretted and in the Chamber’s view this should be reconsidered. Recommendation 6

*Ensure the penalty framework surrounding superannuation guarantee is sufficiently flexible to appropriately deal with the spectrum of employer culpability in non-compliance*

is not directed towards “softening” penalties, but towards reducing the arbitrary impact of the current framework, which, depending on the circumstances, can be counterproductive in achieving remedy. The Working Group said

*It is also important that the penalty regime does not act as a disincentive to rectifying non‑compliance by voluntarily disclosing errors and undertaking corrective action*.[[10]](#footnote-10)

1. The Working Group noted that

*Based on anecdotal evidence, the current superannuation guarantee charge and penalty system may discourage some employers from voluntarily disclosing errors and undertaking self‑correction. Several submissions to the Senate Committee, including by the Inspector-General of Taxation, Institute of Public Accountants, Financial Services Council, the Tax Institute and the Australian Chamber of Commerce and Industry have recognised the need to balance the deterrence role and consideration of an employer’s circumstances and compliance position.[[11]](#footnote-11)*

1. Recommendation 7

*Amend the calculation of the nominal interest component in the Superannuation Guarantee (Administration) Act 1992 so that interest is only payable for the period contributions are outstanding*

is intended to remove an anomaly which gives rise to inequity. This is not well described as softening penalties. The Working Group said

*In addition to making the penalty framework more flexible, the Working Group recommends that the Government amend the methodology for calculating the nominal interest component of the superannuation guarantee charge. This is because the existing methodology produces anomalous and inequitable results*.[[12]](#footnote-12)

1. A SG shortfall arises in the event that sufficient contribution has not been made on behalf of an employee to his or her appropriate fund within 28 days of the end of the quarter. At that time (28 days after the end of the quarter ends) a SG charge arises which must be declared and paid within one month, but the nominal interest component is applied from the beginning of the quarter (by this time 4 months ago) even in circumstances where the charge is paid before or by its due date, that is, before the charge payment was due.
2. As advised in the explanatory memorandum there is no obligation in the SG(A) Act to make a contribution.[[13]](#footnote-13) The employer’s obligation is to lodge a charge statement and pay the charge, an obligation which can be lawfully avoided by timely payment of contribution.
3. An employer which completes its contribution 27 days after the quarter pays no interest and the contribution is tax deductable; in contrast, an employer which pays 29 days after the quarter has 4 months’ nominal interest and no deductibility. This goes much further than remedying the missed contribution’s access to earnings and despite being called “nominal” the interest component is punitive. Front loading interest in this way means that the effective rate of interest declines the longer the contribution remains unpaid.

## Schedule 1 – Directions and penalties re the SG charge

1. Schedule 1 proposes to amend the TA Act to allow the ATO to issue directions to an employer in the event that the employer has failed to comply with SG obligations. Under the schedule the ATO would be able direct an employer to
   1. undertake an approved course of education within a specified time and furnish evidence of completion;
   2. pay the outstanding SG charge or estimated charge.
2. Relevant SG obligations arise under the
   1. SG(A) Act when there is a failure to declare and pay the SG charge, lodge a SG statement or make sufficient complying contributions to avoid the SG charge and also to keep proper records;
   2. TA Act when an ATO estimate of the outstanding SG charge is not paid in time or there is a failure to comply with any other TA Act provision relating to the SG(A) Act.
3. The exposure draft explanatory memorandum advises that these amendments are intended to give effect to an understanding of the government’s response to the Working Group’s Recommendation 6.[[14]](#footnote-14) These proposed amendments are presumably based on the phrase in that recommendation “…*sufficiently flexible to appropriately deal with the spectrum of employer culpability in non-compliance.*” Assuming that the proposed new power to issue directions forms part of the “…*the penalty framework surrounding superannuation guarantee…*”the draft bill’s drafting would seem to misconstrue Recommendation 6 somewhat.
4. Failure to attend approved training in time attracts an administrative penalty. An employer which fails to comply with a direction to attend and provide evidence of so doing is also liable to a penalty under s 8C TA Act which escalates with repeated breaches and imposes offences of absolute liability (although proving an inability to comply is a defence). Failure to comply can lead to a gaol term of up to 12 months.
5. No such course has been designed nor delivered and there is little understanding of where delivery points might be and how attendance requirements might impact directed employers, and how readily the Commissioner might wish to issue such a direction. It is unclear that future instances of failure to complete a directed course (which is understood to mean to complete satisfactorily) of approved training will be prompted by similar causes to the other s 8C offences. Especially without experience it seems difficult to equate non-compliance about completing approved training with a failure to provide required information or attend for questioning. It is open to question about whether it is therefore appropriate to link training non-compliance with existing s 8C offences before there has been demonstrated evidence of its patterns.

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| Recommendation 1: Penalties for approved training non-compliance  Consideration could be given to not proceeding with proposed Schedule 1 Item 1 but instead providing specific pecuniary penalties and not proceeding with the condition of absolute liability for failure to attend and complete an approved training course within time. |

1. It is proposed that directions to attend may be triggered by the Commissioner’s reasonable belief that there has been a failure to comply with one or more obligations under the SG(A) or TA Acts. “Reasonable belief” does not have to be evidence of actual failure. Every self-corrected contribution would seem to satisfy this condition, and as time goes by, the outstanding SG charge amounts (informally “discharged” by self-corrected contributions, but formally undeclared and unpaid) continue to rise. Although the proper solution is to reform the SG charge system to distinguish the contribution from penalties associated with non-payment, inserting failure to attend provisions into s 8C of the TA Act at this time appears excessive.
2. There is to some extent retrospectivity in this draft provision. Item 4 provides that directions to attend training could be made with respect to reasonably suspected failures to comply with SG(A) or TA Act obligations on or after 1 July 2018 even where the failure is a failure to pay an amount which became payable before that time and which remains unpaid. Whilst this allows the ATO to issue directions addressing instances of inadequate understanding of SG obligations it is currently aware of, it also opens the possibility that many self-correcting contributor employers could become subject to these directions.
3. There is another potential source of retrospectivity as well. Proposed s 2 of the exposure draft bill commences Schedule 1 at the beginning of the first quarter to commence after the Royal Assent. Depending on the tabled bill’s passage, commencement of Schedule 1 may be some months after 1 July 2018.

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| Recommendation 2: Clarifying self-corrected contributions  Consideration could be given to reconsidering Item 4 Schedule 1 and/or the material in the explanatory memorandum to advise that self-corrected contributions are not generally intended to be investigated. |

1. Schedule 1 also inserts a new Division 296 into the TA Act. Failure to comply with a direction to pay a guarantee charge attracts a penalty of 50 penalty units and/or up to 12 months’ gaol and is an offence of strict liability. It is a defence for the person to prove that (s)he took all reasonable steps to discharge the liability before the direction was issued and to comply with the direction after it was issued. The requirement to take “all” reasonable steps and to make that out to the court’s satisfaction is a very high evidentiary hurdle, particularly in the case of small businesses.
2. It is not clear whether making a self-corrected contribution would constitute taking all reasonable steps to ensure the liability was discharged before the direction was issued. The intention behind making a self-corrected contribution is not to ensure that the SG charge liability is “discharged”, but to avoid discharging it. The intention is to remedy the missed payment of contribution. The amount of SG charge bears little relationship to the amount of missed contribution, in part because of its penalty ingredients and in part because it is based on the employee’s salary or wages for the quarter concerned, not the amount of his or her missed contribution. The difference can be significant.
3. As noted above, the proper solution is to distinguish between the amount of outstanding contribution and foregone earnings which may have arisen because of the delay in payment and any penalties for delayed or missed payment. Penalties should be significant where there is egregious behaviour, but determined on the facts of the case. The SG charge should be directly linked to the outstanding contribution and generally treated in the same way as other taxes.
4. The exposure draft explanatory memorandum[[15]](#footnote-15) makes the case for treating undischarged SG charge differently. It says

*1.69 Applying criminal sanctions to failures to comply with a direction to pay an outstanding liability in respect of superannuation guarantee charge reflects that, unlike other debts owed to the Commonwealth, amounts of superannuation guarantee charge are paid to the Commissioner and then distributed to the superannuation funds of employees who did not receive the minimum level of contributions from their employer. The additional penalties that can apply through this new direction provide additional incentives to employers to ensure that they are fully compliant with their existing obligations under the SGAA 1992 and related obligations under the TAA 1953.*

*1.70. The penalties are also subject to section 4D of the Crimes Act 1914, meaning that the specified amounts are the maximum penalties that can be imposed.*

*1.71 A failure to comply with the direction is an offence of strict liability*. [Schedule 1, item 3, subsection 296-15(2) in Schedule 1 to the TAA 1953]

*1.72 This means that it is not necessary to establish fault if a person has failed to comply with a direction to pay an outstanding amount. Applying strict liability is appropriate because the sole reason for the direction being issued is to ensure that the amount of the existing outstanding liability is actually discharged.*

1. The Australian Chamber recognises that although a tax, the SG charge is in part directed to remedying unpaid contribution, and is in this sense directed to securing the asset base for employees’ retirement income stream (a part of social contributions). If the SG charge were purely remedying unpaid contribution and foregone earnings this special treatment may be justified, but while the SG charge is not directed in this way its proposed treatment in the exposure draft bill is not.

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| Recommendation 3: Penalties for directions to pay non-compliance  Consideration could be given to reconsidering the sanctions available for non-compliance with a direction to pay the whole of an undischarged SG charge or to provide some level of discretion which could be exercised on the penalty component of the charge. Alternatively the burden of strict liability could be reduced. Any modification from the current draft could be reviewed following a review of the current SG charge. |

1. Under item 5 of Schedule 1 these provisions would apply to failure to pay a SG charge or estimate which first becomes payable on or after 1 July 2018. As noted at para 8 above, 1 July 2018 may precede the Schedule 1 commencement quarter.

## Schedule 2 – Disclosure of information about non-compliance

1. The amendments in draft Schedule 2 will significantly expand the information that the ATO can share with employees affected by non-contributions and when the ATO can approach employees with information. Currently the ATO can provide some information to a complainant employee, or former employee, about its response to that employee’s complaint. Exposure draft Schedule 2 is in response to the Working Group’s Recommendation 3.
2. Schedule 2 will allow the ATO to share information with an employee or former employee of an employer which has failed, or which the ATO reasonably suspects to have failed, to comply with its superannuation obligations about that failure or suspected failure and about the ATO’s response to that failure or suspected failure.
3. The current capacity to share information would be expanded to include the Commissioner’s responses to reasonably suspected failures to comply, including suspected non-compliance with relevant provisions of the TA Act, to employees, former employees and those who may be or may have been employees. Currently the ATO can only advise complainants and only about their complaint.
4. The incidence of reasonably suspected failure to make contributions or lodge a SG statement and pay the SG charge seems likely to increase significantly with the expansion of Single Touch Payroll obligations (draft Schedule 3) and especially fund reporting (draft Schedule 4). The Working Group report foreshadows that the ATO will be shifting resources into responding to these new, near real time, data sources.
5. The growth of social media has made employers increasingly vulnerable to reputational damage which is not necessarily based on fact. Whilst the Commissioner’s understanding of the employer’s general financial circumstances are protected from ATO disclosure, a notified employee’s inferences are not protected from disclosure. There are no restrictions on what an employee may do with ATO information about his/her contributions.
6. The Australian Chamber recommends that disclosure to non-complainants require that there has been preliminary contact with the employer before any disclosure. This rebalance may not require amendment of the draft exposure bill and possibly could form part of the explanatory memorandum. Item 3 of the Schedule which proposes to expand disclosures to those whose employment status is uncertain should also be reconsidered.

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| Recommendation 4: Disclosures  Consideration could be given to a requirement that disclosures which are not triggered by employee notification are subject to prior contact with the affected employer and not proceeding with proposed item 3 Schedule 2. |

1. Item 4 also provides that the expanded range of disclosures can include information about the employer’s failure or suspected failure to comply with its superannuation obligations before 1 July 2018.

## Schedule 3 – Single touch payroll and salary sacrifice reporting

1. Currently employers can report to the ATO withheld taxes and other withholdings, “salary or wages”, “ordinary time earnings” and superannuation contributions made under the standard STP electronic reporting system at the time the wages are paid or the contribution made. This will become compulsory for “substantial employers” (those employing 20 or more employees at 1 April 2018) from 1 July 2018.
2. The ATO has discretion to exempt employers or classes of employers for identified periods.
3. Schedule 3 makes two substantial amendments. The first (Part 1) is to extend compulsory STP reporting to all employers with effect on 1 July 2019. Thus, whether an employer is substantial only need be determined on 1 April 2018 for compulsory reporting from 1 July 2018 because all employers will have to report from 1 July 2019.
4. The second (Part 2) is to require employers to report salary sacrifice salary or wages/ordinary time earnings amounts which are not paid to the employee because they are made, or are to be made, as “pre-tax” superannuation contributions and not included in the employee’s taxable income.
5. Salary sacrifice contributions are to be reported on or by the day that the employee is paid and would have been paid the amount had it not been sacrificed. This new reporting obligation is intended to apply from 1 July 2018 to employers reporting under STP or their current system.
6. Reporting under STP requires programming changes to the employer’s payroll/accounting system or that of its service provider. It is unclear how well developed all systems are and the extent to which exemptions might be needed for those subject to the 1 July 2018 commencement. The inclusion of reporting withheld superannuation salary sacrifice amounts will require further programming amendments (as will the amendment proposed to be made by item 6 of Schedule 4 for systems and services which have already been upgraded).
7. The terms “sacrificed ordinary time earnings amount” and “sacrificed salary or wages amount” are to be inserted into the SG(A) Act by Schedule 2 of the *Treasury Laws Amendment (Improving Accountability and Members Outcomes in Superannuation Measures No. 2) Bill 2017* (Accountability and Member Outcomes Bill)*.* That bill is yet to be enacted and these two terms have no settled statutory meaning. This is recognised by proposed s 2 of the exposure draft bill which provides that Schedule 3 Part 2 commences after the commencement of the Accountability and Member Outcomes Bill, and does not commence if that bill is not enacted.
8. Item 15 of Schedule 3 provides that superannuation salary sacrifice reporting will apply to quarters commencing from 1 July 2018. It is a little unclear how this would operate if both bills were enacted and either bill were enacted after 1 July 2018. Item 15 might require some rewording.
9. Second, the information available to the Australian Chamber does not allow it to form any reasonable view of the impact of these changes on system readiness for STP reporting, or capacity to make ready STP systems for reporting as proposed to be amended. Depending on the state of readiness, and capacity to include variations in time, it may be necessary to consider specific transitional provisions for the proposed 1 July 2018 commencement date.

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| Recommendation 5: Salary sacrifice reporting  Consideration could be given to reviewing Item 15 Schedule 3 and/or the material in the explanatory memorandum in recognition of the possible relevant enactment times and system readiness for mandatory STP reporting. |

## Schedule 4 – Fund reporting

1. Under Schedule 4 fund reporting to the ATO will significantly change. Currently funds report annually about contributions in a Member Contributions Statement (MCS) which is due by 31 October following each financial year. This timing is a source of considerable delays in the identification of employees who have not or may not have had contributions made on their behalf. Actions to reduce the time lag for good system-wide contributions data are welcomed.
2. Schedule 4 supports the move from annual MCS reporting to events-based reporting which will provide data about what member contributions have been made and when they were made in, or close to, real time. Fund sourced events-based reporting also means that data about contributions which have been made are to be sourced from the most reliable source as efficiently as possible.
3. Schedule 4 appears to continue the requirement that funds would report data on both the receipt of the contribution and its allocation. If this is correct it seems that the way events-based reports will be triggered and the data which are then forwarded to the ATO will mean contribution payments which are late for whatever reason, even those which are seconds late, will be visible as having been made after time. All shortfalls, including those which were caused by a system or service provider outage, and including those about which the payer employer is unaware, will be visible. Most shortfalls of this kind will not be declared and paid. Self-corrected employer contributions, whether informally known to the ATO, or not, will also be visible. These, too, will be undeclared SG shortfalls.
4. Again the real solution is to reform the SG charge into its elements and treating them separately and appropriately, and to review the appropriateness of the current late payments offset provisions under the SG(A) Act.
5. Consideration might be given to text in the explanatory memorandum which could assist the ATO to develop policy to sensibly address the issue. Clearly a literal reading of the SG(A) Act supported by digitally precise reporting which means that every shortfall, no matter how minor, and matter its cause, is to be followed up is not intended.

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| Recommendation 6: Late payments and SG charges under events-based reporting  Consideration could be given to addressing the issues of   1. payroll/accounting system and provider readiness, and 2. technical SG shortfalls   in the explanatory memorandum. |
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## Schedule 5 – Compliance measures

1. The director penalty regime in the TA Act provides that when withheld PAYG or a SG charge has not been paid by the due date the ATO can issue a director penalty notice which makes each director personally liable for payment, or for payment of an estimate, of either of these underlying liabilities. Estimates are issued some time after the actual liability arises and therefore have a later initial and due date than the actual underlying obligation.
2. Although any payment made counts towards both liabilities, an estimate is a separate liability from the underlying non-payment and it independently continues whilst not fully met.
3. Under the TA Act a director’s obligation ceases if liabilities
   1. are paid within 21 days of the penalty notice[[16]](#footnote-16),
   2. an administrator is appointed, or
   3. the company is wound up.
4. Putting an administrator in or winding up (insolvency action) removes the directors’ liability unless the company
   1. has not furnished a SG statement or reported withheld PAYG amounts, or
   2. if it has not paid an estimate and 3 months has passed since the due date of the obligation.
5. Currently, the ATO can also require security deposits to cover current or future liabilities where it considers that the entity will not continue to operate.
6. Schedule 5, intended to give effect to the Working Group’s Recommendation 4, proposes to amend this scheme in three ways.
7. (Part 1) Item 3 amends the initial day of an estimate of the unpaid SG charge or withheld PAYG to the last day of the relevant quarter for unpaid SG charge or the day the withheld PAYG was due. Item 7 provides that estimates made from 1 July 2018 which may be made for unpaid SG charge or PAYG withholding arising before that date and are subject to the proposed variation.
8. The different treatment of the unpaid SG charge is proposed because of the 1 month and 12 day SG charge payment period. Under the proposed amendment an estimated SG charge will have an earlier initial day than the underlying SG charge liability as well as its initial day preceding the making and issuing of the estimate in question. The initial day determines the date from which a penalty notice can be issued. The exposure draft explanatory memorandum states

*5.28 The consequence of this timing difference is that there is a gap between the two director obligations. This gap can be exploited by directors to frustrate the original intent of the director penalty provisions and avoid being held personally accountable for unpaid and overdue superannuation guarantee charge and PAYG withholding liabilities incurred while they presided over the company. These changes resolve this timing issue by aligning the initial day for the company’s estimates with the initial day for the related underlying withholding liability or the end of the quarter for superannuation guarantee liabilities. This treatment only applies for the purposes of working out whether a director penalty notice can be issued to a director (or former director) of a company under Division 269 in Schedule 1.*

*5.29 These amendments treat a director as having an obligation to cause the company to pay a Division 268 estimate before the company has an actual obligation to pay the estimate. However, this approach is justified on the basis that the company’s obligation to pay the estimate relates directly to the company’s obligation to pay the underlying liability relating to that estimate. Therefore, it is appropriate that the directors presiding over the company at the time the underlying liability arose also have an obligation to ensure their company complies with any estimate of that underlying liability issued later in time. This is the outcome these amendments are designed to achieve.*

1. The amendment is directed to eliminating the capacity to take advantage of the disparity between the initial day of the underlying liability and a later estimate of the underlying liability required because the actual liability has not been declared by the employer.
2. It is a source of discomfort that the amendment is not in terms similar to those for non-payment of withheld PAYG, that is, on the day by which PAYG withholding liabilities were to be paid. This is the initial day for a declared unpaid SG charge. It is presumed that most director penalty notices which are issued for non-payment of SG charge are issued on the basis of estimates. The Australian Chamber would not wish to see an employer’s earlier self-corrected contributions triggering an estimate so as to provide access to a director penalty notice, or directly supporting a director penalty notice.
3. (Part 2) Items 9, 10 and 12 have the effect of rescinding the three month period during which taking insolvency action removes directors’ personal liability for unpaid SG charge or estimates of it. The removal of the three month period means directors’ liability to have the SG charge declared and paid to the ATO continues unless the company is put into administration or insolvency within 1 month and 28 days after the end of the quarter – the last day by which the SG charge should have been paid. Any director who resigned after the 1 month 28 day date continues to be personally liable even if (s)he resigned before the estimate was issued.
4. Item 14 applies the proposed amendment to estimates made on or after 1 July 2018.
5. The Australian Chamber also note that there seem to be some minor errors in examples 5.1 and 5.2.[[17]](#footnote-17) In the case of example 5.1 there appears to be missing text at the end. In the case of 5.2 it seems likely that the reference to “Thien”, at line 10, should be a reference to “Cristiano”. Thien appears to have remained as a director.
6. (Part 3) Empowers the ATO to apply to the Federal Court for an order to require a company to provide a security payment creating a court enforceable order in addition to the current fine. Power to apply would be available for security orders issued on or after 1 July 2018.
7. Item 7 provides that these new rules would apply for estimates made from 1 July 2018 which may include an estimate of underlying liabilities which arose before that date. Unpaid PAYG withholding, the liability for the estimate will arise from the due date of the PAYGW payment. This is the same day as the underlying liability
8. The new rules apply to SG charge liabilities which become payable on or after, and to estimates made on or after 1 July 2018. An estimate may cover an earlier liability. Unpaid undeclared SG charge, the liability for the estimate will arise from the end of the quarter. The initial day of the actual underlying liability is the day that the SG charge is first unpaid (1 month and 28 days after the quarter has ended).
9. The 3 month rule remains for unpaid PAYGW.

## Schedule 6 – Amendments relating to employee commencement

1. Schedule 6 is uncontroversial for employers and welcome. Currently the ATO can advise an employer of an employee’s tax file number (TFN) if the employee has provided it to the ATO, but not the employer, in a TFN Declaration Form.
2. The schedule extends the ATO’s capacity so that the ATO can pre-fill an individual’s TFN declaration and standard choice forms for a particular employer with the person’s TFN and superannuation accounts. This facilitates the employee’s choice decision and withholding rates for PAYG. The amendments would apply to TFN declarations made to the ATO on and after 1 July 2018**.** The TFN declaration forms will contain new wording.
3. If enacted the changes, including what employers should consider in the case of existing employees, should be communicated. The Australian Chamber would be pleased to assist with this process.

# About the Australian Chamber

The Australian Chamber of Commerce and Industry is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

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1. The Commissioner does have discretion to settle a number of other outstanding taxes on a case by case basis, but because the SG charge is really a hypothecation for individuals, the absence of a discretion is appropriate in this case. [↑](#footnote-ref-1)
2. P 117, Commissioner of Taxation, [*Annual Report 2016-17*](https://www.ato.gov.au/uploadedFiles/Content/CR/downloads/annualreport.pdfhttps:/www.ato.gov.au/misc/downloads/pdf/qc53532.pdf), October 2017. The Commissioner has moved to allowing overdue employers to “self-correct”, to pay overdue contributions and interest directly into the fund. An additional $106M was paid this way in 2016-17 and these self-corrected contributions impact the contributions gap. In 2016-17 there was a significant reduction in the number of employers whose investigation resulted in a liability being raised. [↑](#footnote-ref-2)
3. P 116, table 2.21, Commissioner of Taxation, [*Annual Report 2016-17*](https://www.ato.gov.au/uploadedFiles/Content/CR/downloads/annualreport.pdfhttps:/www.ato.gov.au/misc/downloads/pdf/qc53532.pdf), October 2017. Employer self-corrected payments are not recorded as SG raised nor is their payment recorded in this context. Self-corrected contributions do not show up as voluntary disclosures because the charge statement is not lodged. [↑](#footnote-ref-3)
4. P 76, table 2.21, Commissioner of Taxation, [*Annual Report 2015-16*](https://annualreport.ato.gov.au/sites/g/files/net1861/f/ATO_AR_15-16_Vol1-Full.pdf), October 2016 and P 116, table 2.21, Commissioner of Taxation, [*Annual Report 2016-17*](https://www.ato.gov.au/uploadedFiles/Content/CR/downloads/annualreport.pdfhttps:/www.ato.gov.au/misc/downloads/pdf/qc53532.pdf), October 2017 [↑](#footnote-ref-4)
5. Pp 7 – 8, paras 2.5 – 2.10, especially para 2.6, [*Cross Agency Superannuation Guarantee Working Group* – *Interim Report*](https://static.treasury.gov.au/uploads/sites/1/2017/08/P2017_T200724_interim.pdf), January 2017 [↑](#footnote-ref-5)
6. P 19, Commissioner of Taxation, [*Annual Report 2016-17*](https://www.ato.gov.au/uploadedFiles/Content/CR/downloads/annualreport.pdfhttps:/www.ato.gov.au/misc/downloads/pdf/qc53532.pdf), October 2017. [↑](#footnote-ref-6)
7. P viii, Commissioner of Taxation, [*Annual Report 2015-16*](https://annualreport.ato.gov.au/sites/g/files/net1861/f/ATO_AR_15-16_Vol1-Full.pdf), October 2016 [↑](#footnote-ref-7)
8. [*Superannuation Guarantee Non-compliance*](https://static.treasury.gov.au/uploads/sites/1/2017/08/P2017_T200724.pdf), Superannuation Guarantee Cross-Agency Working Group, 31 March 2017 [↑](#footnote-ref-8)
9. [*Turnbull Government backs workers on superannuation*](http://kmo.ministers.treasury.gov.au/media-release/086-2017/), Media release, 29 August 2017 [↑](#footnote-ref-9)
10. P 44, para 5.5, [*Superannuation Guarantee Non-compliance*](https://static.treasury.gov.au/uploads/sites/1/2017/08/P2017_T200724.pdf), Superannuation Guarantee Cross-Agency Working Group, 31 March 2017 [↑](#footnote-ref-10)
11. P 44, para 5.7, [*Superannuation Guarantee Non-compliance*](https://static.treasury.gov.au/uploads/sites/1/2017/08/P2017_T200724.pdf), Superannuation Guarantee Cross-Agency Working Group, 31 March 2017 [↑](#footnote-ref-11)
12. P 46, para 5.19, [*Superannuation Guarantee Non-compliance*](https://static.treasury.gov.au/uploads/sites/1/2017/08/P2017_T200724.pdf), Superannuation Guarantee Cross-Agency Working Group, 31 March 2017 [↑](#footnote-ref-12)
13. P 4, para 1.9, exposure draft explanatory memorandum. P 7, para 1.24 also addresses this, however the usual effect of an enterprise agreement is to void any award superannuation provision, not to supplement or retain it. [↑](#footnote-ref-13)
14. P 4, para 1.8, exposure draft explanatory memorandum. [↑](#footnote-ref-14)
15. P 15, exposure draft explanatory memorandum [↑](#footnote-ref-15)
16. If an estimate is higher than the actual unpaid SG charge the employer or its directors would need to pay the higher amount to fully discharge their liability. If only the (lower) unpaid SG charge amount is paid the remaining additional amount of the estimate has not been discharged and liability remains. [↑](#footnote-ref-16)
17. Pp 47-48, para 5.29, exposure draft explanatory memorandum. [↑](#footnote-ref-17)