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

EXPOSURE DRAFT EXPLANATORY MATERIAL

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

<i>Abbreviation</i>	<i>Definition</i>
APRA	Australian Prudential Regulation Authority
Commissioner	Commissioner of Taxation
ITAA 1936	<i>Income Tax Assessment Act 1936</i>
PAYG	Pay as you go
SGAA 1992	<i>Superannuation Guarantee (Administration) Act 1992</i>
SISA 1993	<i>Superannuation Industry (Supervision) Act 1993</i>
SUMLMA	<i>Superannuation (Unclaimed Money and Lost Members) Act 1999</i>
TAA 1953	<i>Taxation Administration Act 1953</i>

Chapter 1

Directions and penalties in relation to superannuation guarantee charge

Outline of chapter

1.1 Schedule 1 amends the TAA 1953 to allow the Commissioner to issue directions to an employer who fails to comply with their obligations under the SGAA 1992 or an obligation under the TAA 1953 as it relates to the SGAA 1992 (superannuation guarantee obligations).

1.2 The Commissioner can direct an employer to undertake an approved course relating to their superannuation guarantee obligations where the Commissioner reasonably believes there has been a failure by the employer to comply with their superannuation guarantee obligations.

1.3 The Commissioner can also direct an employer to pay unpaid and overdue superannuation guarantee charge liabilities. This is to address recalcitrant employers who intentionally and repeatedly disregard their obligations and continuously fail to pay their superannuation liabilities.

1.4 The purpose of these amendments is to enhance compliance with superannuation guarantee by employers.

1.5 All legislative references in this Chapter are to the TAA 1953 unless otherwise stated.

Context of amendments

1.6 The Superannuation Guarantee Cross-Agency Working Group was established in December 2016 to report on the operation, administration and extent of non-compliance in the superannuation guarantee system in Australia.

1.7 In March 2017, the Superannuation Guarantee Cross-Agency Working Group released its final report, which contained its final recommendations on options to improve superannuation guarantee compliance.

1.8 These amendments are one of several measures announced as part of the Government's package of reforms to strengthen compliance

with superannuation guarantee obligations by employers. The amendments are based on recommendation 6 contained in the Superannuation Guarantee Cross-Agency Working Group's report.

1.9 The SGAA 1992 sets out the circumstances in which an employer is liable to the superannuation guarantee charge and the obligations they have in respect of the charge. There are no provisions in the SGAA 1992 that place an obligation on an employer to make contributions on behalf of their employees.

1.10 The superannuation guarantee rules are designed to ensure that employees have at least a minimum level of superannuation support through contributions provided by their employer in respect of their employment. The rules achieve this by imposing a tax (the superannuation guarantee charge) on employers who fail to contribute an amount at least equivalent to the minimum percentage of their employee's ordinary time earnings into superannuation. Employers can reduce the amount of superannuation guarantee charge payable by making contributions to their employee's superannuation fund of choice before the quarterly due date (the 28th day after the end of the quarter). If the minimum level of superannuation contribution is made in respect of the individual employee, then the superannuation guarantee charge is reduced to nil.

1.11 The superannuation guarantee charge is a tax related liability under Subdivision 255-A in Schedule 1, and once due and payable, becomes a debt due to the Commonwealth. Part 4-15 in Schedule 1 deals with the collection and recovery of tax related liabilities.

1.12 Currently, the failure to comply with a superannuation guarantee obligation under the SGAA 1992 can result in financial penalties for the employer. An employer who fails to lodge the superannuation guarantee statement on time is liable to pay additional superannuation guarantee charge (known as the 'Part 7 penalty') which can be up to 200 percent of the amount of the underlying superannuation guarantee charge. General interest charge is also imposed for late payments once a superannuation guarantee assessment has been made.

1.13 The TAA 1953 also imposes administrative penalties (for example in relation to false and misleading statements in relation to a superannuation guarantee statement under Division 284 in Schedule 1) and contains offences for failing to comply with tax related obligations.

1.14 An employer's failure to comply with their superannuation guarantee obligations can occur for a variety of reasons. In particular, smaller employers may not be fully aware of their superannuation guarantee obligations under the SGAA 1992. Employers may also

misclassify payments which results in an underpayment of superannuation guarantee.

1.15 In other cases, there are recalcitrant employers who have intentionally failed to provide their employees with their superannuation guarantee entitlements and repeatedly disregarded their obligations and continuously failed to pay their superannuation liabilities.

Summary of new law

1.16 The amendments empower the Commissioner to issue directions to employers to undertake specific actions where the Commissioner is satisfied that there has been a failure to comply with an obligation or a failure to pay a charge. These directions are designed to enhance employer compliance with their superannuation guarantee obligations.

1.17 The key features of the education direction are as follows:

- The Commissioner can issue a direction to an employer if the Commissioner reasonably believes the employer has failed to comply with a superannuation obligation.
- The person who has received the direction must complete the approved course and provide proof of completion to the Commissioner.
- Failure to comply with the direction can result in administrative and/or criminal penalties.

1.18 The key features of the direction to pay superannuation guarantee charge are as follows:

- The Commissioner can issue a direction to an employer if the employer has failed to pay an amount of superannuation guarantee charge, or an estimate of superannuation guarantee charge, for a quarter.
- The employer must ensure that the amount of the unpaid liability is paid within the period specified in the direction.
- Failure to comply with the direction can result in criminal penalties.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The Commissioner can issue a direction to an employer to undertake an approved course where that employer has failed to comply with their superannuation guarantee obligations under the SGAA 1992 or their obligations under the TAA 1953 as it relates to the SGAA 1992.	No equivalent.
The Commissioner can issue a direction to an employer to pay an outstanding superannuation guarantee liability or an estimate of the liability.	No equivalent.

Detailed explanation of new law

1.19 The amendments insert a new Division 295 in Schedule 1 to the TAA 1953 which provides the Commissioner with the power to issue a direction to an individual to complete an approved course. Such directions can be issued where the Commissioner reasonably believes that there has been a failure by an employer to comply with a superannuation guarantee obligation.

1.20 The amendments also insert a new Division 296 in Schedule 1 to the TAA 1953 which provides the Commissioner with the power to issue a direction to an entity to pay an unpaid and overdue superannuation guarantee liability.

Education directions

1.21 The Commissioner can issue a written direction to an employer if the Commissioner reasonably believes that the employer has failed to comply with an obligation under the SGAA 1992 or an obligation under the TAA 1953 as it relates to the SGAA 1992. The direction must direct an employer to undertake an approved course of education and provide the Commissioner with evidence of completion of the course. [*Schedule 1, item 3, subsection 295-10(2) in Schedule 1 to the TAA 1953*]

1.22 It is appropriate for the Commissioner to have the discretion to issue an education direction to an employer where the employer's lack of knowledge or understanding of their obligations has contributed to a failure to comply with their obligations under the SGAA 1992 or the TAA 1953.

1.23 The purpose of the Commissioner issuing directions to employers to undertake an approved course is to address knowledge gaps and reduce future cases of non-compliance through employers gaining a better understanding about their ongoing superannuation obligations and liabilities.

Failure to comply with obligations under the SGAA 1992 or the TAA 1953

1.24 There is no obligation in the SGAA 1992 for employers to make superannuation contributions on behalf of employees. This is usually governed by the employment arrangements (e.g. enterprise agreements or awards). However if the minimum superannuation guarantee contribution is not made by an employer for a quarter, they are liable to pay the superannuation guarantee charge equal to the total of the amount of the superannuation guarantee shortfalls, nominal interest and administrative components for the quarter.

1.25 The Commissioner must have reasonable belief that the employer has failed to comply with an obligation under the SGAA 1992 or the TAA 1953. The meaning of ‘employer’ adopts the same meaning from the definition contained in the SGAA. *[Schedule 1, item 3, paragraph 295-10(1)(a) in Schedule 1 to the TAA 1953]*

1.26 The Commissioner must have evidence of the employer’s failure to comply with the superannuation guarantee obligation. The level of evidence does not need to amount to an actual failure to comply with an obligation by an employer. However, the Commissioner must be able to reasonably conclude that there has been a failure to comply with one of the following obligations:

- Failing to pay the amount of superannuation guarantee charge that is payable (section 16 of the SGAA 1992). This includes failing to pay any superannuation guarantee charge arising from a default assessment (section 36 of the SGAA 1992) *[Schedule 1, item 3, subparagraph 295-10(1)(a)(i) in Schedule 1 to the TAA 1953]*
- Failing to lodge a superannuation guarantee statement for the quarter on or before the ‘lodgement day’, being the 28th day of the second month after the quarter end (section 33 of the SGAA 1992) *[Schedule 1, item 3, subparagraph 295-10(1)(a)(ii) in Schedule 1 to the TAA 1953]*
- Failing to provide the Commissioner with any information that is requested (section 34 of the SGAA 1992) *[Schedule 1, item 3, subparagraph 295-10(1)(a)(ii) in Schedule 1 to the TAA 1953]*

- Failing to comply with an obligation to keep records as required under the SGAA 1992 (section 79 of the SGAA) [*Schedule 1, item 3, subparagraph 295-10(1)(a)(iii) in Schedule 1 to the TAA 1953*]
- Failing to pay a liability arising from an estimate the Commissioner makes of an unpaid superannuation guarantee charge by the time it is due and payable (subsection 268-20(1)(b) in Schedule 1) [*Schedule 1, item 3, subparagraph 295-10(1)(a)(iv) in Schedule 1 to the TAA 1953*]
- Failing to comply with any other obligation under the TAA 1953 that relates to the SGAA 1992 [*Schedule 1, item 3, subparagraph 295-10(1)(a)(v) in Schedule 1 to the TAA 1953*]

Example 1.1– failure to comply with an obligation under the SGAA 1992 by an individual

Chloe is a sole trader who owns and operates her own business making and supplying wholesale jewellery. Chloe has three wage earning employees, Christine, Jo and Mike. As an employer, Chloe has failed to pay superannuation contributions for all of her employees for four quarters in the 30 June 2017 year and therefore has four superannuation guarantee shortfalls. Chloe lodges her superannuation guarantee statements for one of the four quarters and only pays the superannuation guarantee charge for that quarter.

Chloe, as an employer, has failed to comply with her obligations in her failure to lodge a superannuation guarantee statement for three quarters (under section 33 of the SGAA 1992) and her failure to pay the superannuation guarantee charge liability for those quarters (under section 49 of the SGAA 1992).

Example 1.2– failure to comply with a related obligation under the TAA 1953

Chloe is a sole trader who makes and supplies expensive jewellery. She has been operating her business for four years. Chloe has failed to pay superannuation guarantee contributions for all three of her employees. The Commissioner is aware that Chloe has not lodged any superannuation guarantee statements for any of the quarters.

The Commissioner issues a notice pursuant to Division 268 of estimates for the superannuation guarantee charge payable by Chloe for the quarters in the four years that she has been operating. After being given the notice of estimate, Chloe fails to engage with the Commissioner and does not discharge any of the estimated superannuation guarantee charge liabilities.

Chloe has failed to comply with the company's obligations under the TAA 1953 by failing to pay the estimates of superannuation guarantee charges for those quarters.

Requirements of the direction

1.27 If an employer has failed to comply with its obligations under the SGAA 1992 or related obligations under the TAA 1953, the Commissioner may issue a written direction to a person associated with employer requiring them to undertake a specified approved course of education provided by the Commissioner or another entity. *[Schedule 1, item 3, section 295-15 in Schedule 1 to the TAA 1953]*

1.28 The written education direction must specify the period within which the person must comply with the direction. The period specified must be a timeframe which is reasonable based on the circumstances of the employer. *[Schedule 1, item 3, subsection 295-10(3) in Schedule 1 to the TAA 1953]*

1.29 The amendments make it clear that an education direction given by the Commissioner is not a legislative instrument within the meaning of section 8 of the *Legislation Act 2003*. *[Schedule 1, item 3, subsection 295-10(6) in Schedule 1 to the TAA 1953]*

Who can complete the education direction?

1.30 Depending on the type of employer who has failed to comply with the superannuation obligation, the amendments contain a list of particular individuals who can be issued with a direction by virtue of their association with the employer. This includes a sole trader and a director in a company. *[Schedule 1, item 3, paragraph 295-10(1)(b) in Schedule 1 to the TAA 1953]*

1.31 The provision also allows the Commissioner to issue the direction to a person who makes or participates in making decisions that affect the whole or a substantial part of the business of the employer. This captures any person who is in an executive decision making position of any type of employer. *[Schedule 1, item 3, subparagraph 295-10(1)(b)(v) in Schedule 1 to the TAA 1953]*

Requirements of employer arising from the direction

1.32 An employer must comply with the direction before the end of the specified period provided on the written direction. The employer must also ensure that they or someone else on their behalf provides the Commissioner with evidence of completion of the course. *[Schedule 1, item 3, subsections 295-10(2) and (4) in Schedule 1 to the TAA 1953]*

Consequences of not complying with the direction

1.33 An employer who fails to comply with the direction within the specified time period is liable to an administrative penalty of 5 penalty units. *[Schedule 1, item 3, subsection 295-10(5) in Schedule 1 to the TAA 1953]*

1.34 An employer who has completed the approved course but fails to provide evidence of completion of the course has failed to comply with the direction and is liable to an administrative penalty. This administrative penalty is automatically imposed but can be remitted by the Commissioner.

1.35 The amendments also list a failure to comply with an education direction as an additional circumstance in which a person commits an offence under section 8C. *[Schedule 1, item 1, paragraph 8C(1)(fa)]*

1.36 Section 8C applies to failures to comply with certain requirements that are imposed under or pursuant to a taxation law. These currently include requirements to provide information to the Commissioner or another person, to notify the Commissioner or another person of a particular matter or thing, and to attend before the Commissioner or another person.

1.37 The offence in section 8C is an offence of absolute liability. However, subsection 8C(1B) provides a defence for persons who are unable to comply with the relevant requirement.

1.38 Tiered penalties apply to offences under section 8C. These penalties are provided for by section 8E and apply different penalties to first, second, and third or subsequent offences. A person who commits a first offence is liable to a fine of up to 20 penalty units, is liable to a fine of up to 40 penalty units for a second offence, and is liable to a fine of up to 50 penalty units and/or imprisonment of 12 months for a third or subsequent offence.

1.39 Adding compliance with an education direction to the circumstances specified in section 8C means that a failure to comply with such a direction is an offence of absolute liability. This means that it is not necessary to establish fault if an employer has failed to comply with the written direction before the end of the specified period.

1.40 Extending the existing offence of absolute liability and the tiered penalties in section 8E to failures to comply with an education direction is appropriate as it maintains consistency with the other failures that are already covered by section 8C. All of the circumstances relate to requirements that are imposed under the taxation law to take particular actions and a failure to comply with an education direction is directly

comparable to the existing requirements to notify the Commissioner of particular matters or attend before the Commissioner or another person.

1.41 The existing defence for being unable to comply with a requirement also applies to failures to comply with an education direction, meaning that an employer who is genuinely incapable of complying with the direction will not commit an offence.

1.42 Applying the existing section 8C penalty framework to education directions ensures that the consequences of not complying with a direction are consistent with the existing framework for other failures. The existing penalties will assist in ensuring that employers who have already failed to comply with their obligations under the SGAA 1992 and the TAA 1953 face appropriate sanction for not fulfilling the further obligation under the TAA 1953 in respect of education courses.

Approval of course

1.43 The Commissioner may, in writing, approve one or more courses of education for the purpose of the education direction. A course that is approved by the Commissioner may be provided by the Commissioner or another entity. *[Schedule 1, item 3, subsections 295-15(1) and (2) in Schedule 1 to the TAA 1953]*

1.44 The amendments make it clear that an approval of a course given by the Commissioner is not a legislative instrument within the meaning of section 8 of the *Legislation Act 2003*. *[Schedule 1, item 3, subsection 295-15(3) in Schedule 1 to the TAA 1953]*

Course fees

1.45 An entity providing an approved course of education may charge fees for the course. *[Schedule 1, item 3, subsection 295-20(1) in Schedule 1 to the TAA 1953]*

1.46 Any fees that are charged must not amount to taxation. *[Schedule 1, item 3, subsection 295-20(2) in Schedule 1 to the TAA 1953]*

1.47 An entity has the discretion whether to choose to charge fees for the approved course or not. For providers who do charge fees, it is appropriate that the fees remunerate the course providers for facilitating the education courses. The amendments ensure that the course fees do not amount to taxation by imposing an obligation on service providers to ensure that the course fees they set must not amount to taxation. This is because the Constitution requires that taxes be imposed in separate legislation.

1.48 The fees which service providers of the approved courses charge are expected to have the following characteristics:

- The fees generally have a discernible relation with the value of the provision of the approved course being provided;
- The fees do not necessarily have to equal precisely or directly with the cost of providing the service;
- The fees do not have a revenue raising purpose;
- The fees can be fixed by reference to the costs of delivering the services to all users, rather than to a particular user, provided there is a rational basis for determining the level of funding between users.

1.49 The course fees are payable by the employer. It is likely the fees are deductible for the employer as they are necessarily incurred in carrying on a business.

Variation of direction by the Commissioner

1.50 The Commissioner can, at any time, make its own variation of the direction, or revoke the direction. *[Schedule 1, item 3, section 295-25 in Schedule 1 to the TAA 1953]*

Variation of direction at the request of the recipient of the direction

1.51 The recipient of the direction can request that a direction be varied. The request must be in writing, must set out the reasons for the variation and must be provided to the Commissioner before the end of the period specified in the direction. *[Schedule 1, item 3, subsections 295-30(1), (2) and (3) in Schedule 1]*

1.52 The reasons for variation may include why the recipient cannot comply with the direction within the specified time period, or seek an extension for the timeframe and include the reasons why an extension is required in their specific circumstances.

1.53 The Commissioner must make a decision in relation to the request to:

- vary the direction otherwise than in accordance with the request;
- vary the direction that would otherwise be in accordance with the request; or

- refuse to vary the direction.

[Schedule 1, item 3, subsection 295-30(4) in Schedule 1 to the TAA 1953]

1.54 The decision must be made within 28 days from receipt of the request. If 28 days passes and the Commissioner has not made a decision, the Commissioner is taken to have refused the variation request.

[Schedule 1, item 3, subsection 295-30(5) in Schedule 1 to the TAA 1953]

1.55 Where the variation decision is made within the timeframe specified in the direction, the Commissioner must provide notification to the employer of the decision that is being taken. The Commissioner must provide a copy of the varied direction and written reasons for the decision in relation to the request if the decision is to refuse the request or to vary the request that is different to what was requested by the employer.

[Schedule 1, item 3, subsection 295-30(6) in Schedule 1 to the TAA 1953]

1.56 Those who make a request to vary a direction receive automatic extensions for the date specified in the direction in which they must comply with the education direction. The extension is limited to the period starting from the day the Commissioner receives the request and ends on the day the Commissioner provides notification of the decision in relation to the request. *[Schedule 1, item 3, subsection 295-30(7) in Schedule 1 to the TAA 1953]*

Objection rights

1.57 The recipient of a direction can object to a decision of the Commissioner to issue a direction, vary a direction or refuse to vary a direction in accordance with a request under the taxation laws set out in Part IVC of the TAA 1953. *[Schedule 1, items 2 and 3, paragraph 14ZW(1)(bi) and section 295-35 in Schedule 1 to the TAA 1953]*

Application and transitional provisions

1.58 The amendments in Schedule 1 to insert Division 295 in Schedule 1 (education directions) apply in relation to a failure to comply with a superannuation guarantee obligation that occurs on or after 1 July 2018. *[Schedule 1, item 4]*

1.59 This includes a failure to pay an amount of superannuation guarantee charge or an estimate of a superannuation guarantee charge that became payable before 1 July 2018 and remains payable on or after 1 July 2018. This is justified because the failure to pay an amount of superannuation guarantee charge that is due and payable would still have occurred if the amount is an existing unpaid amount that is not settled by the employer.

Direction to pay superannuation guarantee charge

1.60 The Commissioner can issue a written direction to an employer requiring that it pay an amount of superannuation guarantee charge that is payable by the employer under the SGAA 1992 or an amount of an estimate of the superannuation guarantee charge under Division 268 in Schedule 1. *[Schedule 1, item 3, subsection 296-10(1) in Schedule 1 to the TAA 1953]*

1.61 As the liabilities to which this direction relates must already exist before a direction to pay can be issued, the direction operates in conjunction with the existing collection and recovery rules that apply in respect of tax related liabilities under the TAA 1953. The extension of the direction to estimates under Division 268 in Schedule 1 reflects that the liability to the estimate, although a separate liability, is imposed as a method for collecting unpaid superannuation guarantee charge.

1.62 The purpose of the direction is to provide the Commissioner with an additional tool to enforce compliance with the existing obligations to pay amounts in respect of the superannuation guarantee.

Requirements of the direction

1.63 If the Commissioner decides to give a direction to an employer to pay an amount of superannuation guarantee charge or a related estimate of the charge, the direction must contain a number of particulars. These particulars are required in order for employers who receive a direction to be made fully aware their rights and obligations in respect of the direction, as well as the consequences that apply if they do not comply with the direction.

1.64 The direction must set out:

- The amount that the employer is required to pay and the quarter to which the amount relates. *[Schedule 1, item 3, paragraphs 296-10(3)(a) and (b) in Schedule 1 to the TAA 1953]*
- The consequences of failing to comply with the direction and explain the review rights available to the employer. *[Schedule 1, item 3, paragraphs 296-10(3)(d) and (e) in Schedule 1 to the TAA 1953]*
- Specify the period within which the employer must comply with the direction. This period must be at least 21 days after the day that the direction is given. *[Schedule 1, item 3, paragraph 296-10(3)(c) in Schedule 1 to the TAA 1953]*

1.65 This minimum period provides a minimum amount of time for an employer to comply with the direction. However, the Commissioner is

free to specify a longer period of time in the direction where it is appropriate to do so.

Offence

1.66 An employer commits an offence if they are given a direction to pay the amount of an outstanding liability and the amount of the liability is not discharged within the period specified in the direction. The maximum penalty for the offence is 50 penalty units, imprisonment for 12 months, or both. *[Schedule 1, item 3, subsection 296-15(1) in Schedule 1 to the TAA 1953]*

1.67 This is a separate offence provision that is distinct from the offence provisions provided in section 8C.

1.68 While it is the employer that will commit an offence if the relevant liability is not discharged within the necessary period, the employer can avoid committing an offence if another entity discharges the liability on their behalf. This could occur where a third party pays the amount of the outstanding liability to the Commissioner at the request or direction of the employer.

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.

1.73 The offence of strict liability and the amount of the related penalty is consistent with the existing offences that apply to other failures to comply with taxation obligations (see for example, section 8C creates an offence of absolute liability for failures to comply with requirements under the taxation law).

1.74 Although the offence is an offence of strict liability, a defence is available to ensure that individuals do not commit an offence where they have not complied with the direction in appropriate circumstances. This defence is explained in further detail below and applies in conjunction with the general defence to strict liability offences for honest mistakes of fact under section 9.2 of the Criminal Code contained in Schedule 1 to the *Criminal Code Act 1995*.

1.75 The offence has been imposed through a directions power framework as an alternative to applying criminal sanctions directly to the failure to pay the liabilities in respect of superannuation guarantee. This approach narrows the scope of employers that are potentially subject to criminal sanctions for non-payment by requiring that the Commissioner take into account all relevant facts and circumstances in working out whether to issue a direction to a particular employer.

1.76 It is intended that the Commissioner only issue directions in relation to serious contraventions of the obligations to pay superannuation guarantee related liabilities by employers whose actions are consistent with an ongoing and intentional disregard of those obligations.

1.77 To achieve this outcome, the Commissioner is required to consider the following matters in deciding whether to give a direction to an employer:

- The employer's history of compliance with obligations to pay liabilities related to the superannuation guarantee charge;
- The employer's history of compliance with other obligations under the taxation law;
- Whether the amount of the unpaid liability is substantial, having regard to the size and nature of the employer's business;
- Any steps that the employer had taken to discharge the unpaid liability or to dispute that it exists; and
- Any other matters that the Commissioner considers relevant.

[Schedule 1, item 3, subsection 296-10(2) in Schedule 1 to the TAA 1953]

1.78 The list of matters provides an assessment of things for the Commissioner to consider. Each factor does not need to be present or present to a particular degree. While these factors must be taken into account, no single matter is wholly determinative of whether or not a determination must be issued.

1.79 Instead, the various matters provide guidance to the Commissioner about the circumstances in which a direction to pay should be issued. In this respect, the direction is intended to be issued to employers with a history of serious non-compliance, rather than those that inadvertently breach their obligations to pay the amounts that are relevant to the direction or that have minor or isolated breaches.

Defence for reasonable steps

1.80 If the liability that is identified in a direction is not discharged within the required period, the employer that was issued with the direction will not commit an offence if they took all reasonable steps within the required period to both comply with the direction and to ensure that the original liability was discharged before the direction was given.
[Schedule 1, item 3, subsection 296-15(3) in Schedule 1 to the TAA 1953]

1.81 This defence ensures that employers are not subject to criminal charges for failing to comply with a direction to pay an outstanding liability where they are genuinely unable to do so.

1.82 To be covered by the defence, an employer must have taken all reasonable steps that were available to discharge the liability identified in the direction. These steps are not limited to the period from which the direction was issued to reflect the fact that the direction relates to an obligation that the employer had prior to the direction being issued. The employer has the burden of proof of establishing that the defence is available to them.

1.83 In determining whether all reasonable steps have been taken, it is also relevant to consider whether the employer took steps to avoid paying the liability, or otherwise manufactured a situation which resulted in the employer being unable to discharge its liabilities.

1.84 Actions of this kind would be inconsistent with an employer taking all reasonable steps to discharge their superannuation guarantee liabilities, irrespective of whether the actions occurred prior to the direction being issued.

1.85 The defence is framed as an offence-specific defence, which means that the evidential burden for proving that such reasonable steps were taken is placed on the employer. This approach is justified on the

basis that the actions that an employer took to discharge its own liabilities are peculiarly within the knowledge of the defendant and would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

1.86 A similar approach is adopted in subsection 8C(1B), which provides that a failure to comply with a requirement under the taxation law does not amount to an offence under subsection 8C(1) to the extent that a person is not capable of complying with the relevant obligation. However, as the defence for this direction is also required to refer to the underlying obligation to discharge the liability to which the direction relates, the defence is framed in terms of discharging that liability (rather than simply complying with the direction).

Effect of underlying liability being reduced or ceasing to exist

1.87 If the liability to which a direction relates is reduced before the end of the period in which an employer is required to comply with the direction, the amount that an employer is required to pay under the direction is also reduced. In such circumstances, the amount of the reduction is equal to the reduction in the liability. *[Schedule 1, item 3, subsection 296-25(1) in Schedule 1 to the TAA 1953]*

1.88 Additionally, a direction is taken to be revoked if the underlying liability ceases to exist before the end of the period in which the employer was required to comply. *[Schedule 1, item 3, subsection 296-25(2) in Schedule 1 to the TAA 1953]*

1.89 These rules ensure that certain changes in respect of the underlying liability are automatically taken into account in working out an employer's obligations in respect of a direction. The relevant changes are all ones that are ultimately beneficial to the employer in the sense that they reduce the obligations that an employer has under a direction, or remove those obligations altogether.

1.90 Such changes could occur where the liability is partially discharged through payments made by the employer or another entity. A reduction to a liability, or its cessation, could also occur where the employer successfully objects to the underlying liability itself. In such cases, an employer is still required to pay any remaining amount of the liability.

1.91 The reduction or cessation must occur within the period in which the employer is required to comply with the direction. This means that an employer may still commit an offence for not complying with a direction even where the related liability is reduced or ceases to exist after

the period in which they were required to comply. [*Schedule 1, item 3, subsection 296-25(3) in Schedule 1 to the TAA 1953*]

1.92 This approach is consistent with the general position that an entity is required to discharge their liabilities within the necessary timeframe, even where they dispute the fact that the liability exists. Importantly, the amendments also provide for automatic extensions of the period in which an employer is required to comply where they object to the amount of the liability (these rules are explained in further detail below). The combination of these rules protects employers that legitimately dispute the amount of a liability while providing a clear incentive for employers to raise any such disputes in a timely manner.

1.93 While these adjustment rules do not apply in respect of increases to an underlying liability, the Commissioner is still able to revoke a direction and issue a new direction in respect of such increases. These rules are also explained below.

Automatic variations and revocations

1.94 The Commissioner may vary a direction to reduce the amount required to be paid by an employer or to extend the period within which the employer must comply. Such variations must be made before the end of the period in which the employer must comply with the original variation. [*Schedule 1, item 3, paragraphs 296-20(1)(a) and (b) in Schedule 1 to the TAA 1953*]

1.95 This variation power can only be applied in ways that are beneficial to an employer. Such variations might be made where the Commissioner is provided with additional information about the employer's circumstances after a direction is given and considers that it is appropriate to reduce the amount of the underlying liability that must be paid in order for the employer to avoid criminal sanctions.

1.96 Similarly, the Commissioner might consider it appropriate to extend the period in which the employer is required to pay the amount specified in the direction based on a commitment by the employer to discharge the liability over a longer time period.

1.97 The Commissioner may also revoke a direction at any time before the end of the period in which an employer was required to comply with the direction. [*Schedule 1, item 3, paragraph 296-20(1)(c) in Schedule 1 to the TAA 1953*]

1.98 This revocation power could be used where the Commissioner no longer considers it appropriate for an employer to be subject to the direction.

1.99 The Commissioner may also choose to revoke a direction where the amount of the liability originally identified in the direction was too low. Because a direction cannot be varied to increase the amount that must be paid by an employer in respect of a liability, the Commissioner would need to revoke the original direction and issue a new direction that identifies the higher amount (if it was appropriate to do so). This ensures that the any increases to the obligations imposed on an employer under a direction are subject to the minimum timeframes and other procedural matters that must be adhered to. It also provides employers with clear objection rights in respect of any new directions that are issued.

1.100 The amendments also clarify that a decision by the Commissioner to vary or revoke a direction to pay a superannuation guarantee liability does not affect any liability that an employer has to pay the liability. *[Schedule 1, item 3, subsection 296-20(2) in Schedule 1 to the TAA 1953]*

1.101 Although the direction to pay an outstanding amount is based on the existence of an underlying liability, the decision to vary or revoke a direction could be justified by circumstances unrelated to the existence of the liability. Indeed, because the amendments include specific rules that apply where a liability is reduced or ceases to exist, there is no need for the Commissioner to make a decision to vary or revoke a direction in those circumstances.

Objection rights

1.102 An employer that is dissatisfied with a decision of the Commissioner to give a direction to pay an unpaid liability may object to the decision in the manner specified in Part IVC. Such objections must be made before the end of the period specified in the direction by the Commissioner. *[Schedule 1, items 2 and 3, paragraph 14ZW(1)(bj) and section 296-30 in Schedule 1 to the TAA 1953]*

1.103 The requirement that the objection be made within the period specified in the determination ensures that employers raise any objections they have in a timely manner.

Extension of period to comply if taxation objection is made

1.104 The period in which an employer must comply with a direction is automatically extended if the employer objects to the direction being issued or objects to the taxation decision related to the underlying liability in the manner set out in Part IVC. *[Schedule 1, item 3, paragraphs 296-35(1)(a) and (b) in Schedule 1 to the TAA 1953]*

1.105 Although entities are generally required to discharge their tax liabilities irrespective of whether they dispute the existence of the

liability, in most cases the consequences for failing to discharge a disputed liability within the necessary time period are limited to interest charges.

1.106 In contrast, a failure to comply with direction to pay a liability in respect of superannuation guarantee charge or a related estimate can result in criminal sanctions. Because these consequences are intentionally far greater than the general approach to liabilities, the rules about extensions are required to ensure that employers do not commit an offence for failing to comply with a direction where they have made a legitimate objection in respect of the decision to issue the direction.

1.107 As noted above, if an employer successfully objects to the decision to issue a direction, or to the amount or existence of the underlying liability, the rules about automatic reductions or revocations of the direction will apply. For example, if the result of the objection is that the underlying liability is reduced, the amount that the employer is required to pay under the direction will be similarly reduced. If an employer unsuccessfully objects to a decision, they will still be required to comply with the direction but will be able to do so under the extended compliance period.

1.108 For the extension to apply, the relevant objection must be made before the end of the period in which the employer was required to comply with the direction. *[Schedule 1, item 3, paragraph 296-35(1)(c) in Schedule 1 to the TAA 1953]*

1.109 An employer could object to the decision to issue a direction or to the underlying liability after the direction has been issued. In addition, an employer that has already objected to the underlying liability before the direction is issued will have the period in which to comply with the direction automatically extended.

1.110 If an employer has made one of the relevant objections, the period in which it is required to comply with the direction is extended by a period equal to the number of days starting from the time the objection was made and ending 21 days after the Commissioner notifies the employer of the decision in relation to the objection. *[Schedule 1, item 3, paragraph 296-35(2)(a) in Schedule 1 to the TAA 1953]*

1.111 However, if the employer applies to the Administrative Appeals Tribunal or the Federal Court for a review of the Commissioner's decision in respect of the objection, the period in which to comply is instead extended by a period equal to the number of days starting from the time the objection was made and ending on the day the review or appeal is finally determined. *[Schedule 1, item 3, paragraph 296-35(2)(b) in Schedule 1 to the TAA 1953]*

1.112 These extensions effectively pause the period in which the employer is required to comply with the direction over the time that an objection is being resolved. The additional 21 day period from the time that the Commissioner notifies an employer of the decision about the objection provides an employer with minimum of 21 days in which to decide whether to appeal or seek a review of the decision. A similar extension is not required where the review or appeal is finally determined.

Application and transitional provisions

1.113 The amendments in Schedule 1 to insert Division 296 in Schedule 1 (direction to pay superannuation guarantee charge) apply in relation to a failure to pay an amount of superannuation guarantee charge or an estimate of superannuation guarantee charge that first becomes payable on or after 1 July 2018. [*Schedule 1, item 5*]

1.114 This is justified because of the severe criminal penalties that can occur for failing to comply with the direction to pay. It is necessary to provide reasonable notice of the application of the amendments for employers to undertake any necessary actions before the amendments become effective.

Chapter 2

Disclosure of information about non-compliance

Outline of chapter

2.1 Schedule 2 to the Bill amends the TAA 1953 to provide the Commissioner with the ability to disclose information that relates to a failure or a suspected failure by an individual's employer or former employer to comply with their obligations under the SGAA 1992 or related obligations under the TAA 1953.

2.2 All references to legislative provisions in this chapter are references to Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) unless otherwise stated.

Context of amendments

2.3 The Superannuation Guarantee Cross-Agency Working Group was established in December 2016 to report on the operation, administration and extent of non-compliance in the superannuation guarantee system in Australia.

2.4 In March 2017, the Superannuation Guarantee Cross-Agency Working Group released its final report, which contained its final recommendations on options to improve superannuation guarantee compliance.

2.5 This amendment is one of several measures announced as part of the Government's package of reforms to strengthen compliance with superannuation guarantee obligations by employers. The amendment is based on recommendation 3 contained in the Superannuation Guarantee Cross-Agency Working Group's report.

2.6 Division 355 in Schedule 1 contains the taxpayer confidentiality rules. Subject to certain exceptions, it is an offence for taxation officers to disclose or make a record of 'protected information' in respect of an entity if the information is acquired in their capacity as a taxation officer.

2.7 Protected information is information that is disclosed or obtained under or for the purposes of a taxation law. The information

must relate to the affairs of the entity (although not limited to their taxation affairs) and it must identify, or be reasonably capable of being used to identify the entity.

2.8 The prohibition on disclosure does not apply where an exception to the offence applies. These exceptions include disclosures for other Government purposes.

2.9 One of the exceptions for other Government purposes is contained in item 7 to table 2 in section 355-65(3) in Schedule 1 which provides a specific exception allowing a taxation officer to make a record or advise employees and former employees who have made a complaint about a failure by their employer or former employer to comply with their superannuation guarantee obligations. Under this exception, a taxation officer is permitted to make a record or disclose information relating to the Commissioner's response to the complaint with respect to the employee who made the complaint.

2.10 The exception does not cover information relating to the general financial affairs of the employer.

2.11 Where an employee has not made a complaint about their employer or former employer's failure to comply with their superannuation obligations, a taxation officer cannot disclose information about that failure to the employee as it is protected information. This is because the exception in item 7 of table 2 in section 355-65(3) of Schedule 1 does not apply to this situation. This can occur in circumstances where the Commissioner initiates an investigation or where another employee has complained about the individual's employer.

2.12 Once a liability for superannuation guarantee charge is established through the lodgment of a superannuation guarantee statement or the making of a default assessment, the taxation officer can tell an employee when payments for superannuation guarantee charge are distributed to the employee's superannuation fund.

Summary of new law

2.13 A taxation officer is permitted to disclose protected information that relates to a failure or a suspected failure by an individual's employer or former employer to comply with their obligations under the SGAA 1992 or the TAA 1953 as it relates to the SGAA 1992 in relation to the employee.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>A taxation officer is permitted to make a record or disclose protected information to an individual who is or was an employee where the record or disclosure is information that relates to a failure or a suspected failure by the individual's employer or former employer to comply with the employer's obligations under the SGAA 1992 or the TAA 1953 as it relates to the SGAA 1992 in relation to the employee.</p> <p>The information or disclosure cannot relate to the general financial affairs of the employer.</p>	<p>No equivalent.</p>

Detailed explanation of new law

2.14 These amendments expand a taxation officer's ability to disclose information in relation to an employee by providing an exception to allow the making of a record or disclosure of protected information to current and former employees which relate to the following:

- A failure by the individual's employer or former employer to comply with the employer's obligations under the SGAA 1992 or the TAA 1953;
- Where the Commissioner reasonably suspects there has been a failure to comply with the employer or former employer's obligations under the SGAA 1992 or the TAA 1953; or
- Any actions taken by the Commissioner in relation to such a failure or suspected failure.

[Schedule 2, item 2, item 7A to the table in subsection 355-65(3) in Schedule 1]

2.15 These amendments supplement the existing law which allow the Commissioner to disclose protected information relating to the Commissioner's response to a complaint by an employee about their employer's failure to comply with the employer's obligations under the SGAA 1992 or the TAA 1953 in relation to the employee.

2.16 These amendments are designed to allow a taxation officer to disclose information where the Commissioner has evidence that there has been a failure or reasonably suspects there has been a failure to comply with the employer's obligations under the SGAA 1992 or the TAA 1953 so far as it relates to an individual employee of the employer.

2.17 This will generally be where an employer has failed or is suspected of failing to pay the superannuation guarantee charge and lodging the superannuation guarantee statement by the due date. These obligations are triggered where an employer has a superannuation guarantee shortfall (which is made up of the total of all of the individual superannuation guarantee shortfalls for the employer) and the employer has not reduced the shortfall to nil by paying employee superannuation guarantee contributions before the relevant due date. An employer also has a range of other obligations under the SGAA 1992 relating to reporting and providing information to the Commissioner and paying estimates of superannuation guarantee charges.

2.18 Under the amendments, the Commissioner can inform a current or former employee about information where the Commissioner is aware of a failure or reasonably suspects there has been a failure by their employer to comply with their superannuation obligations. The Commissioner should have evidence to support its conclusion that there is a reasonable suspicion of a failure in order to trigger the disclosure. This allows the Commissioner to initiate its own disclosures based on the compliance activities being undertaken by the Commissioner and increased reporting from employers and superannuation providers.

2.19 The exception also permits the Commissioner to disclose information relating to an individual that relates to the Commissioner's response to the failure or suspected failure. This information can include the compliance activities that the Commissioner is undertaking in relation to the employer.

Example 2.1 - Disclosure to other employees who have not lodged complaints

RCorp has three employees, Nathan, Jill and Amy. The Commissioner receives a complaint from Amy who believes RCorp has not been paying her superannuation guarantee correctly. Haydon, a taxation officer, commences an investigation of RCorp's superannuation guarantee compliance. Haydon's investigations reveal that Nathan and Jill may also have been underpaid superannuation guarantee for the same quarter.

Under the existing law, Haydon could only discuss his investigation with Amy and would not have been able to disclose the suspected failure to Nathan or Jill. Under the amendments, Haydon can now

inform Nathan and Jill about the suspected underpayments of superannuation guarantee.

Haydon completes his investigation and establishes a superannuation guarantee charge liability for RCorp. Haydon is able to keep Amy, Nathan and Jill informed of the actions being taken to recover the superannuation guarantee charge amounts that relate to each of them.

Example 2.2 - Disclosure based on Commissioner's own investigations

Jo, a taxation officer, has been reviewing data received from a number of superannuation funds. She notices a mismatch in the employer contributions for a number of GCorp's employees compared to other data received in relation to GCorp's payroll. Jo suspects that GCorp may have stopped paying superannuation guarantee for its employees but not lodged superannuation guarantee charge statements.

Under the amendments, Jo is able to contact GCorp's employees about GCorp's possible failure to comply with its obligations under the SGAA 1992 but only to the extent the disclosure relates to the particular employee's entitlements.

Consequential amendments

2.20 An amendment to ensure that a disclosure that is made under item 7 to the table in subsection 355-65(3) in Schedule 1 also includes a failure to comply with an obligation under the TAA 1953 as it relates to the SGAA 1992. This is to capture all of the information that the Commissioner can disclose in their response to a complaint by an employee where there has been a failure of an obligation under the TAA 1953. *[Schedule 2, item 1]*

2.21 An amendment to clarify that a taxation officer is able to provide disclosures to an employee if there is a dispute to whether they are an employee. *[Schedule 2, item 3, subsection 355-69(9) in Schedule 1]*

Application and transitional provisions

2.22 The amendments in relation to the disclosure of protected information relating to a failure or a suspected failure of an employer to comply with obligations under the SGAA or under the TAA 1953 apply to records and disclosures made on or after 1 July 2018 (regardless of whether the failure or suspected failure to comply with the obligation occurred before, on or after 1 July 2018). *[Schedule 2, item 4]*

2.23 The disclosures can apply to a failure or a suspected failure to comply with an employer's superannuation obligation that has or is suspected to have occurred before 1 July 2018 because the event would have already occurred. The amendments allow the Commissioner to disclose historical information relating to the potential effected employee which can impact on their superannuation entitlements.

Chapter 3

Single touch payroll reporting

Outline of chapter

3.1 Schedule 3 amends the TAA 1953 to broaden the Single Touch Payroll reporting requirements so they apply to all employers, regardless of the number of employees. Single Touch Payroll is the reporting framework for employers to provide payroll and superannuation information to the Commissioner at the time the employment liabilities are paid or withheld.

3.2 Schedule 3 also amends the TAA 1953 to require employers to report salary sacrificed amounts paid to their employees' superannuation funds under the Single Touch Payroll reporting rules.

3.3 All references to legislative provisions in this chapter are references to Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) unless otherwise stated.

Context of amendments

3.4 The Superannuation Guarantee Cross-Agency Working Group was established in December 2016 to report on the operation, administration and extent of non-compliance in the superannuation guarantee system in Australia.

3.5 In March 2017, the Superannuation Guarantee Cross-Agency Working Group released its final report, which contained its final recommendations on options to improve superannuation guarantee compliance.

3.6 The amendments to broaden Single Touch Payroll reporting were announced as part of the Government's package of reforms to strengthen compliance with superannuation guarantee obligations by employers. These amendments are based on recommendation 1 contained in the Superannuation Guarantee Cross-Agency Working Group's report.

Single Touch Payroll

3.7 Division 389 in Schedule 1 was inserted by Schedule 23 to the *Budget Savings (Omnibus) Act 2016* and introduced the Single Touch

Payroll rules. Single Touch Payroll reporting currently requires the real-time reporting of withholding payments and amounts withheld from them, employee salary or wages and ordinary time earnings, and superannuation contributions to the Commissioner at the time these amounts are withheld or paid by employers.

3.8 The Single Touch Payroll rules are designed to enhance compliance by providing the Commissioner with increased visibility to monitor the payment of employee entitlements. This enables the Commissioner to identify non-compliance by employers earlier and better inform affected employees.

3.9 Division 389 in Schedule 1 currently applies to ‘substantial employers’ from 1 July 2018 or from 1 July of the year that they become a substantial employer. An entity is a substantial employer at a particular time if on the most recent 1 April before that time, commencing 1 April 2018, the entity had 20 or more employees, inclusive of the total number of employees employed by all member companies of the wholly-owned group. Entities that do not have 20 or more employees can choose to report under the Single Touch Payroll rules on a voluntary basis.

3.10 A significant proportion of superannuation guarantee non-compliance is attributable to small businesses. The Superannuation Guarantee Cross-Agency Working Group’s final report recommended the expansion of mandatory Single Touch Payroll reporting to all employers to provide the Commissioner more visibility of non-compliance by employers which could then be actioned more promptly.

Summary of new law

3.11 The Single Touch Payroll reporting rules in Division 389 in Schedule 1 apply to all employers, regardless of the number of employees they have.

3.12 All employers are required to report ‘sacrificed ordinary time earnings amounts’ and ‘sacrificed salary or wages amounts’ within the meaning of the SGAA 1992 (salary sacrificed amounts) paid to their employees’ superannuation funds under the Single Touch Payroll reporting rules.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
All entities with employees are required to report the information required under the Single Touch Payroll rules in Division 389 in Schedule 1 to the Commissioner.	Entities with 20 or more employees (substantial employers) are required to report the information required under the Single Touch Payroll rules in Division 389 in Schedule 1 to the Commissioner.
All entities with employees are required to report salary sacrificed amounts to the Commissioner.	No equivalent.

Detailed explanation of new law

Single Touch Payroll reporting by all employers

3.13 These amendments expand the scope of Single Touch Payroll reporting under Division 389 in Schedule 1 to apply to all entities who are employers, regardless of the number of employees they have. [*Schedule 3, item 6, subsection 389-5(1) in Schedule 1*]

3.14 Single Touch Payroll reporting requires the automatic reporting of certain amounts by employers to the Commissioner under Division 389 in Schedule 1, as set out in subsection 389-5(1) in Schedule 1. Employers are required to report withholding payments and amounts withheld from them, employee salary or wages and ordinary time earnings to the Commissioner at the time these amounts are withheld or paid by employers. As a result of other amendments made to the requirements in Division 389 as part of Schedule 2, employers will also be required to report salary sacrifice amounts to the Commissioner under the Single Touch Payroll rules.

3.15 The amendments remove the existing condition in Division 389 relating to ‘substantial employers’. As a result, the requirement to report certain amounts under Division 389 applies to all employers, and is no longer restricted to ‘substantial employers’. Therefore, employers only need to undertake a headcount on 1 April 2018, to determine if they are a ‘substantial employer’, and no later after 1 April.

3.16 The expansion of mandatory and real time reporting of employer liabilities to all employers is designed to improve the Commissioner’s ability to monitor superannuation guarantee compliance by increasing the visibility of non-payments by all employers.

Example 3.1 – size of employer

EXL Health Pty Limited is a company that provides allied health services. EXL Health Pty Limited employs 10 individuals for the health practice.

EXL Health Pty Limited is an entity that has employees. EXL Health Pty Limited will be required to report the relevant amounts to the Commissioner under Division 389 in Schedule 1.

Application and transitional provisions

3.17 The amendments requiring all employers to report under the Single Touch Payroll reporting rules apply in relation to an amount that an entity is required to report under Single Touch Payroll if the requirement to notify arises on or after 1 July 2018. *[Schedule 3, item 10, subsection (1)]*

3.18 For small employers who are not ‘substantial employers’ (entities with 20 or more employees), Single Touch Payroll reporting commences from 1 July 2019. For ‘substantial employers’ at 1 July 2018, these entities must continue to report under the existing Single Touch Payroll rules as they are required to report before 1 July 2019.

3.19 The amendments also apply to specific entities with whom the Commissioner has set a different application date for Single Touch Payroll reporting after 1 July 2018 but prior to 1 July 2019, the application day for any such entity will be the earlier of the day set by the Commissioner or 1 July 2019. This ensures that all employers will be subject to Single Touch Payroll by 1 July 2019. *[Schedule 3, item 10, subsection(2)]*

Reporting of sacrificed amounts by employers

3.20 These amendments require employers to report salary sacrificed amounts to the Commissioner under the Single Touch Payroll reporting rules.

3.21 Employers are required to report ‘sacrificed ordinary time earnings amounts’ and ‘sacrificed salary or wages amounts’ within the meaning of the SGAA 1992. In broad terms, these are the amounts by which an employee’s ‘ordinary time earnings’ and ‘salary or wages’ are reduced for a quarter under a salary sacrifice agreement.

3.22 The *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Act 2017* amended the SGAA 1992 to prevent employers from using their employees’ salary sacrificed superannuation contributions to reduce their own

superannuation guarantee contributions and ensure that superannuation guarantee is paid on the pre-salary sacrifice base. As a result of those amendments, an employer must make superannuation guarantee contributions in respect of an employee for a quarter of at least 9.5 per cent of an employee's ordinary time earnings base, independent of any contributions that the employee salary sacrifices to superannuation.

3.23 The amounts are required to be reported to the Commissioner by the time the employer would have been required to report the amounts under Division 389 in Schedule 1 had they been paid to the employee as 'ordinary time earnings' or 'salary or wages'. [*Schedule 3, item 13, subsection 389-5(1) in Schedule 1 (after table item 2)*]

3.24 These amendments ensure that the Commissioner continues to receive notifications of all amounts that are relevant to an employee's superannuation entitlements. It achieves this by requiring employers to report an employee's total salary or wages and ordinary time earnings and under the new law, salary sacrificed amounts which are paid into superannuation. This then properly captures the full picture of an employee's superannuation contribution entitlements.

Application and transitional provisions

3.25 The amendments requiring all employers to report salary sacrificed amounts apply in relation to quarters beginning on or after 1 July 2018. [*Schedule 3, item 15*]

Consequential amendments

3.26 Schedule 3 makes amendments as a consequence of expanding the Single Touch Payroll reporting to all employers, including the repeal of the definition of 'substantial employer', provisions and headings which explain and reference 'substantial employer' and Guide material. The definition is no longer required as a result of expanding Single Touch Payroll reporting to all employers. The provisions which allow voluntary reporting by entities that are not 'substantial employers' are also no longer required. [*Schedule 3, items 1 to 5 and 7 to 9, subsection 995-1(1) of the Income Tax Assessment Act 1997, paragraphs 8AAZLGB(1)(a) and (3)(b), sections 389-1 and 389-5 (heading), subsections 389-5(6), 389-15(1) and (2), and 389-15(3) (heading) in Schedule 1*]

3.27 Schedule 3 makes consequential amendments to include references to new item 2A in the table in subsection 389-5(1) in Schedule 1 for the reporting of salary sacrificed amounts in a number of provisions that currently reference items 1 or 2 in that table. [*Schedule 3, items 11, 12 and 14, paragraphs 8K(2A)(a), 8N(2)(a), 284-75(8)(a) in Schedule 1, and subsection 389-25(1) in Schedule 1*]

Chapter 4

Fund reporting

Outline of chapter

- 4.1 Schedule 4 amends the law to allow the Commissioner to provide superannuation providers with a grace period for correcting false or misleading statements in relation to member information statements without giving rise to penalties.
- 4.2 Schedule 4 removes the requirement for employers to report superannuation guarantee contributions paid to superannuation providers under the Single Touch Payroll reporting rules.
- 4.3 Schedule 4 reintroduces a previous measure to remove the requirement for superannuation funds to lodge bi-annual statements for lost members.
- 4.4 All references to legislative provisions in this chapter are references to Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) unless otherwise stated.

Context of amendments

- 4.5 The Superannuation Guarantee Cross-Agency Working Group was established in December 2016 to report on the operation, administration and extent of non-compliance in the superannuation guarantee system in Australia.
- 4.6 In March 2017, the Superannuation Guarantee Cross-Agency Working Group released its final report, which contained its final recommendations on options to improve superannuation guarantee compliance.
- 4.7 The amendments relating to grace periods and employer reporting of superannuation guarantee contributions relate to measures announced as part of the Government's package of reforms to strengthen compliance with superannuation guarantee obligations by employers. These amendments relate to recommendation 2 contained in the Superannuation Guarantee Cross-Agency Working Group's report.

4.8 While not part of the superannuation guarantee package of reforms, the amendments relating to bi-annual statements for lost members also streamline fund reporting. The amendments are being reintroduced following the lapse of the *Treasury Legislation Amendment (Repeal Day 2015) Bill 2016*.

APRA-regulated superannuation fund reporting

4.9 Recommendation 1 in the Superannuation Guarantee Cross Agency Working Group's final report recommended more frequent and detailed superannuation fund reporting. This recommendation operates in conjunction with the expansion of Single Touch Payroll reporting to all employers. However, reporting of superannuation guarantee contributions paid into employee superannuation accounts moves to superannuation funds and away from employers. These changes strengthen both the Commissioner's capacity to monitor compliance and identify non-compliance when it occurs, as well as to improve strategies to prevent non-compliance.

4.10 As part of this measure, the frequency of the APRA regulated superannuation fund reporting increases to an 'event-based' reporting, replacing the current annual member contribution statement. These changes are being enforced through the Commissioner's existing powers to require reporting from superannuation providers under section 390-5 in Schedule 1.

4.11 The measure does not apply to self-managed super funds.

Statements for lost members

4.12 A measure to remove the requirement for superannuation providers to provide biannual lost member statements to the Commissioner was previously introduced to Parliament as part of the lapsed *Treasury Legislation Amendment (Repeal Day 2015) Bill 2016*. The amendments for that measure were contained in Parts 2 and 3 in Schedule 2 to the Bill.

4.13 This measure is being reintroduced as part of the superannuation and taxation integrity package.

4.14 Superannuation funds are required to lodge a biannual lost members statement with the Commissioner, identifying all superannuation balances of lost members. This statement provides information to the Commissioner to display on a register of lost members. The Commissioner also collects member information through the annual member information statement, some of which is duplicated in the lost member statement.

Summary of new law

4.15 Schedule 4 amends the law to allow the Commissioner to provide superannuation providers with a grace period for correcting false or misleading statements in relation to member contribution statements without giving rise to penalties.

4.16 Schedule 4 removes the requirement for employers to report superannuation guarantee contributions paid to superannuation providers under the Single Touch Payroll reporting rules.

4.17 Schedule 4 amends the SUMLMA to remove the requirement for superannuation providers to lodge, twice yearly, a lost members statement with the Commissioner. These changes remove an additional reporting burden for funds, reducing compliance costs.

4.18 Information for the purposes of the register of lost members will be collected using the Commissioner's existing administrative powers under the TAA 1953 (although the amendments introduce a minor change to those powers to clarify their scope).

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The Commissioner can grant superannuation providers a grace period to correct false and misleading statements made under events-based reporting without penalty.	No equivalent.
All entities are not required to report superannuation guarantee contributions under the Single Touch Payroll rules in Division 389 in Schedule 1 to the Commissioner.	Entities with 20 or more employees (substantial employers) are required to report superannuation guarantee contributions under the Single Touch Payroll rules in Division 389 in Schedule 1 to the Commissioner.
Superannuation providers are not required to provide the Commissioner with a lost member's statement on a twice yearly basis.	Superannuation providers must give the Commissioner a lost member's statement on a twice yearly basis.

Detailed explanation of new law

Ongoing grace period for correcting errors for superannuation providers

4.19 These amendments allow the Commissioner to provide superannuation providers with an ongoing grace period for correcting false or misleading statements in relation to member information statements without giving rise to penalties. *[Schedule 4, item 5, section 390-7 in Schedule 1]*

4.20 There are a number of offences which gives rise to criminal penalties in relation to making false or misleading statements. An entity commits an offence if they provide a statement to the Commissioner where:

- the statement is false or misleading in a material particular (subsection 8K(1A));
- the statement contains an omission which makes the statement false or misleading in a material particular (subsection 8K(1B));
- the entity recklessly provides a statement that is false or misleading or omits information which makes the statement false or misleading (subsection 8N(1)).

4.21 An entity is also liable to an administrative penalty for making a statement to the Commissioner that is false or misleading whether because of things in it or omitted from it (subsection 284-75(1) in Schedule 1).

4.22 Under the amendments, where a superannuation provider makes a further statement to the Commissioner to correct the original statement which is in the approved form and within a grace period (if one has been provided), a superannuation provider will not be subject to administrative penalties or offences relating to providing false or misleading statements. *[Schedule 4, items 1, 2 and 4, subsections 8K(2B), 8N(3) and 284-75(9) in Schedule 1]*

4.23 This grace period is designed to allow superannuation providers to conduct assurance processes of information and payments received from employers which is then reported to the Commissioner. The amendments provide superannuation providers with opportunities to correct the statement within specified time periods without being liable to penalties or offences relating to providing false or misleading statements. It is designed to provide a balance between superannuation providers increasing their reporting on time and reporting accurate information. After the grace period has expired, any false or misleading statement

made to the Commissioner may be subject to penalties. The Commissioner may remit these penalties under existing powers.

4.24 The Commissioner can determine, by legislative instrument, the timeframe for superannuation providers to correct errors and specify different timeframes which may apply to different classes of entities. *[Schedule 4, item 5, subsection 390-7(5) in Schedule 1]*

4.25 The Commissioner can provide, by notice, a different period for an individual superannuation provider. This allows, for example the Commissioner to reduce an entity's grace period if it appears that the particular entity is misusing the grace period. The Commissioner's decision to provide a different period for an individual superannuation provider is a reviewable decision. *[Schedule 4, item 5, subsections 390-7(2) to (4) in Schedule 1]*

4.26 Under subsection 390-115(1) in Schedule 1, if a superannuation provider becomes aware of a material change or omission in any information given to the Commissioner (which includes in a statement given under section 390-5 in Schedule 1), it must inform the Commissioner of the change or omission in the approved form no later than 30 days after it becomes aware of the change or omission.

4.27 These amendments do not change the existing obligation under subsection 390-115(1) in Schedule 1. The obligation to inform the Commissioner of material changes or omissions continues to apply to superannuation providers and operates concurrently with the new amendment in section 390-7 in Schedule 1 which allows superannuation providers to take advantage of the grace period to correct statements before false and misleading penalties apply.

Employer reporting of superannuation contributions

4.28 The amendment removes the requirement in Division 389 in Schedule 1 for employers to report to the Commissioner contributions paid to superannuation funds by the employer as part of Single Touch Payroll. *[Schedule 4, item 6, item 3 to the table in subsection 389-5(1) in Schedule 1]*

4.29 This change is the result of increased APRA-regulated superannuation fund reporting which provide the Commissioner with superannuation contributions paid by employers for each employee member account. The Commissioner will receive this information under events-based reporting from 1 July 2018. Therefore the current requirement for employers to separately report information under item 3 in subsection 389-5(1) in Schedule 1 is no longer required.

Application and transitional provisions

4.30 The removal of the requirement for employers to report superannuation guarantee contributions applies to contributions paid on or after 1 July 2018. *[Schedule 4, item 7]*

Statements for lost members

4.32 Part 4 of the SUMLMA requires the Commissioner to keep a register of lost members containing information for the purpose of reuniting individuals with their lost superannuation money. Superannuation providers must give the Commissioner a twice yearly statement containing information relating to lost members for the purpose of the register. These requirements are in addition to the biannual reporting and payment requirements for certain unclaimed lost member accounts in Part 4A of the SUMLMA.

4.33 Superannuation providers are also required to give the Commissioner a member information statement, in the approved form under section 390-5 of Schedule 1. Subsections 390-5(5) and 390-5(6) of Schedule 1 of the TAA 1953 enable the Commissioner to specify, by legislative instrument, the period covered by the statement and the day on which the statement must be given to the Commissioner. Currently, a member information statement is required for each individual who held a superannuation interest in a superannuation plan for a financial year and is due on 31 October each year.

4.34 The proposed amendments will repeal requirements under Part 4 of the SUMLMA for the provision of information about lost superannuation members to the Commissioner for the purposes of the register of lost members. The Commissioner will continue to be required to keep a register of lost members under Part 4 of the SUMLMA and will be permitted to give information contained in the register to State and Territory authorities. Information for the purposes of the register of lost members will be collected using the Commissioner's existing power to require reporting from superannuation providers under section 390-5 in Schedule 1 of the TAA 1953. *[Schedule 4, Part 2, items 13 and 15 to 20, section 7, Part 4, subsections 24HA(1), 25(3) and 26(3), section 27, paragraph 29(1)(b) and subsection 44(1) of the SUMLMA]*

4.35 The amendments will also repeal the meaning of a lost member in Part 4 of the SUMLMA, and incorporate this meaning within the definition of lost member in section 8 of the SUMLMA. A lost member continues to be a lost RSA holder within the meaning of the *Retirement Savings Accounts Regulations 1997* or a lost member within the meaning of the *Superannuation Industry (Supervision) Regulations 1994*. *[Schedule 4, Part 2, item 14, section 8 of the SUMLMA]*

Application and transitional provisions

4.36 The repeal of requirements under Part 4 of the SUMLMA for the provision of information about lost superannuation members to the Commissioner for the purposes of the register of lost members does not apply to information that is required to be given to the Commissioner under the lost member bi-annual statements for a half year ending before 1 January 2018. *[Schedule 4, item 16]*

4.37 In practical terms, this means that the final bi-annual statement superannuation providers are required to lodge under the existing law are statements due on 30 April 2018 for the period 1 July 2017 to 31 December 2017. From 1 January 2018, superannuation providers no longer need to lodge the bi-annual statement. However, they are still required to report information about lost members as required by the Commissioner under section 390-5 in Schedule 1 to the TAA 1953..

4.38 The transitional provision ensures that the lost member register which, before the commencement of this item, was kept for the purpose of the lost member register required under Part 4 of the SUMLMA is preserved. From the commencement of this Part, the lost member register is treated as being kept under the new requirement under the SUMLMA, as amended by Part 3 of Schedule 3. *[Schedule 4, item 17]*

Consequential amendments

4.39 Schedule 4 makes consequential amendments to repeal headings and add an additional note to clarify when a superannuation provider will be able to rely on the grace period. *[Schedule 4, items 3 and 5, subsections 284-75(8), and 390-7 (1) notes 1 and 2 in Schedule 1]*

4.40 Schedule 4 also makes a consequential amendment to allow the Commissioner to request information from superannuation providers relating to the SUMLMA under the existing section 390-5 in Schedule 1 to the TAA 1953. *[Schedule 4, item 18]*

Chapter 5

Compliance measures

Outline of chapter

5.1 Schedule 5 to the Bill amends the TAA 1953 to enhance compliance with superannuation guarantee charge and other tax related liabilities. The amendments achieve this in the following ways:

- Strengthening the integrity of the director penalty provisions for directors who fail to comply with their superannuation guarantee charge and PAYG withholding obligations; and
- Enhancing compliance with the requirement to provide security through the use of Court orders.

5.2 All references to legislative provisions in this chapter are references to Schedule 1 to the TAA 1953 unless otherwise stated.

Context of amendments

5.3 The Superannuation Guarantee Cross-Agency Working Group was established in December 2016 to report on the operation, administration and extent of non-compliance in the superannuation guarantee system in Australia.

5.4 In March 2017, the Superannuation Guarantee Cross-Agency Working Group released its final report, which contained its final recommendations on options to improve superannuation guarantee compliance.

5.5 These amendments are measures announced as part of the Government's package of reforms to strengthen compliance with superannuation guarantee obligations by employers. The amendments are based on recommendation 4 contained in the Superannuation Guarantee Cross-Agency Working Group's report.

Penalties for directors of non-complying companies

5.6 In relation to a company's superannuation guarantee obligations, under Division 269 in Schedule 1 a company is liable to pay a superannuation guarantee charge at the time it must lodge a

superannuation guarantee statement. The ‘due day’ for a superannuation guarantee charge for a quarter is the 28th day of the second month after the quarter ends.

5.7 In relation to a company’s PAYG withholding obligations, under Subdivision 16-B the obligation to withhold and pay amounts to the Commissioner depends on whether an entity is a large, medium or small withholder. Large withholders must pay amounts within 1 week of the time they are withheld. Medium withholders must pay amounts by the 21st day of the month following the month in which they were withheld. Small withholders are generally required to pay amounts by the 28th day of the month following the end of the quarter in which they are withheld. These payments do not involve an assessment as the obligations to withhold and pay withheld amounts arise because of the particular payments (for example salary and wages) being made.

5.8 Under Division 268 in Schedule 1, the Commissioner can make an estimate of an overdue and unpaid superannuation guarantee charge that has not been assessed or a PAYG withheld amount. Companies are under an obligation to pay the amount of the estimate. The amount of the estimate is due and payable at the time the notice is given.

5.9 Division 269 in Schedule 1 provides for separate obligations imposed on directors and penalties for failing to meet those obligations. Directors have personal obligations to ensure that the company complies with its obligations. These ‘director obligations’ apply until the company complies with its obligation, an administrator is appointed, or a company begins to be wound up.

5.10 If a company fails to meet its obligations to pay a superannuation guarantee charge, PAYG withholding amount or estimates of these liabilities by the ‘due day’, the directors of the company are personally liable to pay a penalty to the Commissioner. The amount of the director penalty is equal to the unpaid amount of the company’s liability under the obligation. The Commissioner cannot commence proceedings to recover the penalty until 21 days after a director penalty notice is given.

5.11 There are timing differences between when the director obligation to ensure the company pays its superannuation guarantee charge and PAYG withholding liabilities (also referred to in Division 269 as ‘underlying liabilities’) arises and when the director obligation to ensure the company pays a Division 268 estimates of those unpaid underlying liabilities. An estimate of a superannuation guarantee charge or PAYG withholding liability creates a separate and distinct liability from the underlying liability (and as a consequence, a separate and distinct director obligation to ensure the company pays the estimate).

5.12 The timing differences between these two distinct director obligations can be exploited by directors to frustrate the original intent of the director penalty provisions. This can result in directors avoiding being held personally accountable for unpaid and overdue superannuation guarantee charge and PAYG withholding liabilities incurred while they presided over the company.

Remittance of penalty and the ‘lock-down rule’

5.13 Director penalties under Division 269 in Schedule 1 can be remitted if a director stops being under one of the relevant obligations either before the director penalty notice is given to them, or within the 21 day notice period.

5.14 A director of a company stops being under an obligation in the following circumstances:

- If the company pays the outstanding PAYG withholding amount, superannuation guarantee charge, or estimates of these amounts; or
- If an administrator is appointed; or
- The company is wound up.

5.15 The appointment of an administrator or the winding up of a company does not affect a director penalty for a company’s unpaid tax related liabilities in the following circumstances:

- Where the company’s obligation is to pay PAYG withholding – when three months from the due day have passed (but only to the extent that the company has failed to report the payments or withholding amounts to Commissioner);
- Where the company’s obligation is to pay superannuation guarantee charge – when three months from the due day have passed and the company has failed to lodge a superannuation guarantee statement with the Commissioner;
- Where the company’s obligation is to pay an estimate of PAYG withholding or superannuation guarantee charge – when three months have passed from the day by which the company was under an obligation to pay the underlying liability to which the estimate relates.

5.16 If one of these items applies, the director penalty will not be remitted if the company goes into liquidation or administration and the penalty is effectively ‘locked down’. A ‘locked down penalty’ can only be remitted if the company pays the liability to which the penalty relates or the director pays the penalty imposed.

5.17 There has been observed deliberate behaviour in taking advantage of the three month period before a director penalty for an unpaid superannuation guarantee charge or an estimate is ‘locked down’ in order to delay placing the company in liquidation or voluntary administration.

Security deposits

5.18 Division 255 in Schedule 1 provides the Commissioner the ability to require a security deposit for the payment of an existing or future tax related liability where the Commissioner has reason to believe that an entity is carrying on a business and intends to carry on that business for a limited time only. The Commissioner may also require a security deposit where they believe it is reasonable to do so. The Commissioner must give notice of the requirement to give security in the required form.

5.19 It is a criminal offence to fail to provide security as required. The penalty for non-compliance is 100 penalty units.

5.20 In the case where there are substantial tax liabilities and the value of the security requested is significant, the penalty for failing to comply with the requirement to provide security can be insufficient to ensure compliance.

Summary of new law

5.21 The amendments strengthens the Commissioner’s ability to collect superannuation guarantee charge and PAYG withholding liabilities in the following ways:

- With respect to director penalties under Division 269 in Schedule 1, a director’s obligations in relation to ensuring their company pays an estimate of superannuation guarantee charge or withholding liability commence at the same time as their obligations in relation to ensuring the company pays the underlying liability to which the estimate relates;

- Removal of the three month period before director penalties are ‘locked down’ in respect of unpaid superannuation guarantee charge liabilities; and
- Allowing the Commissioner to apply for a Court order to compel entities to comply with a security deposit requirement.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>For the purpose of the director penalty provisions in Division 269 in Schedule 1, a director is under an obligation to ensure that the company complies with its obligations in respect of an estimate under Division 268 in Schedule 1 commencing from the ‘initial day’. For PAYG liability estimates, the initial day will be from the day on which the company would have been obliged to pay the underlying liability. For superannuation guarantee liability estimates, the initial day will be from end of the quarter to which the estimate relates to.</p>	<p>For the purpose of the director penalty provisions in Division 269 in Schedule 1, a director is under an obligation to ensure that the company complies with its obligations in respect of an estimate under Division 268 in Schedule 1 commencing on the ‘initial day’, being the day the company is given a notice of the estimate.</p>
<p>A director penalty cannot be remitted if a company is placed into voluntary administration or insolvency where:</p> <ul style="list-style-type: none"> • The company has an obligation to pay a superannuation guarantee charge and the company does not report the superannuation guarantee charge liability to the Commissioner on or before the due date; • The company has an obligation to pay an estimate of a superannuation guarantee charge and the day by which the company was obligated to pay the underlying liability to which the estimate relates has passed. 	<p>A director penalty cannot be remitted if a company is placed into voluntary administration or insolvency where:</p> <ul style="list-style-type: none"> • The company has an obligation to pay a superannuation guarantee charge and the company does not report the superannuation guarantee liability to the Commissioner within three months from due date of the superannuation guarantee charge liability. • The company has an obligation to pay an estimate of a superannuation guarantee charge and three months from the day by which the company was obligated to pay the underlying liability to which the estimate relates has

	passed.
The Commissioner can seek a Court order to compel an entity to comply with a requirement to provide a security deposit for an existing for future tax related liability under section 255-100 of Schedule 1.	No equivalent.

Detailed explanation of new law

Timing of obligation to pay estimates for the purposes of Division 269 in Schedule 1

5.22 These amendments alter the time at which a director taken to be under an obligation to ensure the company pays an estimate of an underlying superannuation guarantee charge or PAYG withholding liability for the purposes of the director penalty provisions in Division 269 in Schedule 1.

5.23 Consistent with the scope of the director penalty provisions generally, the amendments apply in relation to the directors of companies which have been issued with a notice to pay an estimate under Division 268 in Schedule 1. *[Schedule 5, item 3, subsection 269-10(4) in Schedule 1]*

5.24 The amendments align the date that a director commences being under an obligation to cause their company to pay an estimated liability imposed by the Commissioner to be the same date the company is either liable for the underlying liability or for the end of a quarter. *[Schedule 5, item 3, subsection 269-10(5) in Schedule 1]*

5.25 The amendments extend back the ‘initial day’ for a director’s obligation with respect to estimates of underlying liabilities that are superannuation guarantee charges, to be the last day of the quarter to which the estimate relates. *[Schedule 5, item 3, subparagraph 269-10(5)(a)(ii) in Schedule 1]*

5.26 The amendments also extend back the ‘initial day’ for estimates of underlying liabilities that are PAYG withholding liabilities, to be the day the company is obliged to pay the amount of the actual underlying liability. *[Schedule 5, item 3, subparagraph 269-10(5)(a)(i) in Schedule 1]*

5.27 As noted above, currently there is a timing difference between the time a director begins to be under the obligation to cause the company to pay an estimate and to cause the company to pay the actual underlying liability (to which the estimate relates). The timing difference being that

an obligation to pay an estimate of an underlying liability arises at the time notice of the estimate is given, but the obligation to pay the underlying liability was, or arose some time prior to the estimate being given.

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.

Example 5.1 – 'Initial day' for an estimate of superannuation guarantee liability

Thien, Cristiano and Harry are directors of a company, C-R7 Pty Ltd which operates a business. C-R7 Pty Ltd employs 50 individuals. C-R7 Pty Ltd has failed to comply with its superannuation guarantee obligations by failing to lodge a superannuation guarantee statement and pay the superannuation guarantee charge for the quarter ended 31 March 2018. On 31 May 2018, Cristiano resigns as a director of C-R7 Pty Ltd. On 1 July 2018 the Commissioner issues C-R7 Pty Ltd a notice of an estimate for the superannuation guarantee charge for the quarter ended 31 March 2018.

For the purpose of the director penalty provisions in Division 269 in Schedule 1, the directors (including Cristiano who resigned) will be deemed to have an obligation to ensure that C-R7 Pty Ltd complies with the estimate. This obligation commenced on 31 March 2018 (the initial day) even though the estimate was not given until 1 July 2018. Consistent with existing law, the directors are still required to ensure

that C-R7 Pty Ltd complies with the estimate at the time the estimate was given to the company: 1 July 2018 (the due date). If C-R7 Pty Ltd does not comply with the notice on 1 July 2018, the directors will be personally liable to a director penalty equivalent to the amount of the unpaid estimate for superannuation guarantee charge liability. The Commissioner can commence proceedings to recover the penalty from the directors 21 days after the directors are served with a director

Example 5.2 – ‘Initial day’ for an estimate of PAYG withholding liability

In continuing on from Example 5.1, the Commissioner issues C-R7 Pty Ltd a notice on 1 July 2018 of an estimate for the PAYG withholding liability for the month of March 2018. C-R7 Pty Ltd is a medium withholder.

For the purpose of the director penalty provisions in Division 269 in Schedule 1, the directors (including Cristiano who resigned on 31 May 2018) will be deemed to have an obligation to ensure that C-R7 Pty Ltd complies with the estimate. This obligation commenced on the date in which the company was obliged to pay underlying liability, this being 21 April 2018 (the initial day). Consistent with existing law, the directors are still required to ensure that C-R7 Pty Ltd complies with the estimate at the time the estimate was given to the company: 1 July 2018 (the due date). If C-R7 Pty Ltd does not comply with the notice on 1 July 2018, the directors (including Thien) will be personally liable to a director penalty equivalent to the amount of the unpaid estimate for PAYG withholding liability for the month of March 2017. The Commissioner can commence proceedings to recover the penalty from the directors 21 days after the directors are served with a director penalty notice.

Compliance with the obligation relating to an estimate of a liability

5.30 Under the existing law, the directors of a company must cause the company to comply with its obligations. The directors of the company continue to be under this separate obligation until the company complies, an administrator is appointed or the company begins to be wound up.

5.31 The amendments make it clear that if the obligation referred to in the existing law relates to an obligation to pay an estimate, the director is considered to be subject to their obligation to cause the company to pay the estimate in certain circumstances. [*Schedule 5, item 4, subsection 269-15(2A) in Schedule 1*]

5.32 One of these obligations requires a director be subject to the obligation to ensure their company complies with an estimate at all times on and after the ‘initial day’ of the estimate until the director’s obligation

ceases. This includes any time before the Commissioner has issued the estimate. *[Schedule 5, item 4, paragraph 269-15(2A)(c) in Schedule 1]*

5.33 These amendments superimpose obligations in respect of estimates of liabilities which are extended back to the time when the underlying PAYG withholding liability was payable or at the end of a quarter for underlying superannuation guarantee charge liability (being the initial day of the estimate). A director is required to establish that they have taken steps to ensure their company complies with the obligation relating to the actual underlying liability (before the estimate was issued). This step must be considered as part of the director establishing that they have taken the necessary steps to ensure their company discharges the obligation arising from the estimate of that underlying liability.

5.34 These changes resolve the timing issue identified above by aligning the timing of the obligations of a company's estimates with the timing of the obligations for the related underlying liability.

Defences

5.35 The amendments introduce new conditions in the existing defences for directors who have been issued with a director penalty notice for an estimate of an underlying liability.

5.36 A director has a defence with respect to a director penalty for an unpaid estimate where they can show that during their time as a director, they took all reasonable steps to ensure that they caused the company to pay the estimate, as well as the underlying liability to which the estimate relates. *[Schedule 5, item 5, subsections 269-35(3AA) and (3AB) in Schedule 1]*

5.37 The new conditions on this defence are necessary to ensure that directors are not able to frustrate a director penalty in respect of estimates. The amendments deem a director's obligation with respect to estimates to arise from the 'initial day', being the time when the underlying PAYG withholding liability was payable or at the end of a quarter for underlying superannuation guarantee charge liability. The new conditions on the defence are designed to protect current or former directors if during their tenure or their management and control of the company, the director can show they took all reasonable steps to ensure their company discharged the obligation in respect of both the estimate and the actual underlying liability, or alternatively show that there were no reasonable steps for the directors to take for both obligations.

5.38 If a director raises any defences against liability for the director penalty with respect to an obligation to pay an estimate, these defences will only be applicable from the 'initial day', and not the day the estimate was given to the company.

Application and transitional provisions

5.39 The amendments apply in relation to an estimate made under Division 268 in Schedule 1 on or after 1 July 2018 (regardless of whether the underlying liability to which the estimate relates arose before, on or after 1 July 2018). [*Schedule 5, item 7*]

Circumstances where a director penalty is remitted

5.40 These amendments remove the 3 month period before a director penalty is 'locked down' and cannot be remitted if a company is placed into voluntary administration or insolvency. This change is restricted to superannuation guarantee charges and estimates of superannuation guarantee charge. [*Schedule 5, item 12, item 4 to the table in subsection 269-30(2) in Schedule 1*]

5.41 Under the new law, a director penalty cannot be remitted if a company is placed into voluntary administration or insolvency where the company has an obligation to pay a superannuation guarantee charge and the company does not report the superannuation guarantee liability to the Commissioner on or before the due date.

5.42 Generally, an employer is required to remit superannuation contributions within 28 days of the end of the quarter. Where the superannuation contribution is not paid and there is a superannuation guarantee shortfall, the employer is subject to obligations to lodge the superannuation guarantee statement and pay the superannuation guarantee charge to the Commissioner. The liability for a superannuation guarantee charge arises 1 month and 28 days after the end of a quarter.

5.43 The elimination of the 3 month time period shortens the timeframe so that director penalties are 'locked down' earlier and cannot be remitted after the due date provided that a superannuation guarantee statement has not been lodged on or before the due date. For superannuation guarantee liabilities the due date for the purposes of Division 269 in Schedule 1 is 1 month and 28 days after the end of the quarter. Prior to these amendments, directors would ordinarily have 4 months and 28 days from the end of the quarter to place their company into voluntary administration or insolvency before 'lock down' of the director penalties would occur. The amendments ensure the timing of the 'lock down' rule mirrors the timing of the obligations which the company and the director have to ensure that their superannuation guarantee liabilities are met.

5.44 With respect to estimates of superannuation guarantee charge liabilities, the due date is the date the company was obliged to pay the underlying liability (to which the estimate relates). Prior to these amendments, directors would ordinarily have 3 months from the due date

of the underlying liability to place their company into voluntary administration or insolvency before the 'lock down' of the director penalty for the estimate would occur. These amendments ensure the timing of the 'lock down' rule mirrors the timing of the obligations which the company and directors have to ensure an estimate of superannuation guarantee charge liability is complied with.

Example 5.3

Susie is the director of a company, M&E Pty Ltd. M&E Pty Ltd is an employer of 10 individuals and is subject to superannuation guarantee obligations. M&E Pty Ltd fails to pay superannuation contributions for its employees for the quarter ended 31 March 2017. M&E Pty Ltd fails to lodge the superannuation guarantee statement and fails to pay the superannuation guarantee charge by the due date, being 28 May 2017. M&E Pty Ltd subsequently lodges the superannuation guarantee statement for the March 2017 quarter on 30 June 2017.

On 15 August 2017, M&E Pty Ltd is placed into voluntary administration. As a director, Susie has failed to ensure that M&E Pty Ltd meets its obligations in respect of the superannuation guarantee charge within the required timeframes.

On 30 August 2017, the Commissioner issues Susie with a director penalty notice for the outstanding superannuation guarantee charge liability. The director penalty notice issued to Susie is not capable of being remitted, despite the company being placed into voluntary administration because it took place more than 1 month and 28 days after the end of the relevant quarter for payment of superannuation guarantee charge (which is the due date for superannuation guarantee charge for the purposes of Division 269 in Schedule 1) and for M&E Pty Ltd to lodge the superannuation guarantee statement.

5.45 The amendments do not apply to PAYG withholding liabilities and estimates of PAYG withholding liabilities. This is because companies are obliged to report and pay PAYG withholding liabilities to the Commissioner occur at the same time. The due date for reporting and payment of PAYG withholding amounts are within 1 week for large withholders and generally within 28 days of the month/quarter end for medium and small withholders.

Application and transitional provisions

5.46 The amendments apply in relation to PAYG withholding liabilities and estimates that first become payable on or after 1 July 2018. *[Schedule 5, subitem 14(a)]*

5.47 The amendments apply in relation to superannuation guarantee charge liabilities that are made on or after 1 July 2018. *[Schedule 5, subitem 14(b)]*

5.49 The amendments apply in relation to estimates of superannuation guarantee charge liabilities are made on or after 1 July 2018 (regardless of whether the underlying liability to which the estimate relates arose before, on or after 1 July 2018). *[Schedule 5, subitem 14(b)]*

Order to provide security

5.50 These amendments allow the Commissioner to apply to the Federal Court to order an entity to comply with a requirement to give a security. The Commissioner must have given a notice of the requirement to provide a security deposit. *[Schedule 5, item 15, subsection 255-115(1) in Schedule 1]*

5.51 Enabling the Commissioner to make these applications and for the Court to make these orders addresses the instances of non-compliance with the security deposit rules. Non-compliance predominantly arises where the value of the security deposit (which reflects the value of the tax related liability) exceeds the penalty for failing to provide the security deposit. Entities who fail to comply with a Court order risk committing a criminal offence resulting in criminal penalties. These consequences are designed to drive taxpayer behaviour into complying with the Court order and providing the security deposit to the Commissioner.

5.52 The Court may also choose to place other orders on an entity to ensure the requirement to provide the security is met effectively. The Court may require that the requirement be complied with by a specified day in the order. *[Schedule 5, item 15, subsections 255-115(2) and (3) in Schedule 1]*

5.53 The Court has the flexibility to place ancillary orders on an entity. For example, the Court may order the provision of a different security requirement over a different asset or allow a different time period or time extension to comply with the order. These ancillary orders are consistent with the orders that can already be made by a Court under section 8G in relation to other requirements under taxation law. The consequences of failing to comply with a Court order are serious which justifies the Court's power to alter the existing requirement and imposing new orders. This can help the entity comply with the Court order and avoid committing an offence.

5.54 An entity who receives a Court order must be served the order orally by the Court or by methods specified by the Court procedural rules. *[Schedule 5, item 15, subsection 255-115(4) in Schedule 1]*

5.55 An entity who fails to comply with the order commits an offence and is liable to a penalty of 50 penalty units or imprisonment for 12 months, or both. *[Schedule 5, item 15, subsection 255-120(1) in Schedule 1]*

5.56 This offence is an offence of strict liability. *[Schedule 5, item 15, subsection 255-120(2) in Schedule 1]*

5.57 This penalty ensures that appropriate consequences apply to entities that refuse to comply with an order that has been made against them by the Court. The amount of the penalty and the application of strict liability is the same as the offence for refusing to comply with other Court orders and the associated penalty that are already imposed under sections 8G and 8H. Applying the same consequences in respect of security deposits ensures a consistent outcome between the two sets of rules and is appropriate as they both deal with failures to comply with Court orders.

5.58 An entity does not commit an offence to the extent they are not capable of complying with the order. *[Schedule 5, item 15, subsection 255-120(3) in Schedule 1]*

5.59 This defence is consistent with the defence set out in section 8H. The defence covers situations where an entity has entered into voluntary administration or insolvency. This ensures that an entity will not commit an offence where an entity no longer controls or manages the business and the business assets and are not capable of complying with the order.

Application and transitional provisions

5.60 The amendments apply in relation to a requirement to give security in relation to a tax-related liability if the Commissioner provides the notice of the requirement on or after 1 July 2018. *[Schedule 5, item 16]*

Consequential amendments

5.61 Schedule 5 makes consequential amendments to remove item 4 to the table in subsection 269-10(1) in Schedule 1 and the note which are no longer required. Schedule 5 also makes consequential amendments to include a note under the existing reasonably arguable position defence contained in section 269-35(3A) which clarifies that the defence may be available to times before the notice of an estimate of a superannuation guarantee charge liability is given. *[Schedule 5, items 1, 2 and 6, item 4 in table 4 of subsection 269-10(1) in Schedule 1, the note in subsection 269-10(1) in Schedule 1, the note in subsection 269-35(3A) in Schedule 1]*

5.62 Schedule 5 makes consequential amendments to remove the reference to the 3 month rule in respect of superannuation guarantee liabilities and estimates. The amendments retain the 3 month rule in respect of PAYG withholding liabilities and estimates. *[Schedule 5, items 8 to 11 and 13, heading to column 2, item 1 in column 2 to the table, item 2 in column 1 to the table, item 2 in column 2 to the table in subsection 269-30(2) in Schedule 1, subsection 269-30(3) in Schedule 1]*

Chapter 6

Amendments relating to employee commencement

Outline of chapter

6.1 Schedule 6 to the Bill contains amendments to allow the pre-filling of an individual's tax file number declaration and superannuation standard choice form by the Commissioner to the individual's employer.

6.2 All references to legislative provisions in this chapter are references to Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) unless otherwise stated.

Context of amendments

6.3 Currently, individuals must provide a tax file number declaration and superannuation standard choice form to either the Commissioner or to the individual's employer (usually, via paper). The tax file number declaration allows an individual the option to disclose their tax file number to an employer or claim an exemption from quoting their tax file number, and provides information which can affect their withholding rates. These disclosure obligations for individuals are not mandatory under the tax law.

6.4 A taxation officer is permitted to disclose an individual's tax file number to an employer of the individual if the individual provided the number to the Commissioner in a tax file number declaration. However, there are situations where an employee may not know their tax file number or may be enquiring about their tax file number to the Commissioner which are not covered by this exception.

6.5 The current disclosure rules do not permit any pre-filling of information relating to the individual to their employer.

Summary of new law

6.6 Schedule 6 to the Bill contains amendments to allow the pre-filing of an individual’s tax file number declaration and superannuation standard choice form by the Commissioner to the individual’s employer.

6.7 The amendments achieve this by providing a range of new exceptions to the tax file number offence and the confidentiality of taxpayer information rules to enable the disclosure of tax file numbers, withholding information and the superannuation member accounts of individuals.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The Commissioner can disclose the tax file number of an individual if the employee has provided the tax file number to the Commissioner in a tax file number declaration, or made a tax file number declaration in particular circumstances.	The Commissioner can disclose the tax file number of an individual if the employee provided the number to the Commissioner in a tax file number declaration.
The Commissioner can disclose to an individuals’ employer protected information on matters relating to the withholding rates of an individual.	No equivalent.
The Commissioner can disclose protected information to an individual’s employer (including the individual’s existing superannuation membership accounts) for the purpose of the individual making an informed superannuation choice.	No equivalent.

Detailed explanation of new law

6.8 These amendments enable the Commissioner to disclose a tax file number to an individual’s employer if the individual provided a tax file declaration to the Commissioner in relation to that employer.
[Schedule 6, item 1, paragraph 202CG(a) of the ITAA 1936]

6.9 The Commissioner can also disclose a tax file number to an individual's employer if the employee made a tax file declaration to the Commissioner and the individual does not know their tax file number or is enquiring about the tax file number with the Commissioner. *[Schedule 6, item 1, paragraph 202CG(b) of the ITAA 1936]*

6.10 The amendments add two additional exceptions to the taxpayer confidentiality provisions in Division 355 in Schedule 1.

6.11 The Commissioner can disclose protected information to an employer (the payer) in relation to whom an individual has made a tax file number declaration that is in effect. The disclosure must be made for the purpose of the individual giving a declaration to the employer to determine withholding matters relating to the individual and is limited to information that relates to this purpose. The individual must provide consent to the disclosure in order for the disclosure to be made. *[Schedule 6, item 3, item 11 to the table in subsection 355-50(2) in Schedule 1]*

6.12 The Commissioner can disclose information to an employer (as defined in the SGAA 1992) for the purpose of informing the individual of their existing superannuation interests, assist the individual to choose whether to maintain a current superannuation account or create a new one and to assist individuals to give effect to such a choice. *[Schedule 6, item 4, item 11 to the table in subsection 355-65(3) in Schedule 1]*

6.13 These changes enable the Commissioner to pre-fill information from an employee's tax file number declaration and superannuation standard choice forms on their business management software.

6.14 An individual, whose information will be disclosed by the Commissioner, must first consent to the Commissioner disclosing their information before the Commissioner discloses their protected information to their employer's business management software so that it can be presented as pre-filled information.

6.15 The disclosures enable the individual to make a tax file declaration using up-to-date information about matters that may impact their withholding rate. The disclosures can assist the individual to make an informed choice between their employer's default superannuation fund and their existing superannuation funds. These changes ensure that an appropriate rate of withholding is applied by employers and reduce the proliferation of superannuation member accounts for individuals.

Application and transitional provisions

6.16 The amendments allowing the disclosure of a tax file number to an employer of an employee applies in relation to a TFN declaration made on or after 1 July 2018. [*Schedule 6, item 2*]

6.17 The amendments in relation to the disclosure of protected information to an employee's payer of information relating to the withholding matters of the employee apply from commencement.

6.18 The amendments in relation to the disclosure of protected information to an employee's payer for the purpose of the employee making a superannuation fund choice apply from commencement.

