



Trustees beware: Tightening of superannuation requirements

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- 🌀 **Superannuation Guarantee (SG) Amendment Bill**
- 🌀 **Stricter penalties for trustees and other providers of services to superannuation funds.**
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Superannuation Guarantee (SG) administration

As mentioned briefly in the December issue, a Bill has been introduced into parliament, seeking to amend the timing of payments of SG by employers. The Bill, Superannuation Guarantee (Administration) Amendment Bill 2000, is a Private Bill put forward by Shadow Assistant Treasurer Mr Kelvin Thompson. Essentially it seeks to apply the following:

- Employers will be required to pay any SG liability on a quarterly basis
- Each quarterly amount will be payable 21 days after the end of the quarter (for the first three quarters) and 28 days after the final quarter
- If an employer has a superannuation guarantee shortfall for that quarter, they will now be required lodge a superannuation guarantee statement for that quarter
- Administration and nominal interest charges will apply to the superannuation guarantee shortfall for that quarter
- The Australian Taxation Office (ATO) will now be able to chase employers' SG payments on a quarterly basis and to issue default assessments for any particular quarter.

The changes have been brought about by a perceived weakness in the current administration of SG payments. Currently, the

legislation only requires payments to be made once a year. As a result, by the time the ATO and/or employees realise that the employer has failed to meet its obligations, it is too little, too late. Payments on a quarterly basis will allow the ATO to better monitor the situation. With the introduction of the GST and PAYG it will also prove to be more efficient and better on cash flow for businesses.

The main disadvantage the Bill faces is that it is a Private Member's Bill. The history of such Bills is that they rarely ever pass to the final stages. Nevertheless, the idea behind the Bill is worthwhile and would help tighten the administrative procedures.

Stronger penalties for SIS offences

While we're on the topic of increased supervision, the government recently passed the Financial Sector Legislation Amendment Act (No.1) 2000. This adds weight to the notion that, in the government's view, trustees and to a lesser extent, employers, custodians and auditors, should be more responsible for their actions.

The main changes by that Act to the Superannuation Industry (Supervision) Act 1993 (SIS Act) are contained in Schedule 3, and are split into two parts:

Part 1 — Enforcement enhancement

This provides greater ability for the regulator to enforce the provisions of the SIS Act, including:

- Power to disqualify a person from being involved in the administration of superannuation, either as trustee, investment manager or custodian. Any decision is reviewable, in the first instance by the regulator, then by the Administrative Appeals Tribunal (AAT)

- Provision of a new offence relating to falsely holding yourself out as an actuary or an approved auditor
- A new requirement for the former trustee to assist in the identification of the property of the fund and to provide relevant books relating to the fund's affairs, where the regulator has replaced the trustee
- The power for the regulator to accept enforceable undertakings.

Part 2 — Amendments to existing offence provisions

This part is in turn broken down into two divisions:

Division 1

Changes a number of offences from fault liability (which requires proof of fault elements such as intention and recklessness) to either:

- strict liability (which doesn't require the elements of intention or recklessness, although there may be a defence for mistake of fact) or
- two-tier fault and strict liability.

Generally, the offences that have become strict liability or two-tier fault and strict liability are those that are basic and fundamental to the prudent operation of the fund. They do not involve the exercise of discretion or judgment by the person. The offences can best be summarised as follows. (Note that, in relation to the table, one penalty unit equals \$110. Also, where the penalty is imprisonment, the court may impose an appropriate fine instead, or in addition to, a term of imprisonment. If a body corporate is convicted of the offence, the court may impose a fine of an amount not greater than five times the maximum fine that could be imposed by the court on an individual convicted of the same offence):

Offence — failure to:	Responsibility	Strict liability	Fault liability
Lodge an annual return within the prescribed period	Trustee	Yes, 25 penalty units	Yes, 50 penalty units
Remit superannuation deducted from wages within the required period	Employer	Yes, 50 penalty units	Yes, 100 penalty units
Keep, and retain for ten years, all minutes and records of meetings and s71E election	Trustee	Yes, 50 penalty units	No
Keep, and retain for ten years, records of all changes and consents to trustees (including changes to directors of corporate trustee)	Trustee	Yes, 50 penalty units	No
Keep, and retain for ten years, all reports provided to members	Trustee	Yes, 50 penalty units	No
Establish procedure for appointing member representatives for an employer-sponsored fund	Trustee	Yes, 50 penalty units	Yes, 100 penalty points
Establish procedure for appointing independent trustee (or independent member of board of directors of corporate trustee) for an employer-sponsored fund	Trustee	Yes, 50 penalty units	Yes, 100 penalty units
Keep, and retain as required, all accounting records to explain transactions and financial position	Trustee	Yes, 50 penalty units	Yes, 100 penalty units
Prepare appropriate accounts and statements	Trustee	Yes, 50 penalty units	Yes, 100 penalty units
Properly appoint an approved auditor to provide required report and to make documents available when requested	Trustee	Yes, 50 penalty units	Yes, two years imprisonment or equivalent fine
Provide audit report within specified period	Auditor	Yes, 50 penalty units	Yes, six months imprisonment or equivalent fine
Seek approval from trustee before appointment of a custodian	Investment manager	Yes, 50 penalty units	No
Appoint investment manager in writing	Trustee	Yes, 50 penalty units	No
Comply with regulations in relation to payment of commissions by a public offer fund	Trustee	Yes, 50 penalty units	Yes, 100 penalty units
Hold public offer fund application monies on trust in accordance with the regulations	Trustee	Yes, 50 penalty units	Yes, one year imprisonment or equivalent fine
Provide information to the regulator as specified in the regulations	Trustee	Yes, 25 penalty units	Yes, 50 penalty units
Provide investigator's report concerning financial position of the fund before required date	Person appointed to provide report	Yes, 50 penalty units	Yes, 100 penalty points
Comply with any requirement imposed by APRA relating to appointment of investigator into financial position of the fund	Trustee	Yes, 50 penalty units	Yes, 100 penalty points
Inform trustee within required time of employee's Tax File Number (TFN) if employee quotes their TFN to the employer for superannuation purposes	Employer	Yes, 10 penalty units	No
Request TFN from certain members of the fund	Trustee	Yes, 50 penalty units	Yes, 100 penalty units
Properly record, retain, use or destroy member's TFN	Trustee	Yes, 50 penalty units	Yes, 100 penalty units

Division 2

Clarifies that a number of offences within the SIS Act considered strict liability offences, are treated as such. These offences are:

Offence — failure to:	Responsibility	Strict liability	Fault liability
Immediately notify regulator, in writing, of any breach	Trustee	Yes, 30 penalty units	No
Notify regulator within 30 days, in writing, of any change or breach in approval of trustees	Approved trustee	Yes, 250 penalty units	No
Adhere to regulator's direction not to accept employer contributions	Trustee	Yes, 100 penalty units	No
Refund contributions accepted in contravention of a regulator's direction not to accept employer contributions	Trustee	Yes, 50 penalty units	No
Take all reasonable steps to notify employer of regulator's direction not to accept employer contributions	Trustee	Yes, 50 penalty units	No
Immediately notify regulator in writing if trustee is or becomes a disqualified person	Disqualified trustee	Yes, 50 penalty units	No
Advise trustee and regulator in writing that custodian is no longer eligible for certain reasons	Custodian	Yes, 50 penalty units	No
Arrange for dismissal of custodian within the prescribed period where custodian is no longer eligible for certain reasons	Trustee	Yes, 100 penalty units	No
Notify each beneficiary of appointment as acting trustee	Acting trustee	Yes, 50 penalty units	No
Obtain and keep, in accordance with the regulations, consent (or copy) from the expert when a public offer fund includes any expert statements in its documents	Trustee	Yes, 10 penalty units	No
Give assistance as required in writing by regulator in connection with application for a civil penalty order made or their lawyer)	Person requested to give assistance (other than person against whom application is being)	Yes, 5 penalty units	No
Keep records, as required under SIS, in such a way that they do not correctly explain matters, transactions or acts.	Person required to keep accounts, accounting records or other records (usually the Trustee)	Yes, 40 penalty units (unless specified defences are available)	No

There are a number of other minor amendments, however the above represent the majority of more 'common' offences. The amendments are to take effect 28 days after the Act receives royal assent, which, at the time of writing, looks likely to be February 2001.

These amendments however, certainly provide a timely reminder that all parties involved in the operation of a fund (whether they be trustees, custodians or auditors) need to have structures and procedures in place to ensure the above basic requirements are met, else, under this new legislation, they will be guilty of a criminal offence even where the offence was unintentional or an oversight.

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GST, instalment income and superannuation revisited

In the September 2000 issue, we discussed GST and some of the frequently asked questions. Since then, not surprisingly, many more questions have been raised in relation to the operation of the GST and superannuation funds. The Government has finally (almost six months after the introduction of GST) released a guide for funds, entitled: 'Guide to the ABN, GST and PAYG for the Superannuation Industry'.

GST

It addresses some of the more recent issues in relation to GST, these being:

Who is required to be registered in relation to the ABN?

The trustee of the fund applies for and is registered in relation to the ABN.

If the trustee is a corporation, the registration will be 'ABC Ltd as trustee for the XYZ Superannuation Fund'. ABC Ltd could act as trustee for a number of different funds as well as trade in its own right, however it will need to have a different and distinct ABN for each fund for which it acts as trustee as well as an ABN for the trading it performs in its own right.

If the trustees are individuals,

then only one ABN is allocated to 'the trustee for the fund' not for each of the fund's trustees. However, all trustees will need to provide their details when applying for the fund's ABN.

Fees paid to trustees

Any fees charged by trustees constitute a supply of services to the fund. Accordingly, GST should be charged on the fee. The fund will be able to claim a reduced input tax credit (RITC) on the GST paid, provided the fund is registered. (For what constitutes an RITC, please refer to the September 2000 issue.)

Reimbursement of trustee for expenses paid

The treatment of this will depend on how the 'reimbursement' is paid.

1. Where the trustee (in its own right) pays expenses of the fund and then on-charges the fund for those expenses, then GST will also need to be charged to the fund. Whether the fund can claim the GST (or part thereof), will depend on what was supplied (essentially what were the expenses paid for by the trustee).
2. Where the trustee incurs expenses on behalf of the fund (rather than in its own right), then the fund is entitled to claim the input tax credits (ITC) or RITC, provided the expenses do not relate to making an input taxed supply.
3. If the fund reimburses the trustee for expenses incurred directly relating to the trustee's activities as an agent of the fund, then the same will apply as per the second scenario above.

Payment of directors' fees

This is consideration for a taxable supply and GST would be charged to the fund, provided the director is

registered. A RITC would be able to be claimed by the fund.

Reimbursement of directors' expenses

This would not be considered a taxable supply and therefore the director could not charge GST. However, the fund may be able to claim the ITC or RITC, provided that:

- The expense incurred was a taxable supply
- The director has not already claimed an ITC
- The expense relates to the director's activities as a director of the trustee company acting on behalf of the fund and
- The fund and trustee company are registered for GST.

Formula may need to be applied to determine member contributions to include in instalment income.

Fees paid to an administrator

Any services provided by the administrator will be subject to GST, provided the administrator is registered. Whether or not the fund can claim any or a portion of the GST as a RITC will depend on the services provided.

Services such as:

- Maintenance of member, employer and trustee records
- Processing contributions and benefit payments
- Producing and distributing statements to member and employers and
- Provision of services to allow compliance with industry regulations (but excluding tax or

audit services) can be claimed as a RITC. However, such things as legal advice on restructuring would not be allowed.

Instalment income

Are imputation credits and capital gains included in instalment income?

Yes, under specific provisions all capital gains and imputation credits on dividends received for the particular period by a superannuation fund are included in determining instalment income. This differs to all other entities where only 'ordinary income' is included. The instalment rate calculated for funds takes into account these differences.

What member contributions, if any, should be included in instalment income?

Where the taxable member contributions are easily identifiable (for example where a s 82 AAT notice is received), then that amount is included.

However, many member contributions cannot be determined as being taxable until year end, when a s 82 AAT notice is received. That being the case, the ATO has advised that a proportion of the member contributions should be included, using the following formula:

$$\frac{\text{Total taxable member contributions from the previous year}}{\text{Total member contributions from the previous year}} \times \text{member contributions for the period}$$

The ATO has advised that an alternative method may be used where it will result in a more accurate method. 