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Fletch Heinemann, Partner, Cooper Grace Ward, has a wealth of experience managing disputes with the ATO, OSR and Department of Home Affairs, drawing on this knowledge in providing upfront advice and helping clients deal with revenue authorities. His technical specialisations include income tax (including international tax and residency issues), GST, payroll tax and customs duties. In managing clients' tax and customs disputes, he helps with the audit stages, ATO interviews, notices of objection, appeals in the AAT, QCAT, Federal Court and Supreme Court.

SUPERANNUATION GUARANTEE AMNESTY INTRODUCED ... AGAIN

This time with a real sting in the tail

Fletch Heinemann

On 24 May 2018, the government first introduced a 12-month superannuation guarantee (SG) amnesty. The relevant Bill failed to pass the Senate and then lapsed when the federal election was called on 11 April 2019.

On 18 September 2019, the Bill was re-introduced [the *Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019*], with an amnesty period beginning on 24 May 2018 and ending six months after the legislation receives Royal Assent.

The amnesty is being offered as a last chance for employers. In this version of the amnesty, if a taxpayer doesn't take advantage of the amnesty in relation to historical shortfalls, they will be subject to a penalty of up to 200%. And the Commissioner of Taxation will lose the power to remit that penalty below 100% for historical quarters.

There are a number of areas where the obligation to pay compulsory superannuation is not clear-cut. The most common mistakes,

where well-meaning businesses have inadvertently underpaid compulsory superannuation, are set out below.

Trap 1: not understanding ordinary time earnings

There should be no superannuation guarantee charge when compulsory superannuation is paid on time, at the correct rate, on 'ordinary time earnings'.

'Ordinary time earnings' means the earnings in respect of the ordinary hours of work. The difficulty in some cases is assessing what hours of work are 'ordinary'. Overtime is generally not 'ordinary hours', but complications can arise when:

- a workplace agreement prevails over an award, so that it is not clear what hours are ordinary and what hours are overtime
- hours are designated as 'overtime' but are paid at the same rates as normal hours
- there is no award and no agreement, in which case all hours may be 'ordinary hours'.

The worst cases we have seen are businesses paying compulsory

superannuation on 38 hours per week, when in fact all hours were 'ordinary hours'. A mistake like this, multiplied across a workforce, can produce a significant superannuation guarantee charge bill.

Trap 2: contractors who are actually employees

Whether an individual is an employee or independent contractor continues to be the subject of many disputes.

The Australian Taxation Office (ATO) provides a list of factors that they consider when assessing whether an individual is an employee or independent contractor. These factors are:

- the intention of the parties, as shown in the terms and circumstances of the formation of the contract
- who exercises control over the individual's work
- whether the individual operates on his or her own account or in the business of the payer—particular risk areas here include uniforms and email signatures
- whether the individual is paid for 'results' contracts
- whether the work can be delegated or subcontracted
- who bears the commercial risk
- who provides tools and equipment and who pays business expenses
- other indicators, such as leave.

The list is a helpful overview of the factors to consider. However, applying these factors to a particular individual's circumstances can be much more difficult. Extreme care should be taken when using the ATO's online calculator. While it generally produces the correct answer in clear-cut cases, it does not properly analyse border-line cases. It is also not binding.

There has also been a recent trend in the case law where a further test has been introduced: whether the individual is carrying on a business. This is a different test compared to the ATO's consideration of the factors (above) about whether the individual is acting on their own account. On the business test, if an individual is not carrying on a business, they are an employee.

We have seen a number of unfortunate cases where the ATO (or OSR) has concluded that individuals who were treated as contractors were actually employees.

Trap 3: deemed employees

The superannuation guarantee charge legislation deems certain contractors to be employees. This applies to genuine independent contractors. The list of deemed employees includes:

- board members
- individuals who work under a contract that is wholly or principally for their labour
- various MPs, members of Legislative Assemblies and other officials
- anyone paid to perform or present any music, play, dance, entertainment, sport, display or promotional activity, and anyone paid to provide services in connection with one of those

- anyone paid to perform services in connection with the making of any film, tape or disc or of any television or radio broadcast.

For individuals providing professional services, the issue is often whether they are being paid wholly or principally for their labour.

Advantages and risks with the amnesty

The amnesty offers a number of incentives. The table below sets out the advantages of the amnesty.

Table 1. Advantages of the amnesty

Factor	Amnesty conditions	Normal conditions
SGC shortfall	Deductible	Not deductible
Contributions offset against SG charge	Deductible	Not deductible
Administration component	Waived	\$20 per employee per quarter
Nominal interest	Still applies	Still applies
Part 7 penalties	Waived	Maximum penalty is 200% of the SG charge; the amnesty will result in the ATO losing the ability to remit the penalty below 100% for historical quarters in all but 'exceptional circumstances'
Payment plan	Amnesty conditions fail if: - payment is not made by the end of the amnesty period; or - a payment arranged is not in place by the end of the amnesty period.	Subject to the usual ATO debt policies

For the payments to be deductible, the payments must be made within the amnesty period. This means that if a payment plan extends beyond the amnesty period, the payments made after the end of the amnesty period will not be deductible.

The main risk with the amnesty is making a disclosure and then being unable to pay the superannuation guarantee charge. There is no guarantee that the ATO will enter into an acceptable payment arrangement. This can have serious consequences, including that the benefits of the amnesty will not apply. The business may then be insolvent if it cannot pay its debts as and when they become due and payable.

As noted above, the Bill provides for an additional incentive (in the form of a stick) to disclose within the amnesty period by limiting the ATO's ability to remit penalties for periods covered by the amnesty.

This means that, if assessments are issued for quarters covered by the amnesty (those starting on or before 1 January 2018), the penalties generally cannot be reduced below 100%. There is an exception for 'exceptional circumstances'.



The quote

If a taxpayer doesn't take advantage of the amnesty in relation to historical shortfalls, they will be subject to a penalty of up to 200%.

The explanatory memorandum gives an example of a natural disaster preventing the disclosure of shortfalls as ‘exceptional circumstances’.

Qualifying for the amnesty and identifying risks

To qualify for the amnesty, the disclosure must:

- be made before the end of the amnesty period (six months from the date of Royal Assent)
- contain information that has not previously been disclosed to the ATO
- be made in the approved form, which will generally include the super guarantee charge statement
- relate to the March 2018 and earlier quarters—quarters within the amnesty period are not eligible for the amnesty
- be made before the ATO advises of any review or audit of super guarantee charge obligations (commonly referred to as an ‘employer’s obligations’ audit).

Businesses that have identified risks should take steps to remove (or reduce) those risks in the future. There are a number of options depending on the type of risk identified. **FS**

