

Superannuation Guarantee Integrity Package

The Treasury



Submissions – Superannuation Guarantee Integrity Package

Master Electricians Australia (MEA) the trade association representing electrical contractors recognised by industry, government and the community as the electrical industry’s leading business partner, knowledge source and advocate.

MEA currently has a membership base of approximately 3000 electrical contractors Australia-wide. MEA is a strong supporter of Superannuation and particularly Industry Super Funds such as Energy Super. MEA understands that superannuation will over time replace the aged pension for most Australians as their sole source of income and that underpayment or non-payment of superannuation by rogue employers increases the tax burden of all Australian citizens and those companies that comply with the SGC Act.

MEA supports the intent of the legislation to enforce that all Australians receive their correct entitlements. The proposed new powers of the ATO is a step in the right direction, however the process and penalties will be an insufficient deterrent in cracking down on employers with serious contraventions.

DIRECTIONS AND PENALTIES IN REACTION TO SUPERANNUATION GUARANTEE CHARGE



Employers and corporations become liable for SG payments on the day the company must lodge its superannuation guarantee charge statement. This is on the 28th day of the second month after the end of the preceding quarter. MEA agrees that this time line is appropriate

The ATO then issues a Direction Penalty Notice (DPN) outlining the unpaid amounts and remission options. MEA notes that the 21 days to commence proceedings is appropriate if no response is made or action taken, however in circumstances whereby an employer, with a strong compliance history has suffered financial difficulties then the ATO and Employer should enter into an appropriate plan to address the situation as soon as possible. In the Building and Construction industry at present, as is the case for many industries, cash flow is an important issue. Our members over the past 18 months have identified payment terms of up to 90 days after invoice places significant strain in terms of the Superannuation payments; these type of terms are common place in the industry. MEA would like to see where Employers can demonstrate significant cash flow impediment due to specific circumstances that a DPN is not issued. We believe this would best be addressed through policy enforcement documentation and procedures rather than legislative measures.

We note that during the criminal penalties that an employer may claim “doing all things reasonably practicable” as a defence, again which we believe this is appropriate. However further education / guidance material would be appreciated in explaining what may be seen as

“all things reasonably practicable”. This education process would be conducted after the legislation is passed.

The ATO cannot commence proceedings to recover the penalty until 21 days after notice of the liability has been given to a director.

The Commissioner may give the employer a written direction requiring the undertaking of a specified approved course of education. The Commissioner will determine the specified period requirement to undertake education possibly as a precursor to initiating criminal penalties.

Superannuation in Australia started for all Australians in 1991, some 27 years ago. Superannuation is not a new concept. Most business owners, have at some stage been employees and have had the entitlement to superannuation. The education direction should only be needed by a very small number of businesses whereby owners are new arrivals / suffer language difficulties / suffer a medical condition or disability that impacts their cognitive understanding.

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. Failure to comply with the direction can result in criminal penalties. The explanatory memorandum gives examples of “Chloe” in both examples and the range of noncompliance is between 12 months to 4 years of non-payment.

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 \$4200, is liable to a fine of up to 40 penalty units \$8,400 for a second offence, and is liable to a fine of up to 50 penalty units \$10,500 and/or imprisonment of 12 months for a third or subsequent offence.

It should be noted that in our view the penalties should at least match those of the Fair Work Act being a maximum of \$12,600 for individuals and \$63,000 for corporation per occurrence.

It is our view that an optimistic length of time from identification to prosecution for a third offence would be 3 years.

Using the above assumptions and the “Chloe example in the Explanatory Memorandum an employee earning an average of \$80,277 (ABS 6302.0 - Average Weekly Earnings, Australia, May 2017) with Superannuation of \$7,623.31 per year equates to an underpayment of \$38,116.55 per employee. If as the example says Chloe pays no super for 4 years and is prosecuted to the maximum allowed taking an additional 3 years through the courts that equates to

- 4 Employees are owed \$7,623 super/year over 4 years of noncompliance = \$121,968 super owing, plus
- an additional 3 year to reach maximum penalty including up to 12 month imprisonment = \$91,476;

- Plus lost interest of \$47,000 at 5% interest compounded over 8 years. Total \$260,444 in unpaid and lost superannuation for the 4 employees or \$65,111 each or approximately 3 years' worth of pension for a single person.

The penalty system is not a deterrent for employers to correct their underpayment liability as they receive a significant market advantage over their competitors.

The key findings from the latest survey on Major Labour Costs for the private sector includes the below percentages of total labour costs for employers. (Abs.gov.au, 2018)¹

	Earnings	Superannuation	Payroll Tax	Workers' Compensation	Fringe Benefits Tax	Total Labour Costs
15-16	\$m	\$m	\$m	\$m	\$m	\$m
Private Sector	517,259.6	45,015.9	18,336.4	8,148.5	2,598.5	591,359.0
%	87%	8%	3%	1%	0%	

The average percentage employers attribute to superannuation payments is 8% of total labour costs. This 8% saved by failing to pay superannuation directly effects the profit margin for SMEs giving a significant advantage to employers over their competitors who are meeting their obligations.

In the electrical contract industry whereby labour forms approximately 35% of the total cost of work, non-payment of superannuation by unscrupulous employers gives them approximately a 4% advantage once payroll tax is taken into account. In industries where labour input is in the vicinity of 75% it can be as much as the quoted 8% difference. In both examples these lead to a significant advantage for unscrupulous employers.

DISCLOSURE OF INFORMATION ABOUT NON-COMPLIANCE

MEA agrees with the changes proposed and expects this will contribute significantly to ensuring employees receive their entitlements.

SINGLE TOUCH PAYROLL REPORTS

MEA agrees with the extension of single touch payroll reporting to small businesses as again this will be a minor inconvenience for those employers doing the right thing, however is a major step forward in addressing those employers avoiding their obligations.

FUND REPORTING

MEA understands the changes made to fund reporting however will not comment on their appropriateness due to relevance, however we see no impediments or issues we wish to raise.

COMPLINACE MEASURES

The director penalty regime has been in place since 1993 and most directors have at least a working knowledge of how the provisions operate and when they could become personally liable for the pay as you go (PAYG) withholding tax liabilities of their company.

The purpose of these reforms is to protect employee entitlements and deter 'phoenix' activities of businesses and reduce a director's ability to resign prior to an obligation forming. The new legislation to tighten the ability of a director penalty to be remitted by 3 months will also have an improved effect however we are concerned it may not be significant enough to deter those Directors who do not fulfil their obligations.



Jason O'Dwyer

Manager Advisory Services

Bibliography

Abs.gov.au. (2018). 6348.0 - Labour Costs, Australia, 2015-16. [online] Available at: <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6348.0Main%20Features22015-16?opendocument&tabname=Summary&prodno=6348.0&issue=2015-16&num=&view=> [Accessed 15 Feb. 2018].