

Superannuation Guarantee (Administration) Regulations 1993 No. 52

EXPLANATORY STATEMENT

STATUTORY RULES 1993 No. 52

ISSUED BY THE AUTHORITY OF THE TREASURE

Superannuation Guarantee (Administration) Act 1992

Superannuation Guarantee (Administration) Regulations

The *Superannuation Guarantee (Administration) Act 1992* (the Act) imposes a tax on an employer where the employer provides superannuation support below a minimum level. The purpose of these regulations is to prescribe matters which the Act requires to be dealt with by regulation and to provide for certain other matters which are necessary for the administration of the Act.

The Act allows an employer who provides superannuation support for employees through a defined benefit superannuation scheme to count that support towards the minimum level of superannuation support. For the support to be counted, the employer is required to obtain a benefit certificate from an actuary. The benefit certificate must state the level of employer support implicit in the benefits available to employees in the superannuation scheme. The level of employer support is known as the 'notional employer contribution rate'.

The regulations set out the date by which a benefit certificate must be obtained and the information to be included in the certificate. The regulations also describe the methods the actuary is to use to determine the notional employer contribution rate.

If an employer does not provide sufficient superannuation support for employees, the employer is required to lodge a superannuation guarantee statement and to pay a superannuation guarantee charge. The regulations set out the procedures for lodgment of the superannuation guarantee statements and payment of the superannuation guarantee charge.

If, after lodgment of a superannuation guarantee statement, an employer changes the postal address shown on the statement, the regulations require the employer to notify the Commissioner of Taxation (the Commissioner) within one month of the change. Also, if an employer becomes aware of a change in the address of an employee shown on the employer's last superannuation guarantee statement, the employer must notify the Commissioner within one month of becoming aware of the changed address.

The regulations also set out the manner in which the Commissioner can make annotations on a superannuation guarantee statement.

A portion of the superannuation guarantee charge collected from an employer is to be redistributed to employees for whom the employer did not provide sufficient superannuation support. The money is to be redistributed to a complying superannuation fund chosen by the employee. However, if the employee is deceased or is under age 55 and has retired due to illness, the money will be paid direct to the employee or the deceased employee's representative.

The regulations set out the procedures for:

- the Commissioner to notify employees that an amount of redistributed money is available;
- the employee or a deceased employee's representative to notify the Commissioner if the employee is under age 55 and has retired due to illness or the employee has died;
- the employee to request a complying superannuation fund to collect the redistributed money from the Commissioner for the benefit of the employee;
- the complying superannuation fund to collect the money from the Commissioner.

The regulations prevent the Commissioner from redistributing the money if insufficient information is available to the Commissioner to identify the employee.

The regulations identify the prescribed employees for whom an employer does not have to provide superannuation support. A prescribed employee is a foreign executive who holds a Class 413 visa or entry permit under the Migration Regulations. The regulations also specify those payments of salary or wages which are 'prescribed payments' for the purposes of the Act. A prescribed payment is a payment made under the Commonwealth Government employment program known as the Community Development Employment Program (funded by the Aboriginal and Torres Strait Islanders Commission). 'Prescribed payments' are excluded from the calculation of the superannuation guarantee charge.

The regulations also prescribe the rates of expenses payable to a person who is required to attend before the Commissioner to answer questions on oath or otherwise. The expenses are not payable to an employer, employee of the employer, or a representative of the employer.

The proposed regulations will commence on gazettal.

Notes on each of the regulations are set out in the Attachment to this statement.

ATTACHMENT

Notes on Superannuation Guarantee (Administration) Regulations

By **regulation 1** these regulations are to be known as the Superannuation Guarantee (Administration) Regulations.

Interpretation

The meaning of certain terms used in the regulations are set out in **regulation 2**. Most of the terms are self explanatory.

Benefit Certificates

If an employer wants superannuation support provided through a defined benefit superannuation scheme to be counted towards the minimum level of superannuation support, section 22 of the *Superannuation Guarantee (Administration) Act 1992* (the Act) requires the employer to obtain an actuarial certificate. That certificate, known as a benefit certificate, must specify the level of employer superannuation support implicit in the benefits available to employees in the scheme. Section 10 of the Act defines a benefit certificate.

Regulation 3 sets out the date by which a benefit certificate must be obtained by an employer and the information to be included in the certificate. Under **subregulation 3(1)** an employer must obtain a benefit certificate from an actuary as follows:

- if the employer must lodge a superannuation guarantee statement, the certificate must be obtained on or before the day when the statement for the year, or the first year, to which the certificate relates is lodged;
- if the employer is not required to lodge a superannuation guarantee statement, the certificate must be obtained on or before 14 August in the year following the year, or the first year, to which the certificate relates.

In both the above cases, the Commissioner may allow an extension of time for obtaining the certificate.

Subregulation 3(2) provides that the benefit certificate must contain the following information:

- the name of each superannuation scheme to which the certificate relates;
- specify, or identify by reference to the governing rules of each scheme, the 'minimum requisite benefit' of the scheme;
- specify the notional employer contribution rate for the scheme or combination of schemes;
- specify the class of members to whom the notional employer contribution rate relates;
- include a statement that the notional employer contribution rate has been calculated in accordance with the regulations;
- specify the date of effect of the benefit certificate for each scheme to which the certificate relates;

- include the name, business address and actuarial qualifications of the actuary who issues the certificate; and
- include the signature of the actuary and the date on which the certificate is signed.

Calculation of the notional employer contribution rate

The notional employer contribution rate for a class of employees identified on a benefit certificate is calculated in accordance with either regulation 4, 5 or 6, depending upon which of those regulations a superannuation scheme falls within.

Regulation 4 operates if neither regulations 5 nor 6 apply to determine the notional employer contribution rate. Regulation 4 provides that the notional employer contribution rate is to be calculated by a method decided by an actuary. The actuary must certify that the method adopted:

- applies to the class of employees;
- is consistent with the approach in regulation 5 or the calculation in regulation 6; and
- gives a notional employer contribution rate that is comparable to the rate at which the employer must contribute to the scheme to provide the employees with the minimum requisite benefit.

The term 'minimum requisite benefit' is defined in regulation 2. The term means the minimum benefit required to be vested in the member of a superannuation fund in accordance with the Occupational Superannuation Standards legislation.

A limited number of schemes will meet the conditions which must be satisfied before regulations 5 or 6 will apply. In most cases the notional employer contribution rate is to be determined in accordance with regulation 4. It is expected that The Institute of Actuaries will issue guidelines to actuaries on how to calculate the notional employer contribution rate if regulation 4 applies and that the Commissioner of Taxation will confirm whether those guidelines are acceptable in a Taxation Determination.

Regulation 5 applies to determine the notional employer contribution rate for a defined benefit superannuation scheme if the minimum requisite benefits are fully in accumulation form and the following conditions are satisfied:

- (a) the minimum requisite benefit in respect of each employee in the class is calculated as an accumulation of employer contributions; and
- (b) the employer contribution rate used in calculating the minimum requisite benefit is the same for all employees in the class; and
- (c) the annual salary, for the purposes of the governing rules of the scheme, of each employee in the class is a notional earnings base within the meaning of section 13 or 14 of the Act.

In this case the notional employer contribution rate in relation to a class of employees specified in the benefit certificate is determined as the employer contribution rate used in the calculation of the minimum requisite benefit.

The terms "minimum requisite benefit" and "employer contribution rate" are defined in regulation 2.

Regulation 6 applies to determine the notional employer contribution rate for a class of employees in a defined benefit superannuation scheme if the minimum requisite benefits are fully in defined benefit form and the conditions set out in **subregulation 6(2)** are satisfied. Those conditions are:

- (a) the rate at which a member contributes to the scheme (the 'member contribution rate' or 'MCR') and the combined rate at which a member and that member's employer contribute to the scheme (called the 'total contribution rate' or 'TCR') are both greater than 0 and have not changed since 1 July 1992; and
- (b) the member contribution rate and the total contribution rate are the same in respect of every employee in the class of employees; and
- (c) the tax rate applicable to the standard component of a complying superannuation fund's taxable income has not changed since 1 July 1992; and
- (d) the whole of the minimum requisite benefit payable under the scheme is a taxed element within the meaning of subsection 27AB(1) of the *Income Tax Assessment Act 1936*, and
- (e) the benefit certificate to which the notional employer contribution rate relates is in respect of a single defined benefit superannuation scheme; and
- (f) the date of effect of the benefit certificate is 1 July 1992; and
- (g) the annual salary, for the purposes of the governing rules of the scheme, of each employee in the class is a notional earnings base within the meaning of section 13 or 14 of the Act; and
- (h) the minimum requisite benefit in respect of every member of the class of employees is prescribed in the governing rules of a defined benefit scheme as a multiple of.
 - (i) the annual salary of the person as at the day when he or she withdraws from the fund; or
 - (ii) the average annual salary of the person in a period ending when he or she withdraws from the fund.

In this case the notional employer contribution rate in relation to a class of employees specified in the benefit certificate is determined in accordance with the formula set out in **subregulation 6(3)**. **Subregulations 6(4), 6(5) and 6(6)** set out the formulas to be used in determining the total contribution rate used in the formula in subregulation 6(3).

Subregulation 6(1) defines a number of terms used in regulation 6.

Prescribed employees

Subregulation 7(1) sets out which employees are prescribed employees for the purposes of paragraph 27(1)(d) of the Act. An employer will not have to provide superannuation support for a prescribed employee. Under subregulation 7(1), a prescribed employee is a foreign executive who holds a Class 413 (executive(overseas)) visa or entry permit granted under the Migration Regulations.

Prescribed payments

Subregulation 7(2) specifies those payments of salary or wages which are prescribed payments for the purposes of paragraph 27(1)(e) of the Act. Payments of salary or wages which are prescribed payments are excluded from the calculation of the superannuation guarantee charge. By subregulation 7(2) any payment of salary or wages made under the Commonwealth Government employment program known as the Community Development Employment Program (funded by the Aboriginal and Torres Strait Islanders Commission) will be a prescribed payment excluded from the superannuation guarantee charge.

Lodgment of superannuation guarantee statements

An employer is to lodge a superannuation guarantee statement if the employer is liable to pay superannuation guarantee charge. The employer may also lodge a superannuation guarantee statement if the Commissioner requests a statement under section 34 of the Act. **Regulation 8** prescribes the manner in which statements must be lodged.

Subregulation 8(1) requires an employer to lodge a superannuation guarantee statement as follows:

- if the Commissioner gives notice to an employer specifying the address to which the statement must be sent, the employer is to lodge the statement at that address; or
- in any other case, the statement is to be lodged with an officer authorised by the Commissioner to receive the statements at an office of the Australian Taxation Office.

By **subregulation 8(2)** a superannuation guarantee statement must provide sufficient details to allow proper consideration of the statement.

In order to identify attachments accompanying a superannuation guarantee statement, under **subregulation 8(3)** the attachment must, unless the Commissioner allows otherwise, satisfy the following conditions:

- be endorsed by the employer in the manner set out in **paragraph 8(3)(a)** of the regulations;
- be signed by or on behalf of the employer;
- be dated by each person signing the statement;
- have each page of the attachment numbered, if the attachment has more than one page.

Payment of superannuation guarantee charge

If an employer does not provide sufficient superannuation support, the employer is required to pay a superannuation guarantee charge. The charge is equal to the superannuation guarantee shortfall which is made up of:

- the total of the individual superannuation guarantee shortfalls for all employees;
- an interest component;
- an administration component (section 17 of the Act).

In addition, an employer may be liable for a late payment penalty under section 49 of the Act and other penalties under Part 7 of the Act. These penalty charges are known as additional superannuation guarantee charge. For the purposes of the regulations, a reference to 'charge' includes both superannuation guarantee charge and additional superannuation guarantee charge (see **subregulation 2(1)**).

Subregulation 9(1) provides that the charge may be payable in Australian currency in cash, or by cheque, bank draft or money order. The charge may be paid at any of the following:

- an office of the Australian Taxation Office to an officer authorised to receive payments of the charge;
- a branch of the Reserve Bank of Australia by deposit to the credit of the Commissioner or of a Deputy Commissioner; or
- an Australian diplomatic or consular mission in a foreign country to a diplomatic or consular officer authorised by the Commissioner to receive payment of the charge.

By **subregulation 9(2)** an officer who receives a payment of charge must issue a receipt to the payer, if the payer requests a receipt.

Subregulation 9(3) provides that a payment by cheque is taken not to have occurred if the cheque is dishonoured on presentation.

Payment of the shortfall components

Under Part 8 of the Act part of the superannuation guarantee charge collected from an employer may be redistributed for the benefit of employees for whom the employer failed to provide adequate superannuation support. The amount to be redistributed is known as the shortfall component (see section 64 of the Act). Section 65 of the Act requires the Commissioner to deal with the shortfall component by either:

- paying the amount of the component to a complying superannuation fund nominated by the employee, in accordance with the regulations, for the benefit of the employee; or
- making arrangements in accordance with the regulations so that the amount of the component may be paid to a complying superannuation fund for the benefit of the employee.

Under **subregulation 10(1)**, if the amount of the shortfall component in respect of an employee exceeds \$20 the Commissioner must notify the employee. If the amount of the shortfall component is \$20 or less, the Commissioner can decide whether or not to notify the employee. Any notification by the Commissioner must be in writing. The notice must include the name of the employer and the amount, or sum of the amounts, of the shortfall component [**subregulation 10(2)**].

Once the employee has received the notice from the Commissioner, the employee, unless the employee has died or is under 55 and has retired due to illness, may request the trustees of a complying superannuation fund to collect the amount of the shortfall component or components from the Commissioner. The request must be in writing and state the name of the complying superannuation fund. [**subregulation 10(3)**]. On receipt of the request, the trustees must give to the employee written notice that they have received the request, specifying the date of receipt in the notice [**subregulation 10(6)**]. A penalty of 5 penalty units may be imposed if a trustee fails to comply with subregulation 10(6). If, after receiving the request and giving notice of receipt to the employee, the trustees do not wish to comply with the request, they must notify the employee within 14 days of receiving the request [**subregulation 10(7)**]. This will ensure

an employee can make a request to another complying superannuation fund. A penalty of 5 penalty units may be imposed if a trustee fails to comply with subregulation 10(7).

If the employee has died or is under age 55 and has retired due to illness, the employee or the deceased employee's legal personal representative must notify the Commissioner of the retirement or death. The notice must be in writing and be signed by the employee or the deceased employee's personal representative and be lodged at an office of the Australian Taxation Office. If the employee is under 55 and has retired due to illness, the notice must be accompanied by a certificate signed by 2 registered medical practitioners certifying that the person is unlikely to be able to work again in a capacity for which he or she is reasonably qualified by education, training or experience. If the employee has died, the notice must be accompanied by the deceased employee's death certificate [**subregulations 10(4) and 10(5)**]. On receipt of this notice the Commissioner will be able to pay the amount of the shortfall component to the employee or the deceased employee's representative.

If the trustee of a superannuation fund receives a request from an employee concerning collection of the employee's shortfall component, **subregulation 10(8)** requires the trustee, subject to subregulation 10(7), to lodge the request, or a copy of the request, with the Commissioner at an office of the Australian Taxation Office. The request must be lodged within 14 days of its receipt by the trustee, or such further period as the Commissioner allows, being not more than 10 years after the Commissioner gave notice to the employee. On receipt of the request, or copy of the request, the Commissioner will be able to pay the amount of the shortfall component to the trustee. A penalty of 5 penalty units may be imposed if a trustee fails to comply with subregulation 10(8).

Under **subregulation 10(9)** an employee's entitlement to the shortfall component will lapse if the request is not lodged with the Commissioner within 10 years of notice of the amount of the shortfall component being given to the employee.

Regulation 11 prevents the Commissioner from paying the amount of the shortfall component in respect of an employee, unless sufficient information is reasonably available to the Commissioner to allow the Commissioner to identify the employee.

Payment of allowances for expenses

When a person is required by the Commissioner, under section 77 of the Act, to attend before the Commissioner to answer questions on oath or otherwise, the person is entitled to an allowance for expenses incurred in attending. **Subregulation 12(1)** provides that the amount of the allowances for expenses of attendance are the amounts set out in the Schedule to the regulations. By **subregulation 12(2)** the allowances are not payable to a person attending before the Commissioner in the capacity of employer, employee or a person representing the employer.

The allowances for expenses set out in the Schedule to the regulations are as follows:

- if the person is attending because of his or her professional, scientific or other special skill or knowledge:
 - if the person in his or her occupation is paid by way of salary, wages or fees - an amount that the person would have received by way of salary, wages or fees had the person not attended;
 - in any other case - \$ 100 for each day of attendance.
- in any other case:

- if the person in his or her occupation is paid by way of salary, wages or fees - an amount that the person would have received by way of salary, wages or fees had the person not attended;
- in any other case - \$60 for each day of attendance.

The person is also entitled to be paid a reasonable amount for allowances for:

- travel between the person's usual place of residence and the place where the person is required to attend; and
- meals and accommodation if required to stay overnight; up to a maximum of \$400 per day.

Change of address on superannuation guarantee statement

Subsection 33(2) of the Act requires an employer to include in a superannuation guarantee statement the employer's postal address and the postal address and tax file number, if possible, of any employees for whom the employer has not provided sufficient superannuation support.

Subregulation 13(1) requires an employer to notify the Commissioner if the employer's postal address as set out in the last superannuation guarantee statement changes, or if the employer becomes aware that a postal address for an employee in the last superannuation guarantee statement changes. The Commissioner is to be notified in writing within one month of the change in the employer's address and within one month of the employer becoming aware of the change in the employee's address.

A penalty of 5 penalty units may be imposed for failure to comply with subregulation 13(1).

Subregulation 13(2) provides that, if the employer fails to notify the Commissioner of the change of address, the old address is to be the address for the purposes of these regulations.

Annotations on superannuation guarantee statements

Under **regulation 14**, any annotations on a superannuation guarantee statement by the Commissioner or a person employed by the Australian Taxation Office, in carrying out his or her duties, must be in an ink of a colour that is different from the colour of the ink used to make the statement.