

## **EXPLANATORY STATEMENT**

### **Issued by authority of the Assistant Treasurer**

*Superannuation Guarantee (Administration) Act 1992*

*Superannuation Guarantee (Administration) Regulations 2018*

The *Superannuation Guarantee (Administration) Act 1992* (the Act) establishes the Superannuation Guarantee Scheme and provides rules for its administration.

Section 80 of the Act provides, in part that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The purpose of the *Superannuation Guarantee (Administration) Regulations 2018* (the Regulations) is to remake the *Superannuation Guarantee (Administration) Regulations 1993* (the 1993 Regulations) to ensure its legal effect continues. The *Legislation Act 2003* provides that all legislative instruments, other than exempt instruments, are automatically repealed after 10 years. The 1993 Regulations were scheduled to sunset (automatically repeal) on 1 October 2018.

The 1993 Regulations ensure the smooth administration of the Superannuation Guarantee Scheme by prescribing various rules including reporting requirements, funds that satisfy the choice of funds requirements, and the calculation of the super guarantee charge for certain defined benefit funds in certain circumstances. The Regulations continue to achieve this purpose.

The Regulations remake and improve the 1993 Regulations by repealing redundant provisions, updating references in the provisions, simplifying the provisions and adopting current drafting practices, such as referring to ‘sections’ rather than ‘regulations’.

The Regulations also update visa class references reflecting changes to the *Migration Regulations 1994*, without substantive effect to meaning or operation of the provisions being rewritten.

Public consultation on the Regulations was undertaken between 18 July 2018 and 15 August 2018 (inclusive) through the release of an exposure draft and a call for public submissions. The two submissions received were considered in the finalisation of the Regulations and have been made available on the Department of the Treasury’s website.

Further details of the Regulations are set out in the [Attachment](#).

The Regulations will commence the day after it is registered on the Federal Register of Legislation.

The Act does not specify any conditions that need to be met before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### ***Superannuation Guarantee (Administration) Regulations 2018***

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Legislative Instrument**

The purpose of the Regulations is to remake the 1993 Regulations to ensure its legal effect continues after it sunsets on 1 October 2018.

#### **Human rights implications**

This Legislative Instrument does not engage any of the applicable rights or freedoms.

#### **Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**Details of the *Superannuation Guarantee (Administration) Regulations 2018***

This Attachment sets out further details of the Regulations. All references are to the Regulations unless otherwise stated. References to a ‘corresponding provision’ are to the corresponding provision in the 1993 Regulations, as identified by the Finding Table at page 10.

Changes of a minor or machinery nature, such as references to section rather than regulation in accordance with modern drafting practices, are generally not specifically identified in this Attachment. Where the Regulations make changes that require further explanation, these are identified and explained in this Attachment.

**Section 1 – Name**

The section provides that the title of the Regulations is the *Superannuation Guarantee (Administration) Regulations 2018*.

**Section 2 – Commencement**

This section provides that the Regulations commence the day after they are registered.

**Section 3 – Authority**

This section provides that the Regulations are made under the *Superannuation Guarantee (Administration) Act 1992* (the Act).

**Section 4 – Schedules**

This section provides that each instrument identified in a Schedule to the Regulations is amended or repealed in accordance with these Regulations.

**Section 5 – Definitions**

This section provides the definitions, listing the all the terms defined for the purposes of the Regulations. This section replaces regulation 2 of the 1993 Regulations.

The definitions have been updated to reflect changes in the law since 1993. There is no substantive change in the meaning of the defined terms.

**Section 6 – Defined benefit member**

This section outlines the circumstance in which a member of a superannuation fund will be considered to be a defined benefit member for the purposes of subsection 19(2CA) of the Act – which deals with individual superannuation guarantee shortfalls.

This section operates in the same way as in the corresponding provision in the 1993 Regulations.

## Section 7 – Benefit certificates

A benefit certificate is a certificate issued by an actuary relating to one or more specified defined benefit superannuation schemes. This section prescribes when an employer is required to obtain a benefit certificate and what information that certificate must contain.

There has been no substantive change to the requirements or timing of defined benefit certificates. This section operates in the same way as the corresponding provision in the 1993 Regulations.

## Section 8 – Notional contribution rate – general

The Regulations prescribe three different methods for calculating the employer notional contribution rate for members of a defined benefit fund. Section 9 applies where the minimum requisite benefit in respect of each employee in the class is calculated as an accumulation of employer contributions. Section 10 applies if the minimum requisite benefits are fully in defined benefit form and the conditions set out in subsection 10(2) are satisfied.

This section prescribes the default method of calculating an employer's notional contribution rate for employees who are members of a defined superannuation scheme who do not fall within section 9 or 10.

Section 8 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 section 9 or the calculation in section 10; 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.

There has been no substantive change to the notional employer contribution rate. This section has the same effect as the corresponding provision in the 1993 Regulations.

## Section 9 – Notional contribution rate – accumulation benefits

This section sets out how to calculate the notional employer contribution rate with respect to a class of employees who belong to a defined benefit superannuation scheme, where the minimum requisite benefit in respect of each employee in the class is calculated as an accumulation of employer contributions.

There has been no substantive change to the notional employer contribution rate for accumulation benefits. This section has the same effect as the corresponding provision in the 1993 Regulations.

### Section 10 – Notional contribution rates – defined benefits

This section 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 subsection 10(2) are satisfied.

There is no substantive change to eligibility or calculation of the notional contribution rate for defined benefit scheme employees. This section has the same effect as the corresponding provision in the 1993 Regulations.

### Section 11 – Certain employees excluded

Section 19 of the Act provides for a calculation of the superannuation guarantee by reference to the total salary and wages paid by an employer to their employee. Section 27 of the Act excludes certain categories of salary and wages from the calculation. One such category of excluded salary and wages are salary or wages paid to an employee who is a prescribed employee (paragraph 27(1)(d) of the Act).

This section identifies the relevant prescribed employees whose salary and wages will be excluded from the calculation of the superannuation guarantee.

In general, prescribed employees are non-residents working temporarily in Australia in executive positions.

Australia has had a number of changes to migration laws and the classes of visa that apply to non-residents working in Australia. This section updates the 1993 Regulations to reflect the new classes of visa, and for recent changes to the *Migration Regulations 1994*. These changes do not represent a change in policy or scope of the 1993 Regulations.

There is no material change to the list of prescribed employees. This section has the same policy effect as the corresponding provisions in the 1993 Regulations.

### Section 12 – Certain salary or wages excluded

This section identifies certain salary and wages as prescribed salary and wages. Payments of prescribed salary and wages are excluded for the purposes of the calculating an individual superannuation guarantee shortfall under the Act.

This list has been updated as compared to the list in the 1993 Regulations to remove references to payments under schemes that no longer exist. There is no material change to prescribed salary and wages as compared to the current effect of the 1993 Regulations.

### Section 13 – Nominal Interest Component – rate applicable

The nominal interest component of the superannuation guarantee charge, as stipulated in the Act, remains unchanged at 10 per cent per annum.

### Section 14 – Requirement for providing or offering insurance in respect of death

The Act requires an employer to make contributions to a fund which meets the minimum requirements to offer insurance in respect of death where an employee has not chosen a fund. This section prescribes the requirements in relation to offering insurance in respect of death.

This section has the same effect as the corresponding provision in the 1993 Regulations.

Amendments regarding minimum levels of insurance and choice of fund requirements that would be consequential upon the amendments proposed in *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017* and *Treasury Laws Amendment (Protecting Your Superannuation Package) Bill 2018* will be made separately after those Bills receive Royal Assent.

### Section 15 – Contributions under prescribed legislation

To satisfy choice of fund requirements for the purposes of the Act, employers must provide their employees with a choice of superannuation fund to which the employer will make contributions on behalf of the employee. Subsection 32C(9) of the Act provides that contributions made under a Commonwealth, State or Territory law that is prescribed under the regulations are taken to satisfy the choice of fund requirements. Certain public sector superannuation schemes are administered under such laws.

This section contains the list of Commonwealth, State and Territory laws that regulate the public sector superannuation schemes. The list has been updated in consultation with the States and Territories, to omit from the list the references to State or Territory Acts and Regulations which are no longer required because they are spent or redundant, and adds a new listing to reflect a change in legislative arrangements in Tasmania. The period during which contributions made under the prescribed Act will comply with the choice of fund requirements is also specified.

#### Tasmania

The references to the following Acts and Regulations are omitted because they are no longer operative:

- *Public Sector Superannuation Reform Act 1999* (Tas);
- *Retirement Benefits (Parliamentary Superannuation) Regulations 2012* (Tas);
- *Retirement Benefits (State Fire Commission Superannuation Scheme) Act 2005* (Tas); and
- *Retirement Benefits (Tasmanian Ambulance Service Superannuation Scheme) Act 2006* (Tas).

The superannuation schemes that previously operated under these laws have been exclusively regulated by the *Public Sector Superannuation Reform Act 2016* (Tas) since 31 March 2017. Consequently, contributions made to these superannuation schemes on or after 31 March 2017, under the new *Public Sector Superannuation Reform Act 2016* (Tas), continue to satisfy the choice of fund requirements.

### Section 16 – Chosen funds – information to be provided by employee

This section prescribes the information an employee who wishes to choose a fund must provide their employer.

An employee needs to provide their employer with written documentation setting out:

- their account name with their chosen fund;
- the number or identifier used by the chosen fund to refer to the employee's account if this is available. A superannuation fund may not be able to issue an account number in relation to an employee's account until an initial contribution is received. However, the fund may issue another number or identifier which specifically relates to the employee's interest in the fund;
- the full name of the chosen fund;
- the Australian Business Number of the chosen fund (where it is available);
- a written statement which satisfies subsection 25(1) of the Act from the trustee of the chosen fund. This statement indicates that the fund is a resident regulated superannuation fund within the meaning of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and is not subject to a direction under section 63 of the SIS Act. Contributions made to a superannuation fund where an employer is in receipt of this written statement are taken to be made to a complying superannuation fund;
- if it is a self managed superannuation fund, evidence from the Australian Taxation Office that the fund is a regulated superannuation fund;
- the information which outlines the methods by which an employer can contribute to the chosen fund;
- the number or identifier that relates to the superannuation product if the chosen fund uses such a number or identifier. This number may be referred to as a Superannuation Product Identification Number and will distinguish between the products offered by a superannuation fund where the fund may have more than one superannuation product; and
- the number or another identifier an employer may use to identify an employee, for example, the employee's payroll number, if the employee has one.

This section has the same effect as the corresponding provision in the 1993 Regulations.

#### Section 17 – Standard choice form

The Regulations prescribe that the standard choice form which must be provided to employees by employers under section 32P of the Act, is an approved form under section 388-50 in Schedule 1 to the *Taxation Administration Act 1953*.

### Section 18 – Employee must be notified of certain shortfall components

This section requires the Commissioner of Taxation (the Commissioner) to give a written notice to an employee of certain shortfall components. The notice must include:

- the date of the notice;
- the name of the employer; and
- the amount, or the sum of the amounts, of shortfall component.

A notice may also include a relevant fund.

### Section 19 – Responses to notice of a shortfall component

This section outlines how an employee can respond to a notice of a shortfall component.

This section has the same effect as the corresponding provision in the 1993 Regulations.

### Section 20 – Obligation of responsible officers who receive a request from employee

This section places certain obligations on the responsible officers who receive a request from an employee. Failure to comply with the obligations is an offence of strict liability. Applying strict liability is appropriate in these circumstances as the evidence is peculiarly within the knowledge of the responsible officer, and requiring proof of fault for these obligations would undermine deterrence and the effectiveness of ensuring all employers take appropriate steps to meet their superannuation obligations to their employees.

This section operates in the same way as the corresponding provision in the 1993 Regulations.

### Section 21 – Responses to notice are nominations

This section specifies that a response to a notice sent by the Commissioner is a nomination for the purposes of paragraph 65(1)(b) of the Act.

This section operates in the same way as the corresponding provision in the 1993 Regulations.

### Section 22 – Nomination of relevant fund by employee

Section 22 allows an employee, whether or not they have been given notice under section 18, to either request the responsible officers of a relevant fund to collect the amount of the shortfall component from the Commissioner on their behalf, or to lodge a written nomination of a relevant fund with the Commissioner.

This section operates in the same way as the corresponding provision in the 1993 Regulations.



### Section 23 – Shortfall component not to be paid in certain circumstances

This section 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 confirm the identity of the employee.

This section operates in the same way as the corresponding provision in the 1993 Regulations.

### Section 24 – Approved clearing houses

Under the Act, employers are required to make contributions to superannuation funds on behalf of employees. Instead of making contributions to superannuation funds directly, employers can make the payments to an approved clearing house, which then distributes the payments to the superannuation fund of the employee.

Subsection 79A(3) of the Act provides that an approved clearing house means a body specified in the Regulations.

The Australian Taxation Office is the only approved clearing house for the purposes of subsection 79A(3) of the Act.

### Section 25 – Application – contributions

The regulation of public sector superannuation funds in Tasmania has been reformed with the introduction of the *Public Sector Superannuation Reform Act 2016* (Tas) replacing a number of Tasmanian State Acts and Regulations.

From 31 March 2017, payments to Tasmanian public sector superannuation funds are made exclusively under the *Public Sector Superannuation Reform Act 2016* (Tas).

This section operates to ensure that those payments are included in these Regulations and retain their intended treatment. No employer or employee is detrimentally affected by the operation of this section.

### Section 26 – Things done under the 1993 Regulations (savings provision)

The purpose of this section is to ensure that the remaking of the 1993 Regulation does not invalidate or prevent recognition of things done under that instrument when applying these Regulations.

For example, the section has the effect that benefit certificates issued under and in accordance with the 1993 Regulations remain valid under the Regulations for their stated period of currency. This effect will occur regardless of whether the certificates refer to the provisions of the 1993 Regulations or the Regulations because neither the 1993 Regulations nor the Regulations require the provisions of the instrument to be referenced. Actuaries will be expected to update their certificate templates as soon as is practicable after the Regulations come into effect.

### Schedule 1

Schedule 1 to the Regulations repeals the *Superannuation Guarantee (Administration) Regulations 1993*.

## **Finding table**

As a result of some of the changes described above, it became necessary to renumber provisions of the Regulations. This Explanatory Statement includes a finding table to assist in identifying which provision in the Regulations corresponds to a provision in the old law that has been rewritten or consolidated, and vice versa.

References to the old law are to the 1993 Regulations. References to the new law are to the Regulations. Also, in the finding table, ‘no equivalent’ means that this is a new provision that has no equivalent in the old law.

<i>Old law</i>	<i>New law</i>
<i>Superannuation Guarantee (Administration) Regulations 1993</i>	<i>Superannuation Guarantee (Administration) Regulations 2018</i>
1	1
No equivalent	2
No equivalent	3
No equivalent	4
2	5
6A	6
3	7
4	8
5	9
6	10
7	11
7AC, 7AD	12
7A	13
9A	14
9B	15
9C	16
9D	17
10	18
10A	19
10B	20

<i>Old law</i>	<i>New law</i>
<i>Superannuation Guarantee (Administration) Regulations 1993</i>	<i>Superannuation Guarantee (Administration) Regulations 2018</i>
10C	21
10D	22
11	23
7AE	24
No equivalent	25
No equivalent	26
No equivalent	Schedule 1