

SPR 2021/2 - Explanatory statement -



Explanatory Statement

Superannuation Guarantee (Administration) – Stapled Fund – Guidelines for the Reduction of an Employer’s Individual Superannuation Guarantee Shortfall for Late Contributions Due to Non-acceptance by Notified Stapled Fund Determination 2021

General outline of instrument

1. This instrument is made under subsection 21(2) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA).
2. This instrument sets out the guidelines the Commissioner of Taxation (Commissioner) must have regard to in making a decision whether or not to reduce the amount of an employer's individual superannuation guarantee shortfall (shortfall) for an employee for a quarter under subsection 19(2F) of the SGAA.
3. The instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.
4. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Date of effect

5. This instrument commences on 1 November 2021.

What is the effect of this instrument

6. The effect of this instrument is to specify the written guidelines the Commissioner must have regard to when deciding whether or not to reduce an employer’s shortfall where late superannuation guarantee contributions were made to a fund for an employee because the employee’s most recently notified stapled fund did not accept the superannuation guarantee contributions from the employer.

Guidelines for introductory period

7. The introductory period is 1 November 2021 to 31 October 2022.
8. During the introductory period, the Commissioner will encourage and assist employers to understand and become familiar with the stapled fund requirements. The Commissioner recognises that non-compliance by employers with the stapled fund requirements under the choice of fund rules during the introductory period may have been caused by a lack of knowledge and/or business readiness rather than a non-compliant attitude. It is acknowledged that genuine mistakes and misunderstandings may occur.
9. Therefore, in the introductory period, employers will be provided with help and assistance as a first step to improving compliance with the stapled fund requirements under the choice of fund

rules. Any shortfalls will be reduced to nil unless there is evidence that an employer has not made reasonable attempts to comply with the stapled fund requirements.

Guidelines after the introductory period

10. The Commissioner will adopt a 'business as usual' approach to the administration of the stapled fund requirements under the choice of fund rules from the quarter beginning 1 November 2022. The Commissioner will continue to provide education and assistance to employers to help them comply with the choice of fund rules as part of the 'business as usual' approach. However, the introductory period will only be applicable for the first 12 months following the introduction of the stapled fund requirements as it is considered that this will afford employers sufficient time to understand and comply with the changes to the choice of fund rules.

11. In determining the level of reduction to the amount of the employer's shortfall, the Commissioner will have regard to:

- (a) whether an employer made the late superannuation guarantee contributions to a fund for the employee that complies with the choice of fund rules when the most recently notified stapled fund did not accept the contributions, and
- (b) other mitigating factors or exceptional circumstances that affected the employer in making the superannuation guarantee contributions or their compliance with the choice of fund rules.

12. The Commissioner will also have regard to whether there are circumstances to support an increase to the employer's shortfall.

Degree of compliance with choice of fund rules when making superannuation guarantee contributions after the most recently notified stapled fund did not accept the contributions

13. The legislation seeks to provide a reduction to an employer's individual superannuation guarantee shortfall due to the lateness of superannuation guarantee contributions made to a fund for a quarter because the most recently notified stapled fund did not accept the superannuation guarantee contributions.

14. In determining the level of reduction, the Commissioner will have regard to whether an employer has acted reasonably in compliance with the stapled fund requirements and broader choice of fund rules in the making of the subsequent superannuation guarantee contributions to a fund for the employee.

15. A greater level of reduction (including to nil) will apply where an employer has made the late superannuation guarantee contributions within a reasonable time to a fund that meets the choice of fund rules. For example, the employer made the late superannuation guarantee contributions to:

- (a) a fund subsequently chosen by the employee
- (b) a successor fund that the employee's benefits have been transferred to because the notified stapled fund ceased to exist
- (c) another stapled fund notified by the Commissioner upon the employer making a subsequent request, or
- (d) if the Commissioner has notified the employer that the employee does not have another stapled fund - the employer's (nominated) default fund or a fund specified under a workplace determination or enterprise agreement made before 1 January 2021.

16. In terms of 'reasonable time,' the Commissioner will consider the amount of time between when the employer become aware that the most recently notified stapled fund would not accept the superannuation guarantee contributions and when the contributions are subsequently made to

another fund. For example, a reasonable time would be where an employer became aware that the notified stapled fund would not accept the contributions in the last week or two before the quarterly due date and acted promptly to be able to make the contributions to another fund that complied with the choice of fund rules albeit after the quarterly due date.

17. A lesser level of reduction will apply where an employer did not make the late superannuation guarantee contributions within a reasonable time or made the contributions to another fund that met the choice of fund rules without making a further request for a stapled fund.

18. The Commissioner may not reduce the amount of the employer's shortfall where before the employer made the late superannuation guarantee contributions to another fund:

- (a) the employee had chosen a fund,
- (b) the Commissioner had notified the employer of another stapled fund, or
- (c) the Commissioner had notified the employer of an estimate of superannuation guarantee charge (SGC) or issued an SGC default assessment.

19. The Commissioner considers that the employer has not taken the necessary steps to comply with the stapled fund requirements and choice of fund rules in the instances outlined in paragraph 18 above. However, the Commissioner may consider a reduction where there were other mitigating facts and circumstances or exceptional circumstances.

Evaluation of other mitigating facts and circumstances or exceptional circumstances

20. The Commissioner acknowledges that there may be other facts and circumstances that could have prevented an employer from making the superannuation guarantee contributions in a timely manner or contributed to their non-compliance with the stapled fund requirements and choice of fund rules after the most recently notified stapled fund did not accept the superannuation guarantee contributions.

21. These facts or circumstances include, but are not limited to:

- (a) the date the employee commenced employment in comparison to the end of the quarter
- (b) delays in the notification that the most recently notified stapled fund could not accept the contributions from the employer for the employee
- (c) a subsequent notified stapled fund did not accept the contributions from the employer
- (d) circumstances outside the control of the employer such as:
 - (i) the malfunction or outage of key systems that caused the failure to make the superannuation guarantee contributions by the quarterly due date
 - (ii) ill health or affliction affecting the employer or a key employee of the employer
 - (iii) natural disasters (for example, fires or floods) or other events where the effects are more than the resultant financial hardship or business downturn, or
- (e) the level of co-operation by the employer with the Commissioner.

22. Where such facts and circumstances are present, the Commissioner may further reduce the amount of an employer's shortfall (including to nil).

Circumstances where the Commissioner may not further reduce the employer's shortfall

23. The Commissioner may determine it is not appropriate to further reduce the amount of the employer's shortfall where, for example, an employer:

- (a) has previously been subject to choice of fund rules compliance action

- (b) received guidance from the Commissioner in administrative binding advice or previous compliance activity, or
- (c) has repeatedly made contributions to a fund that does not meet the choice of fund rules.

24. In these circumstances, the employer would be expected to have an understanding of the stapled fund requirements and broader choice of fund rules.

25. It would also be inappropriate for the Commissioner to further reduce the employer's shortfall merely because the amount of the shortfall may be relatively small.

Evaluate if circumstances exist to increase the employer's shortfall

26. Circumstances may arise where it is appropriate for the Commissioner to increase the amount of the employer's shortfall. For example, where an employer has engaged in action or taken steps to prevent or obstruct the Commissioner from ascertaining the shortfall and / or the level of the reduction.

27. Action or steps taken to prevent or obstruct the Commissioner would include, for example, where an employer:

- (a) repeatedly failed to respond to requests to provide information for no acceptable reason
- (b) deliberately supplied irrelevant, inadequate or misleading information or documents
- (c) engaged in:
 - (i) behaviour delaying the provision of information
 - (ii) the destruction of records, or
 - (iii) a combination of these singular actions or steps.

28. The Commissioner may also increase the amount of the employer's shortfall where an employer had a previous shortfall calculated for a quarter of the same type because they did not comply with the choice of fund rules when making the late superannuation guarantee contributions to a fund after the most recently notified stapled fund did not accept the contributions. The increase will apply regardless of whether the previous shortfall in a quarter was assessed during a previous interaction or whether it occurs on the same day. There is no requirement for the employer to be aware of the shortfall for the increase to apply. This means that, where the Commissioner assesses multiple shortfalls of the same type at the same time, the increase will apply to the second and subsequent shortfalls.

29. The Commissioner may increase the employer's shortfall by 20%. The increase cannot result in an outcome that exceeds the original amount of the shortfall.

Notification of decision

30. The Commissioner will notify the employer in writing of the decision made on whether or not to reduce the employer's shortfall. This will include the reasons for the decision irrespective of the level of reduction.

Other matters

31. The Commissioner cannot reduce an employer's shortfall under subsection 19(2F) of the SGAA where the employer has chosen under section 23A of the SGAA to use the late superannuation guarantee contributions to offset the superannuation guarantee charge for a quarter or to carry forward as pre-payment of a future contribution for the same employee in another quarter

under section 23 of the SGAA. This prevents double counting of the late superannuation guarantee contributions.

32. Similarly, where the Commissioner has reduced an employer's shortfall under subsection 19(2F) of the SGAA, subsection 23(8AA) of the SGAA provides that the late contributions relating to that reduction cannot be taken into account in any other quarter for the purposes of the reduction of charge percentage in section 23 of the SGAA. This also prevents double counting of the late contributions.

33. Further, the Commissioner cannot reduce the part of an employer's shortfall that relates to the employer not providing the minimum level of superannuation support for an employee for a quarter.

34. For example, an employer needs to contribute \$1,000 to a fund for an employee that complies with the choice of fund rules to reduce the employer's charge percentage to nil under sections 22 or 23 of the SGAA and avoid the superannuation guarantee charge. The employer attempts to make superannuation guarantee contributions of \$800 to the most recently notified stapled fund before the quarterly due date. The fund, however, does not accept the contributions. The employer subsequently makes contributions of \$700 to a second notified stapled fund for the employee after the quarterly due date. The reduction in the employer's shortfall may only be considered for the amount of the contributions made by the employer – that is, up to the \$700 – and not the remaining \$300 of the shortfall.

35. The Commissioner may provide further written guidance for ATO staff.

Background

36. This instrument has been developed to outline the guidelines the Commissioner must have regard to when deciding whether or not to reduce an employer's shortfall under subsection 19(2F) of the SGAA.

37. Amendments were made to the choice of fund rules in Part 3A of the SGAA by *Treasury Laws Amendment (Your Future, Your Super) Act 2021* with effect from 1 November 2021 to introduce a new requirement relating to 'stapled funds' for employees commencing on or after that date.

38. These amendments may mean an employer should make contributions to an existing superannuation fund account of an employee (known as a stapled fund) to comply with the choice of fund rules.

39. Where an employee has not chosen a fund, or was ineligible to choose a fund, the amendments provide that an employer (or their agent) may request the Commissioner to identify whether a stapled fund for the employee exists under section 32R of the SGAA. Where the Commissioner notifies the employer that the employee has a stapled fund, the employer should make contributions to that fund to comply with the choice of fund requirements.

40. If the fund does not accept the superannuation guarantee contributions made by the employer on behalf of their employee, an individual superannuation guarantee shortfall may arise where the contributions cannot be made to another fund by the due date (i.e. within 28 days after the end of the quarter). A shortfall arises where an employer does not provide the minimum level of superannuation for an employee as prescribed in subsection 19(2) of the SGAA by the due date.

41. A reduction in the resulting shortfall may be available to an employer due to the lateness of the superannuation guarantee contributions in these circumstances. The Commissioner has the discretion to reduce the employer's shortfall in full or part under subsection 19(2F) of the SGAA. However, the Commissioner cannot apply the discretion where there was a chosen fund for the employee at the time the employer attempted to make the superannuation guarantee contribution. This reflects that if there is a chosen fund at that time, the employer should make superannuation guarantee contributions into that fund to comply with the choice of fund requirements.

42. The Commissioner is required to make guidelines that must be considered when deciding whether to exercise this discretion. This instrument provides guidance for employers about when the discretion under subsection 19(2F) of the SGAA may be exercised.

Compliance cost assessment

43. Compliance cost impact: Minor - There will be no additional regulatory impacts as the instrument is minor and machinery in nature.

Consultation

44. Subsection 17(1) of the *Legislation Act 2003* (LA) requires, before the making of a determination, that the Commissioner is satisfied that appropriate and reasonably practicable consultation has been undertaken.

45. Broad public consultation was undertaken for this instrument for a period of two weeks from 2 August 2021 to 16 August 2021 inclusive.

46. The draft instrument and draft explanatory statement were published to the ATO Legal database. Publication was advertised via the 'What's new' page on that website. Major tax and superannuation publishers and associations monitor this page and include the details in the daily and weekly alerts and newsletters to their subscribers and members. This ensures advice of the draft is disseminated widely across the tax professional community, and that they are in an informed position to provide comments and feedback.

47. A message was sent to members of the Private Groups Stewardship Group, Small Business Stewardship Group, Large Business Stewardship Group, and Tax Practitioner's Stewardship Group inviting them to comment on the draft instrument and draft explanatory statement and to disseminate with their networks.

48. The ATO received supportive submissions from two groups in response to the consultation on the draft instrument and draft explanatory statement. One submission also commented on the drafting of the legislation. The ATO acknowledges those comments but they were out of scope for consideration in this instrument.

Exemption from disallowance and sunseting regime

49. Section 42 of the LA provides for the disallowance of legislative instruments. However, paragraph 44(2)(b) of the LA provides that section 42 does not apply to legislative instruments prescribed by regulation. Section 9 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (EOMR) provides a list of instruments that are not subject to disallowance. Table item 3 section 9 of the EOMR lists instruments (other than regulations) relating to superannuation. As a result, this instrument is not a disallowable legislative instrument under section 42 of the LA.

50. Part 4 of the LA provides for the sunseting of legislative instruments. However, paragraph 54(2)(b) of the LA provides that Part 4 of the LA does not apply if the legislative instrument is prescribed by regulation. Section 11 of the EOMR provides a list of instruments that are not subject to sunseting. Item 6 of the table in section 11 of the EOMR lists instruments (other than regulations) relating to superannuation. As a result, Part 4 of the LA does not apply to this instrument.

Legislative references

Acts Interpretation Act 1901

Human Rights (Parliamentary Scrutiny) Act 2011

Legislation Act 2003
Legislation (Exemptions and Other Matters) Regulation 2015
Superannuation Guarantee (Administration) Act 1992
Taxation Administration Act 1953
Treasury Laws Amendment (Your Future, Your Super) Act 2021

Statement of compatibility with Human Rights

As section 42 of the *Legislation Act 2003* does not apply to this instrument, a Statement of compatibility with Human Rights in respect of this instrument is not required under section 9 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.