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Two Decades of Superannuation Guarantee

– *Compulsory employer contributions*

In the history of superannuation in Australia, the introduction of the superannuation guarantee (SG) for compulsory employer superannuation contributions represents the underpinnings of a national framework for funding retirement income. The SG has just passed its 20th birthday and is still administered by the ATO. One wonders what's in store for the next phase of the SG.

Since its inception, many changes have been made to improve the SG system and make superannuation an attractive investment option, particularly through tax benefits and Government sponsored contributions. The ATO has also invested heavily in the education of employers. Superannuation is now entering a new phase and the ATO predicts its growth to continue to over \$6 trillion by 2035.

The future of the superannuation system is largely based on considerations and recommendations from Australia's Future Tax System Review and the Super System Review, better known as the Cooper Review. In its 2010 Budget, the Government announced significant changes to Australia's superannuation regime, namely, the proposed increase to the SG contribution rate from 9% to 12% by 1 July 2019 and raising the age limit from 70 to 75 years from 1 July 2013. Further changes were announced by the Government earlier in this year's budget including:

- the greater use of tax file numbers to locate and match lost member accounts;
- an extension of the director penalty regime to make directors personally liable for unpaid superannuation guarantee amounts, and
- from 1 July 2012, employers must report on employee payslips the amount of superannuation actually paid into their super accounts.

It has taken 20 years for the superannuation regime to transform into what it is today. Based on the statistics published by the ATO, it is not difficult to conclude that the general Australian population regards super as a relatively important investment option. Although some may sing its praises, others consider superannuation a regimented and strictly controlled system which still has failings.



Extension of the Director Penalty Regime

In July 2011, Treasury released draft provisions, as part of a then proposed Tax Laws Amendment (2011 Measures No 7) Bill 2011, to amend the tax law with the stated aim to better protect workers' entitlements to superannuation, strengthen director obligations and reduce the scope for companies to undertake fraudulent phoenix activities. It is understood the new measures may be introduced into the House of Representatives in October 2011 with a view to their passage before the end of the year. The No 7 Bill itself was in fact introduced in the House of Representatives on 21 September 2011 but it did not contain the director obligations and phoenix activities amendments.

Directors personally liable, but possible unintended consequences

Under the proposed new director penalty regime, company directors will be held personally liable for unpaid PAYG withholding and the superannuation guarantee charge (SGC) from 1 July 2011, unless they can show they did not take part in the management of the company or they took all reasonable steps to have the company fulfil its obligations. While the proposed legislation is designed to target phoenix schemes, the provisions could have unintended as well as significant consequences for employers, particularly those that engage independent contractors.

Whether a person is an employee or contractor is a question of law - that can only be determined by considering the totality of the relationship between the parties. Guidance has been provided through rulings and more recently the State Revenue Office of Victoria issued a revenue ruling (PTA.038) that takes effect from 1 July 2011 in relation to determining whether a worker is an employee. The issue has been decided on several occasions in the courts, however, it is surprising that the term "employee" has not yet been defined in the Federal income tax legislation or in State tax legislation like the Payroll Tax Act 2007 (Vic) despite the necessary importance of the distinction when trying to determine liability for PAYG, superannuation and payroll tax payments.

The importance of the distinction becomes more clear with the impending changes to the director penalty regime. For example, should the ATO determine contractors to be employees for superannuation purposes through a compliance audit or where

it is determined by a Court, the new measures could render directors liable if the company fails to pay the SGC in respect of those workers. In these circumstances, it is expected that directors will not be able to avoid liability if a Penalty Notice is issued, even if:

- a genuine belief was held by the director that the workers were engaged as independent contractors;
- the workers held the initial belief that they themselves were contractors; or
- the workers were compensated with a higher rate/fee in lieu of receiving superannuation contributions.

Furthermore, the directors' liability could include:

- 9% of each employee's total salary or wages ("shortfall amount");
- an administration fee for each individual employee (currently \$20 per quarter); and
- interest on the shortfall amount from the beginning of the quarter in which the contribution was due until the later of either:
 - the lodgment of a superannuation guarantee statement outlining the shortfall amount; or
 - the 28th day of the 2nd month after the end of the relevant quarter.

A REVIEW OF CURRENT CONTRACTOR ARRANGEMENTS IS STRONGLY RECOMMENDED

In light of the proposed changes, and in the interests of all company directors, it is strongly recommended that current independent contracting arrangements be reviewed to determine whether any changes need to be made and assess any potential implications under the proposed new director's penalty measures.

NOTE: This article is an extract of 'Directors' liabilities, contractors and super guarantee - a complex mix' by Julie Ling, Tax Partner, WTS Australia published in Thomson Reuters Weekly Tax Bulletin 40 on 23/9/11. For the full article, see paragraph [1507].

THE NEW R&D TAX INCENTIVE

We previously alerted readers in our June Tax Brief that the new research and development (R&D) tax incentive will provide a tax offset for eligible R&D activities and is targeted toward R&D activities that benefit Australia. Tax Laws Amendment (Research and Development) Bill 2011 recently received Royal Assent on 8 September 2011 and now puts in place the new tax incentive which will be jointly administered by the Australian Taxation Office and AusIndustry under two main pieces of legislation:

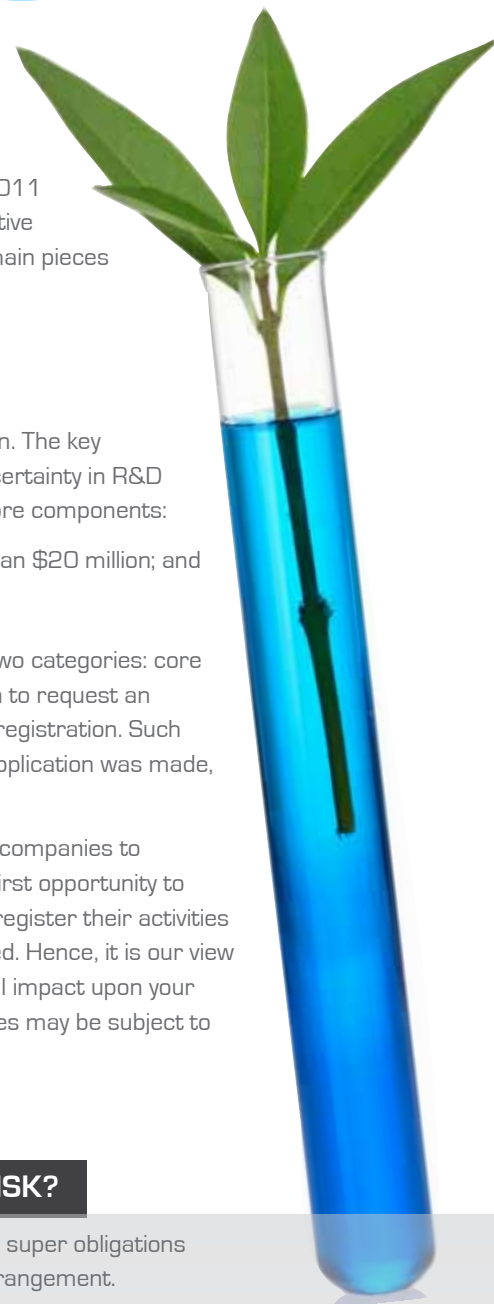
- Division 355 of the Income Tax Assessment Act 1997; and
- Part III of the Industry Research and Development Act 1986.

Briefly, the incentive comes into effect on 1 July 2011 and replaces the old R&D tax concession. The key changes under the new program include a more targeted definition of R&D activities, greater certainty in R&D investment with companies having the option of applying for an 'advance finding' and the two core components:

- a 45% refundable tax offset for certain eligible entities whose aggregated turnover is less than \$20 million; and
- a 40% non-refundable tax offset for all other eligible entities.

The new definition of R&D activities is important for registration and has been separated into two categories: core R&D activities and supporting R&D activities. Where there is doubt, companies have the option to request an advanced finding from Innovation Australia to determine the eligibility of their activities prior to registration. Such findings may affect registrations and claims as they will bind the ATO for the income year the application was made, and the next two income years thereafter.

It will be difficult to know immediately whether the new R&D tax incentive will in fact encourage companies to engage in R&D. If your company has a 'standard' income year beginning on 1 July 2011, your first opportunity to register and claim the R&D tax incentive will be from 1 July 2012. Companies will still need to register their activities annually within 10 months after the end of their income year in which the activity was conducted. Hence, it is our view you should consider how the new requirements for registration under the R&D tax incentive will impact upon your accounting, information and record keeping systems from 1 July 2011 and note that companies may be subject to AusIndustry and ATO compliance activities to verify their eligibility.



ATO FOCUSES ON EMPLOYEES AND CONTRACTORS – ARE YOU AT RISK?

The ATO have advised that in this financial year they will continue to conduct field work to identify whether employees are being incorrectly engaged as contractors. Employers may face penalties for failing to comply with their employer obligations.

The ATO will use their online Employee/contractor decision tool to assist in reviewing the tax and superannuation treatment of workers. By answering a series of questions using the tool they will receive a report which will:

- advise whether the particular arrangement is an employee or a contractor arrangement
- summarise the information provided
- outline the basis of the outcome produced by the tool

- summarise the tax and super obligations required under that arrangement.

The ATO Employee/contractor decision tool can be accessed at the following link: <http://www.ato.gov.au/businesses/content.aspx?doc=/content/00095062.htm>

By using the ATO tool to review your arrangements, it may assist in areas where you have potential exposures and allow you to remedy the situation. Should you require any assistance in this regard, WTS Australia has experience in this area as well as making appropriate voluntary disclosures to the ATO where deemed necessary.

INTERNATIONAL RISKS – WHAT THE ATO IS LOOKING AT

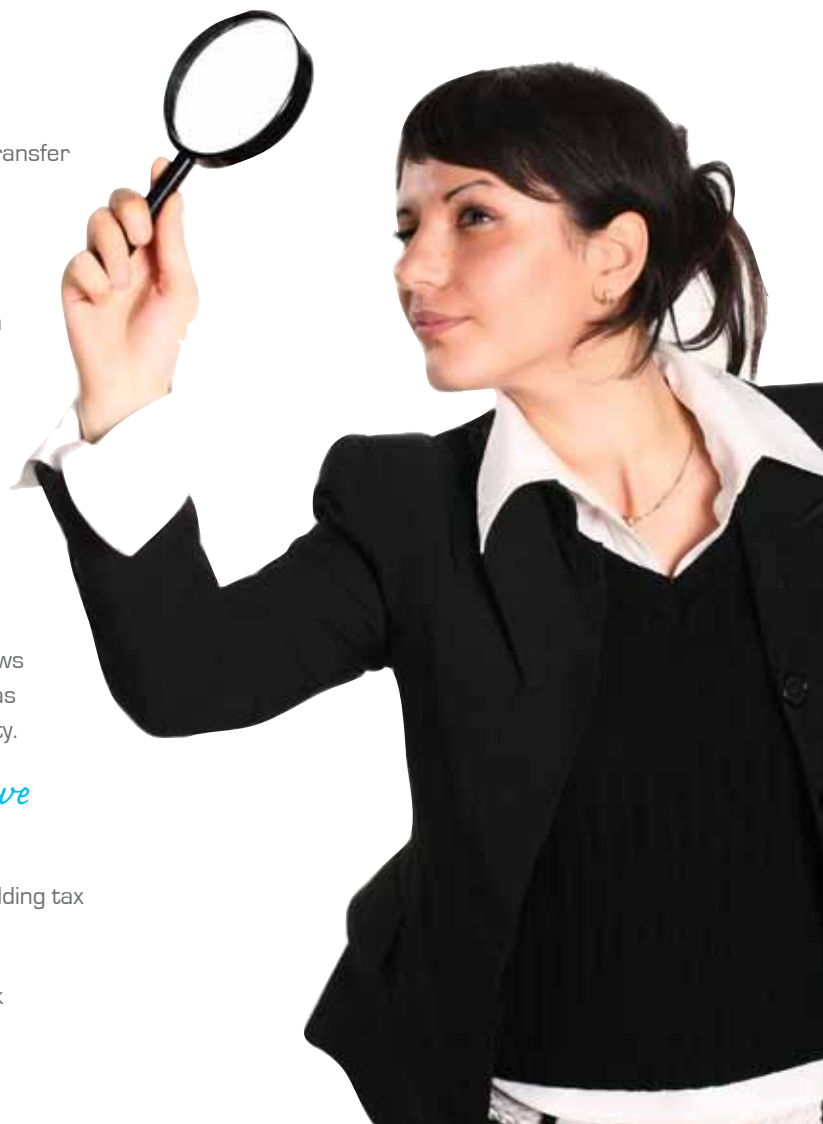
The ATO have published this month a summary of their focus on transfer pricing and related international risks. The following areas are identified:

- business restructures, including transfer of intangible property
- profitability, including the impact of the Global Financial Crisis on the economic performance of large businesses
- financing, including intra group loans and guarantee fees
- services to the mining industry
- foreign bank - profit allocations

Using information collected in questionnaires sent out to large business in 2010 and subsequent risk reviews, the ATO has identified transactions for further investigation. The ATO has communicated with taxpayers subject to questionnaires and reviews either where they have no further issue for concern or where areas are of concern and require ATO attention and possible audit activity.

Some of the outcomes from its project work have resulted in:

- increased voluntary disclosures for income tax, GST and withholding tax
- reduced carried-forward losses
- improved accuracy of Schedule 25A transfer pricing paperwork
- increased uptake of Advance Pricing Arrangements.



NEW REPORTABLE TAX POSITION SCHEDULE

The ATO continues to develop its new Reportable Tax Position (RTP) schedule that will be piloted using a small number of large business taxpayers for the 2012 tax year. The most recent draft of the RTP schedule can be viewed at this link:

<http://www.ato.gov.au/content/downloads/bus00279408rtp2011.pdf>

On our review, the RTP schedule is quite pervasive and aims at tax transparency such that, among other things, material reasonably arguable tax positions taken by a taxpayer must be disclosed to the ATO. A "reportable tax position" is defined as a position that has not been otherwise adequately disclosed to the Commissioner and is any of the following:

- a material position that is not more likely to be correct than incorrect
- a position in respect of which uncertainty about taxes payable or recoverable is recognised and/or disclosed in the taxpayer's or a related party's financial statements
- a position in respect of a reportable transaction (as defined).

The RTP schedule will remain draft until it is officially released from 1 July 2012 for the 2013 tax year.



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Did you know...

...that entities that pay interest, dividends or royalties to non-residents need to provide the ATO with an annual report of all non-resident withholding payments made during the financial year?

The correct form to use, which must be must be lodged by 31 October following the end of the financial year, is the PAYG withholding from interest, dividends and royalties paid to non-residents - annual report. This form does not need to be lodged if interest and dividend payments made to non-residents have already been reported in an annual investment income report, and no royalty payments were made to non-residents. However, you must use this form to report any amounts withheld on royalty payments to non-residents.

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