EXPLANATORY STATEMENT

Select Legislative Instrument 2009 No. 157

Subject – *Superannuation Guarantee (Administration) Act 1992*

Superannuation Guarantee (Administration) Amendment Regulations 2009 (No. 1)

Section 80 of the *Superannuation Guarantee (Administration) Act 1992* (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.

Under the Act, employers must in effect contribute superannuation for their employees, calculated at 9 per cent of the employees' ordinary time earnings. If an employer does not contribute the full amount, a superannuation guarantee shortfall arises. Employers are in the first instance only required to provide superannuation support in relation to a particular payment if it falls within the definition of ordinary time earnings, which is a narrower category than salary and wages because it excludes most overtime and some other payments.

The regulations amend the *Superannuation Guarantee (Administration) Regulations 1993*, to ensure that employers do not have to make superannuation guarantee payments on paid parental leave and ancillary leave payments. The Government announced this policy in the 2009-10 Budget.

The regulations exclude all payments for paid parental leave, whether under current awards or agreements, or under any statutory paid parental leave scheme. Parental leave includes maternity leave, early paid leave relating to an inability to be transferred to a safe job, paternity leave and other leave taken by partners at the time of birth or adoption, pre-adoption leave and adoption leave. The regulations also exclude payments for service with the Defence Force Reserves, and payments for eligible community service activity (as defined in the *Fair Work Act 2009*). Eligible community service includes jury service.

Technically, the regulations operate by removing these payments from the definition of salary or wages rather than directly from ordinary time earnings.

Details of the regulations are set out in the Attachment.

The Act specifies no conditions that needed to be met before the power to make the proposed regulations may be exercised

The regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The regulations commenced on 1 July 2009, to coincide with the date of effect of ATO Superannuation Guarantee Ruling (SGR 2009/2). This ruling sets out the meaning of 'ordinary time earnings' for the purposes of calculating the required minimum level of employer superannuation support under the Act. The proposed regulations do not affect an employee's rights in respect of any superannuation guarantee shortfall which arose prior to 1 July 2009.

The Office of Best Practice Regulation did not require a regulation impact statement, since the regulations broadly preserve the status quo. The Office of Best Practice Regulation (OBPR) reference for this issue is ID 10426.

Authority: Section 80 of *Superannuation Guarantee (Administration) Act 1992*

ATTACHMENT

Superannuation Guarantee (Administration) Amendment Regulations 2009 (No. 1)

Explanation of the amendments

Regulation 1 – specifies the name of the Regulations as the *Superannuation Guarantee (Administration) Amendment Regulations 2009 (No. 1).*

Regulation 2 – provides that the Regulations commence on 1 July 2009.

Regulation 3 – provides that the Schedule 1 amends the *Superannuation Guarantee (Administration) Regulations 1993* (the Principal Regulations).

Regulation 4 – provides that the Regulations only apply to salary or wages that become payable on or after 1 July 2009.

Schedule 1 amendments

Item 1 inserts a new regulation 7AD into the Principal Regulations. The new regulation operates by excluding, or 'prescribing,' certain payments from salary or wages for the purposes of the *Superannuation Guarantee (Administration) Act 1992* (paragraph 27(1)(e)).

Under the new regulation, employers will not have to make superannuation guarantee contributions on these payments after 1 July 2009. This preserves the status quo because under the Australian Taxation Office ruling which applied prior to 1 July 2009, employers did not have to make superannuation guarantee payment contributions on these payments (SGR 94/4).

Subregulation 7AD(1) specifies the payments in the table that are 'prescribed', or excluded from salary and wages.

Item 1 of the table prescribes salary or wages paid to an employee for parental leave.

Item 2 of the table prescribes salary or wages paid by the employee's usual employer while absent so as to perform community service (for example jury duty or service with the state emergency services).

Item 3 of the table prescribes salary or wages paid by the employee's usual employer while absent so as to serve with the Australian Defence Force (for example, in the Defence Force Reserves).

The remaining subregulations clarify the items prescribed in the table.

Subregulation 7AD(2) makes it clear that employees are still entitled to superannuation guarantee contributions while performing community service if the community service provider is their usual employer and is thus paying the salary or wages concerned.

Subregulation 7AD(3) similarly makes it clear that employees are still entitled to superannuation guarantee contributions while serving with the Australian Defence Force (for instance in the Defence Force Reserve) if the Australian Defence Force is their usual employer and is thus paying the salary or wages concerned.

There is an exception if the employee receives income for serving with the Defence Force Reserves that is exempt from income tax (as specified in section 29 of the *Superannuation Guarantee (Administration) Act 1992*, which in turn refers to item 1.4 in the table in section 51-5 of the *Income Tax Assessment Act 1997*). In this case, the employee is not entitled to superannuation guarantee contributions under Subregulation 7AD(3) unless they are being paid for continuous full time service. Subregulation 7AD(3) does not affect a Defence Force employee's rights in respect of any other tax-free allowances.

Subregulation 7AD(4) makes it clear that employers are exempt from making superannuation guarantee contributions only on payments which are specifically for absence while performing community service or service with the Defence Forces. Employees who use normal paid leave are still entitled to their superannuation guarantee contributions in the normal way.

Subregulation 7AD(5) defines eligible community service by referring to the *Fair Work Act 2009*, and makes it clear that this includes jury service. It also defines parental leave as including:

- maternity leave;
- early paid leave for expectant mothers where the employer cannot find safe work for them;
- paternity leave;
- pre-adoption leave; and
- adoption leave.