

***PS LA 2006/14 - Procedures for tax officers engaged in superannuation guarantee compliance activities where the review identifies one or more individuals engaged under a contract that is wholly or principally for their labour***

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# Practice Statement Law Administration

**PS LA 2006/14**

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**FOI status: may be released**

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*This practice statement is issued under the authority of the Commissioner of Taxation and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by tax officers unless doing so creates unintended consequences or where it is considered incorrect. Where this occurs tax officers must follow their business line's escalation process.*

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**SUBJECT:** Procedures for tax officers engaged in superannuation guarantee compliance activities where the review identifies one or more individuals engaged under a contract that is wholly or principally for their labour

**PURPOSE:** To provide instruction to tax officers on what procedures tax officers need to follow when they are undertaking superannuation guarantee compliance activities and the review has identified one or more individuals engaged under a contract that is wholly or principally for their labour

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## **STATEMENT**

1. The ATO engages in superannuation guarantee (SG) compliance activities and issues default SG charge assessments to employers who have not lodged a SG

statement for a quarter and do not provide the minimum required SG support for their employees for that quarter.

2. Under the *Superannuation Guarantee (Administration) Act 1992* (SGAA),<sup>1</sup> employers are required to make superannuation contributions into a complying superannuation fund or retirement savings account for the benefit of their employees in accordance with minimum prescribed levels and by the SG cut-off date. The SGAA defines 'employee' in section 12 to include individuals engaged under a contract which is wholly or principally for their labour (subsection 12(3)). That is, a SG obligation arises in relation to an individual engaged under a contract which is wholly or principally for the individual's labour.
3. There are some general exclusions for employers from providing superannuation support.<sup>2</sup> This practice statement does not change those general exclusions. An employer that engages any individual under a contract wholly or principally for their labour who also comes within those exclusions (for example, the individual is aged 70) is not required to make superannuation contributions to a complying superannuation fund or retirement savings account on behalf of the individual. This practice statement applies once it has been established that an employer has a SG obligation for individual(s) engaged under a contract that is wholly or principally for labour.
4. Where tax officers, through the conduct of any sort of compliance activity, find an employer has not made the minimum required superannuation contributions for an individual engaged wholly or principally for their labour, the employer has a SG shortfall in respect of the individual and will be liable to the SG charge. If the employer has not lodged a SG statement for a quarter or year<sup>3</sup> in which they have a liability to the SG charge, default assessment(s) must be issued in respect of the employer's SG charge liability for the individual for each quarter or year in which a SG statement has not been lodged over the entire period of engagement of the individual, up to a time limit of 5 years.<sup>4</sup> If the employer has lodged SG statement(s) for a quarter/year or quarters/years in which they have a liability to the SG charge, and that statement does not include SG shortfall amounts for the individual(s) engaged under a contract that is wholly or principally for their labour, the tax officer must issue amended assessment(s) to the employer which includes the employer's liability to the SG charge in respect of the individual(s). It is noted that where an employer has lodged a SG statement, the Commissioner has only 4 years from the time the statement was lodged to amend an assessment to increase the employer's liability to the SG charge.

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<sup>1</sup> All legislative references are to the SGAA unless indicated otherwise.

<sup>2</sup> The main exceptions are provided in sections 27 to 29 and are SG employees who are:

- paid less than \$450 in any month
- aged 70 years or over
- under 18 years of age and working for not more than 30 hours a week, or
- performing work of a private or domestic nature for not more than 30 hours a week for a non-business employer.

<sup>3</sup> From 1 July 2003 employers are required to make the minimum required superannuation contributions on at least a quarterly basis or be liable to the SG charge. From the start of SG until 1 July 2003, employers were required to make the contributions on at least an annual basis.

<sup>4</sup> This time limit exists since employers are required to keep records for SG purposes for 5 years under section 79.

5. If the employer is a Commonwealth Government employer, tax officers will inform the employer in writing of their obligation to make SG contributions in respect of the individual for the period of engagement (up to a time limit of 5 years).<sup>5</sup>
6. For all other employers, tax officers will issue default SG assessment(s) or amended SG assessment(s) to the employer for the period of engagement of the individual (up to a time limit of 5 years for default assessments, or 4 years for amended assessments).
7. Paragraphs 4 to 6 of this practice statement do not remove a tax officer's discretion to issue an employer with a SG statement to complete. The time limit outlined in paragraphs 4 to 6 of this practice statement will not apply where the avoidance of the SG charge is due to fraud or evasion. In these circumstances, default or amended assessments should be issued for the entire period of the individual's engagement. If the employer is a Commonwealth Government employer, the tax officer should inform the employer in writing of their obligation to make SG contributions in respect of the entire period of engagement of the individual.
8. Under section 49, if any of the SG shortfall component of the SG charge remains unpaid after the time by which it is due to be paid, the employer is liable to pay the general interest charge (GIC) on the unpaid amount. The Commissioner has the discretion to remit all or part of an employer's GIC liability in accordance with chapter 93 of the *ATO Receivables Policy* and this practice statement. One situation where the Commissioner may grant remission is where an employer has not made the minimum required superannuation contributions for an individual contractor because both the employer and the individual, who is employed under the contract that is wholly or principally for their labour, believed that no employment relationship existed. In such cases, any GIC the employer is liable to in respect of the SG charge default assessment liability will be remitted in full where the employer pays the SG charge liability within 30 days of being notified. In the cases of amended assessments, if the employer pays their SG charge liability within 30 days of being notified the GIC applicable from the date of issue of the amended assessment to the date of payment will be remitted in full. The employer will remain liable to GIC applicable up to the date of issue of the amended assessment.
9. Any penalties under Part 7 and tax shortfall penalties under Schedule 1 to the *Taxation Administration Act 1953* (TAA) should also be remitted in full where:
  - the penalties are directly related to the non-lodgment of a SG statement or a tax shortfall resulting from the employer acting under the belief that the individual was not engaged as an employee for SG purposes, and
  - that belief was shared by the individual engaged.

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<sup>5</sup> Under section 5, the Commonwealth, Commonwealth Departments and untaxable Commonwealth authorities are not liable to pay the SG charge. However the SGAA applies in all other respects as if the Commonwealth were liable to pay the SG charge. The Finance Minister may give directions in writing as necessary for the transfer of money within an account, or between accounts, operated by the Commonwealth. Consequently if a Commonwealth Department does not comply with an ATO request to make superannuation contributions for their SG employees, the ATO would request the Finance Minister issue directions in writing as necessary for the transfer of money within an account, or between accounts, operated by the Commonwealth so that these contributions are made. Note that if the Finance Minister issues directions allowing the Commissioner to issue assessments on Commonwealth Government employers, this paragraph should be read as tax officers informing the employer in writing through the issuance of an assessment.

10. Where it is found that the individual engaged under a contract, that is wholly or principally for their labour, has claimed non-employer sponsored superannuation contribution deduction(s) they have made to their complying superannuation fund or retirement savings account during the period of their contract, and the ATO has determined that the individual is not entitled to such a deduction, the case will be referred to Micro Enterprises and Individuals, Active Compliance. Taxation Ruling TR 2010/1 Income tax: superannuation contributions gives further guidance on whether an individual is entitled to a non-employer sponsored superannuation deduction.
11. Micro Enterprises and Individuals, Active Compliance will review the risk and where necessary, amend the relevant income tax assessments to deny the non-employer sponsored superannuation contribution deduction(s) and issue amended assessments to the individual for all the years in which the individual was not entitled to a non-employer sponsored superannuation contribution deduction within the individual's period of review.
12. In issuing amended assessments to the relevant SG employees, the pre-amendment GIC or shortfall interest charge (SIC) applicable to the assessments will be remitted in full where:
  - The individual did not receive superannuation support from their contracting employer, and did not believe that they were entitled to such support.
  - The individual did not receive superannuation support and they made their own superannuation contribution to their fund.
  - The Commissioner is satisfied that the individual believed the non-employer sponsored superannuation contributions to be income tax deductible to them as they believed they were not engaged in an employment relationship with the contracting entity.
  - The Commissioner is satisfied that had the individual known they would receive, or were entitled to receive employer superannuation support it is likely that they would not have made their own non-employer sponsored superannuation contributions to their fund as these amounts would not be deductible to them.
13. If the unexpected tax liability causes an individual who meets the criteria outlined in paragraph 12 of this practice statement any payment difficulties, the ATO will initially enter into an arrangement for payment that suits the individual's circumstances. An individual who wishes to apply to the ATO to enter into payment arrangements should phone the ATO on 13 11 42 or email the ATO at [debtpayment@ato.gov.au](mailto:debtpayment@ato.gov.au) and refer to this practice statement. Note that any GIC accrued during the course of this initial payment arrangement will be remitted at the conclusion of the payment arrangement provided that the individual adheres to all the terms and conditions of the arrangement.
14. Further information can be found in the following ATO documents:
  - Superannuation Guarantee Ruling SGR 2005/1 Superannuation guarantee: who is an employee? and Superannuation Guarantee Ruling SGR 2005/2 Superannuation guarantee: work arranged by intermediaries (both rulings contain the Commissioner's view on when an individual is engaged wholly or principally for their labour)

- Taxation Ruling TR 2010/1 (this ruling contains the Commissioner's view on when a deduction can be claimed for personal superannuation contributions)
  - Law Administration Practice Statement PS LA 2006/1 (for guidelines on the remission of the penalty imposed under Part 7)
  - Chapter 10 of the *ATO Receivables Policy* – Payment arrangements, and
  - Chapter 93 of the *ATO Receivables Policy* – General interest charge.
15. Further information on the effect on employers, individuals engaged under a contract wholly or principally for their labour and the individuals' fund is included in the flowcharts at Attachment A of this practice statement.

## EXPLANATION

16. Under the SGAA, employers are required to make superannuation contributions into a complying superannuation fund or retirement savings account for the benefit of their eligible employees in accordance with minimum prescribed levels and by the SG cut off date. If an employer does not make the required superannuation contributions by the required time, they will be subject to the SG charge. The SG charge includes the SG shortfall for the employee, nominal interest and an administration fee. The Commissioner has no discretion to remit any of the components of the SG charge and the whole amount is non-deductible for income tax purposes. If an individual is not an employee as defined in the SGAA or is an employee but is otherwise exempted from the application of the SGAA by a specific provision, no liability for the SG charge will arise.
17. The Commissioner has obligations under section 36 to issue default assessments where the employer has not lodged a SG statement in respect of a quarter and is liable to the SG charge for that quarter. The Commissioner also has obligations under that section to pursue recovery of any amounts owing to the Commonwealth.
18. If an individual has not received, and is not entitled to receive any employer superannuation support for the year of income, the individual may be entitled to claim a deduction for their non-employer sponsored superannuation contributions under section 290-150<sup>6</sup> of the *Income Tax Assessment Act 1997* (ITAA 1997), where the individual meets the conditions outlined in sections 290-155, 290-160, 290-165 and 290-170<sup>7</sup>. Deductions for non-employer sponsored superannuation contributions cannot be claimed where an individual is eligible for employer superannuation support (unless less than 10% of the individual's total assessable income, reportable fringe benefits and reportable employer superannuation contributions<sup>8</sup> for the income year must be attributable to the employment activities outlined in subsection 290-160(1) of the ITAA 1997).<sup>9</sup>

<sup>6</sup> For the 2006-2007 and earlier income years - section 26-80 of the ITAA 1997.

<sup>7</sup> For the 2006-2007 and earlier income years – former section 82AAT of the *Income Tax Assessment Act 1936* (ITAA 1936).

<sup>8</sup> 'Reportable employer superannuation contributions' are counted towards the maximum earnings as an employee for the purposes of the 10% test from 1 July 2009.

<sup>9</sup> For the 2006-2007 and earlier income years – unless the individual comes within the 10% rule outlined in former subsection 82AAS(3) of the ITAA 1936.

19. A person who intends to deduct all or part of their personal contributions must give the superannuation provider a valid notice in the approved form; the provider must give them acknowledgment of receipt of the notice.<sup>10</sup>
20. If an individual claims a deduction for contributions and all, or part of, that claim is subsequently disallowed, the individual can notify their fund by varying the original notice and lodging it with the provider in the approved form.<sup>11</sup> The fund can adjust its taxable contributions accordingly. No adjustment can be made once an individual leaves a fund because once benefits have been paid out it is too late for the fund to make the necessary adjustments.
21. If an amount has been included as taxable contributions of a complying superannuation fund and an individual member subsequently lodges a variation notice under section 290-180 of the ITAA 1997<sup>12</sup> with the fund, reducing the amount covered by their previous notice,<sup>13</sup> the fund is able to claim a deduction for the difference in the amounts between the original notice and the variation notice. The deduction to the fund can be claimed in the year the variation notice is received by the fund by virtue of item 2 subsection 295-490(1) if the fund has not made the choice in subsection 295-195(3) of the ITAA 1997.<sup>14</sup> If the fund is unable to fully utilise the deduction because, for example, it has no assessable income, the fund can seek to have the assessment for the year in which the contribution was included in its assessable income amended.<sup>15</sup>
22. Remitting the GIC in full for the period from the original due date to the day before the amended assessment is issued under paragraphs 8 and 12 of this practice statement is within the Commissioner's powers under the TAA, specifically, section 8AAG of the TAA (most appropriately subsections 8AAG(3) and 8AAG(5)). For the 2004-05 and later income years, shortfall interest charge (SIC) is applicable to amended income tax assessments for employees as discussed in paragraph 12 of this practice statement. The Commissioner has a broad discretion to remit the SIC where the circumstances make it fair and reasonable to do so.

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<sup>10</sup> Subsection 290-170(1) notice and for the 2006-2007 and earlier income years this notice is known as a former subsection 82AAT(1A) notice.

<sup>11</sup> Section 290-180 of the ITAA 1997. For the 2006-2007 and earlier income years - this notification is known as a former subsection 82AAT(1C) notice.

<sup>12</sup> For the 2006-07 and earlier income years - the notice is under former subsection 82AAT(1C) of the ITAA 1936.

<sup>13</sup> The previous notice is given under section 290-170 of the ITAA 1997. For the 2006-2007 and earlier income years this notice is known as a former subsection 82AAT(1A) notice.

<sup>14</sup> For the 2006-07 and earlier income years – former subsection 276(1) of the ITAA 1936.

<sup>15</sup> Subsection 295-195(3) of the ITAA 1997. For the 2006-2007 and earlier income years, former subsections 276(3) and 276(4) of the ITAA 1936.

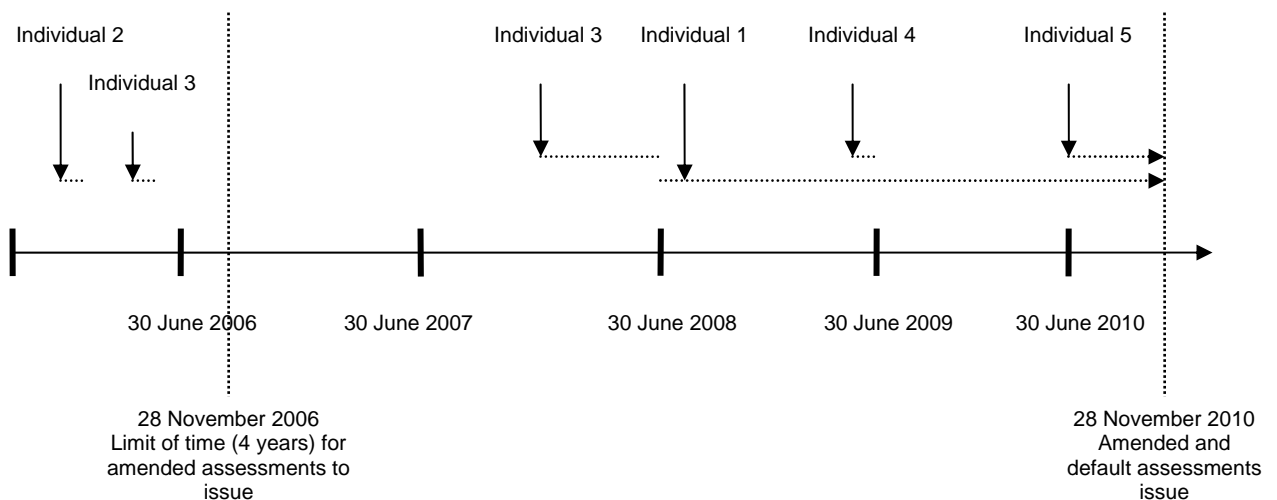
23. Exercise of the remission powers for employers who pay their SG charge liability within 30 days of being notified is allowable under subsection 8AAG(3) of the TAA. This is because the circumstances that have given rise to the late payment and thus imposition of the GIC, are not due to the employer alone, but because both the employer and the employee (that is, the individual engaged by the employer wholly or principally for their labour) believed they were not in an employment relationship. The idea that such a remission is inappropriate because it deprives the employee of interest payable to their superannuation fund does not carry weight in these circumstances, as the employee had the opportunity of separately making superannuation contributions on their own behalf.
24. Where the circumstances outlined in paragraph 12 of this practice statement are found to exist, full remission of interest incurred during the shortfall period for employees engaged wholly or principally for their labour is considered to be fair to the individual concerned as well as being fair to the whole community. In these circumstances, the individual and the employer have entered into arrangements in good faith, with the result that the individual did not receive employer superannuation support from their contracting employer. Instead they made their own superannuation contribution to their fund. Had the individual known they would receive, or were entitled to receive employer superannuation support it is likely that they would not have made their own non-employer sponsored superannuation contributions to their fund as these amounts would not be deductible to them. The individual believed they were entitled to a deduction for non-employer sponsored superannuation contributions as they believed they were not engaged in an employment relationship with the contracting entity. These circumstances are felt to be special circumstances by reason of which it is fair and reasonable to remit the interest incurred during the shortfall period.
25. Partial remission of the GIC is not appropriate in these circumstances taking into account the special circumstances outlined above and the overall aim of the superannuation guarantee regime. The individual has tried to do the right thing in making non-employer sponsored superannuation contributions to provide for their retirement. The individual believed they were ineligible for employer superannuation support and entitled to an income tax deduction for contributions made.
26. This practice statement does not address the Pay As You Go (PAYG) Withholding or the Goods and Services Tax (GST) effects on the employer or individual. Such effects must be determined on a case by case basis due to the differences in the SG law and the PAYG withholding and GST laws.
27. There may be exceptional cases where the procedures included in this practice statement should not be followed. For example, it may be appropriate to not issue default assessments for past years (refer paragraph 4 of this practice statement) because of earlier advice from the ATO that there was no SG obligation in relation to an individual. Approval in these cases to not follow this practice statement can only be given by the Deputy Commissioner (Superannuation).

## Example

28. The ATO conducts SG compliance activities on Employer X. During the course of the compliance activities, it is found that Employer X has engaged five individuals under contracts wholly or principally for their labour within the last five years. Employer X has not made any SG contributions on behalf of any of the individuals. Each of the contractors are paid on the last day of the month and details of the contracts are as follows:

- Individual 1 – engaged 1 July 2008 to present. Paid \$8,000 per month (\$24,000 per quarter).
- Individual 2 – engaged 1 November 2005 to 31 December 2005. Paid \$12,000 for the period of the contract.
- Individual 3 – engaged 1 April 2006 to 31 May 2006 and 1 January 2008 to 30 June 2008. Paid \$5,000 per month.
- Individual 4 – engaged 1 June 2009 to 30 June 2009. Paid \$4,000 for that month.
- Individual 5 – engaged 1 July 2010 to present. Paid \$8,000 per month (\$24,000 per quarter).

Periods of employment:



29. Employer X has lodged SG statements for the quarters ending 31 December 2005, 30 June 2006, and September 2006 on 28 November 2006 and the quarter ending 31 December 2009 on 28 February 2010. Individuals 1 to 5 above (where relevant) were not included in any of the SG statements lodged by the Employer X.

### ***ATO's obligations***

30. The ATO completes its review on 28 November 2010 and issues the following amended assessment and default assessments to Employer X:

<b><i>Period ending</i></b>	<b><i>Assessment type</i></b>	<b><i>SG shortfall</i></b>
31 March 2008	Default	\$1,350 in respect of Individual 3
30 June 2008	Default	\$1,350 in respect of Individual 3
30 Sept 2008	Default	\$2,160 in respect of Individual 1
31 Dec 2008	Default	\$2,160 in respect of Individual 1
31 March 2009	Default	\$2,160 in respect of Individual 1
30 June 2009	Default	\$2,520 (\$2,160 in respect of Individual 1 and \$360 in respect of Individual 4)
30 Sept 2009	Default	\$2,160 in respect of Individual 1
31 Dec 2009	Amended	\$2,160 in respect of Individual 1
31 March 2010	Default	\$2,160 in respect of Individual 1
30 June 2010	Default	\$2,160 in respect of Individual 1
30 Sept 2010	Default	\$4,320 (\$2,160 each for Individuals 1 & 5)

31. The assessments include details of Employer X's full SG charge liability (which also includes the nominal interest and administration components). Employer X has no SG charge liability in respect of Individual 2 and only a part SGC liability for individual 3 due to the time limits to amend assessments. Employer X lodged SG statement for the quarters ending 31 December 2005 and 30 June 2006. The first SG statement an employer lodges in respect of a quarter is an assessment of the employer's SG shortfall for the period and of the SG charge payable on the shortfall under section 35. As such the ATO is only able to amend an assessment to increase an employer's SG charge liability within 4 years from the date the assessment is made. The ATO cannot issue amended assessments for the quarters ending 31 December 2005 and 30 June 2006 as they would be more than 4 years from the date Employer X lodged the SG statements.

### ***Effect on Employer X***

32. Employer X must pay the full amount of SG charge (which includes the SG shortfall for each individual, nominal interest and an administration component) for each period owing to the ATO. If Employer X makes this payment within 30 days of the date the default or amended assessments were issued by the ATO (that is by 28 December 2010 which is 30 days from 28 November 2010), Employer X will receive full remission of GIC in respect of the default assessments, and remission of GIC from 28 November 2010 until the date of payment for the amended assessment. GIC will still be applicable for the amended assessment from 28 February 2010 until the end of 27 November 2010 even when the employer pays within 30 days of 28 November 2010.

33. If Employer X does not pay the full amount of SG charge owing (which includes the nominal interest and administration component) to the ATO by 28 December 2010, Employer X will be liable to GIC from the date the SG charge was due to be paid. For default assessments, that date is 28 November 2010. For the amended assessment, GIC is applicable from 28 February 2010.

***Effect on the individuals engaged wholly or principally for their labour***

34. The ATO reviews each of the Individuals income tax returns. None of the individuals are entitled to a shorter period of review. Details of each individuals tax return relating to eligible employment income and non-employer sponsored superannuation contribution deductions are as follows:

Individual	Income year	Eligible employment income (includes income received from Employer X)	Other income	Amount of the deduction for non-employer sponsored superannuation contributions	Is the individual eligible for a deduction?	Applicable tax shortfall
1	2008-09	\$96,000	\$0	\$10,000	No	\$4,150
1	2009-10	\$96,000	\$0	\$10,000	No	\$3,950
2	2005-06	\$12,000	\$150,000	\$10,000	Yes	N/A
3	2005-06	\$10,000	\$105,000	\$12,000	Yes	N/A
3	2007-08	\$30,000	\$100,000	\$12,000	No	\$4,980
4	2009-10	\$96,000	\$0	\$0	N/A	N/A
5	N/A – relates to 2010-11 which is not yet due to be lodged.	N/A	N/A	N/A	N/A	N/A

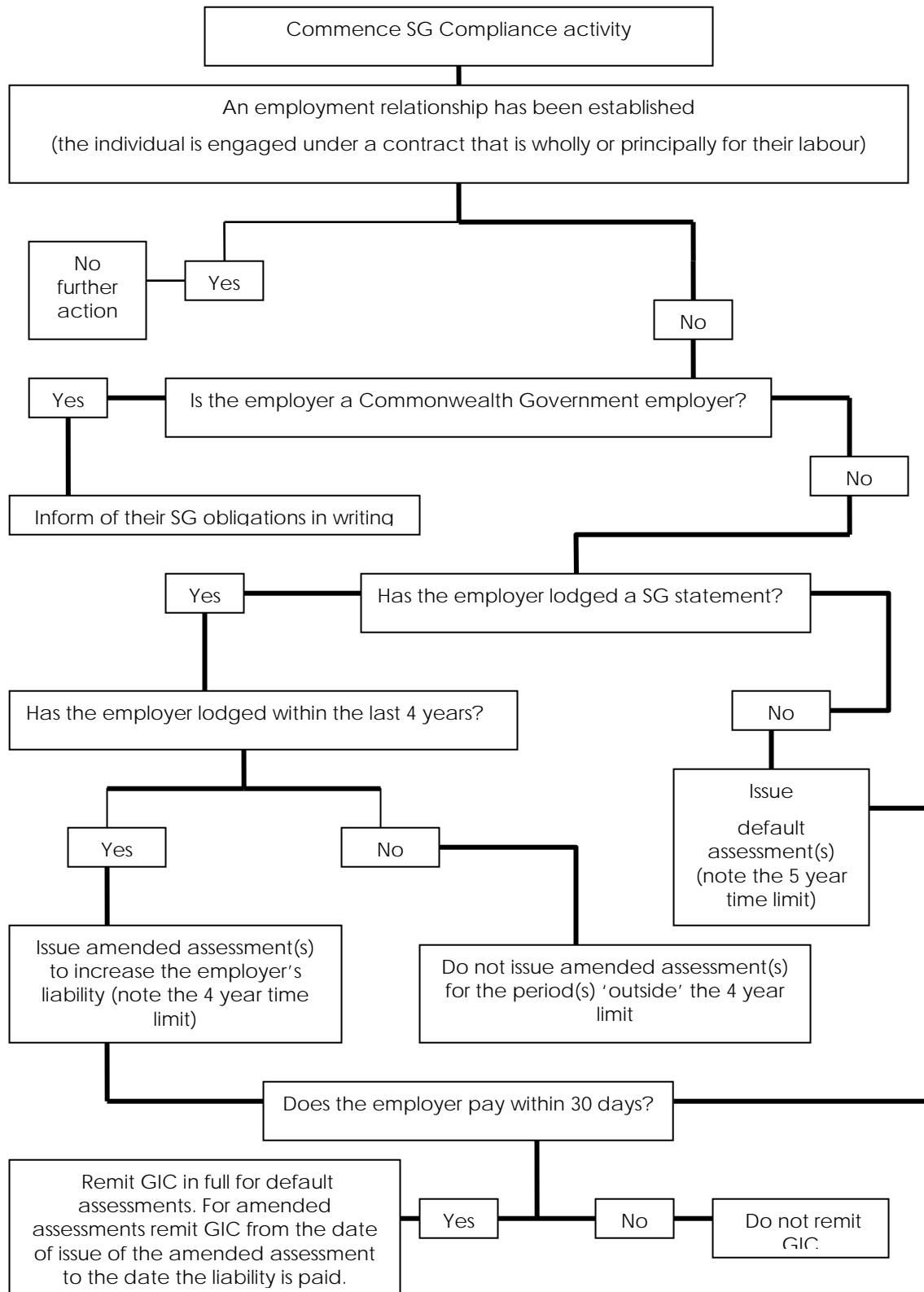
35. The ATO (Micro Enterprises and Individuals, Active Compliance) issues an amended income tax assessment to Individual 1 for the 2008-09 and 2009-10 income years and Individual 3 for the 2007-08 income year. GIC or SIC on the tax shortfall amount is remitted for the shortfall period, that is from the original due date of the assessment until the day before the amended assessment issues.
36. Individual 1 requests that the ATO enter into a payment arrangement with him so that his income tax debt owing can be paid over 12 months. The ATO agrees to enter into such an arrangement with Individual 1 so that the income tax debt owing can be paid over the next 12 months. The payment arrangement is not subject to the accrual of GIC unless individual 1 defaults on the arrangement.

### Amendment history

<b>Date of amendment</b>	<b>Part</b>	<b>Comment</b>
21 March 2011	Generally	Updated current time periods.
	Paragraph 10 and 14	Changed TR 2005/24 to TR 2010/1
	New paragraph 19	Included notification of intent to deduct personal contributions
2 September 2009	Contact officer	Updated.
15 April 2008	Contact officer	Updated.
11 February 2008	Contact officer	Updated.

Subject references	Individuals engaged wholly or principally for their labour Remission of General Interest Charge Superannuation contributions Superannuation Guarantee Superannuation Guarantee audits
Legislative references	SGAA 1992 5 SGAA 1992 12(3) SGAA 1992 27 SGAA 1992 28 SGAA 1992 29 SGAA 1992 35 SGAA 1992 36 SGAA 1992 43 SGAA 1992 49 ITAA 1936 82AAS ITAA 1936 82AAT ITAA 1936 276 ITAA 1997 26-80 ITAA 1997 290-150 ITAA 1997 290-155 ITAA 1997 290-160 ITAA 1997 290-165 ITAA 1997 290-170 ITAA 1997 290-180 ITAA 1997 295-195(3) ITAA 1997 295-490(1) TAA 1953 8AAG TAA 1953 Sch 1
Related public rulings	SGR 2005/1; SGR 2005/2; TR 2010/1
Related practice statements	PS LA 2006/1
Other references	ATO Receivables Policy
File references	05/10174
Date issued	18 October 2006
Date of effect	18 October 2006
Other Business Lines consulted	Operations; Micro Enterprises and Individuals; Small and Medium Enterprises; Debt

Stage 1 – Effect on an employer.



**Stage 2 – Effect on an individual engaged under a contract that is wholly or principally for labour.**



### Stage 3 – Effect on a fund.

