

SPR 2021/2 -



Legislative Instrument

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

I, Usha Narain, Acting Deputy Commissioner of Taxation, make this determination under subsection 21(2) of the *Superannuation Guarantee (Administration) Act 1992*.

Usha Narain

Acting Deputy Commissioner of Taxation
Policy, Analysis and Legislation
Law Design and Practice

8 October 2021

1. Name of instrument

This determination is the *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*.

2. Commencement

This instrument commences on 1 November 2021.

3. Application

- (1) This instrument applies to decisions by the Commissioner of Taxation (the Commissioner) about whether or not to reduce an employer’s **individual superannuation guarantee shortfall** (shortfall) for an employee for a quarter for the purposes of subsection 19(2F) of the *Superannuation Guarantee (Administration) Act 1992* (SGAA) where the conditions in subsection 19(2G) of the SGAA apply.
- (2) This instrument does not apply to:
 - (a) the part of an employer’s shortfall where the superannuation guarantee contributions made by an employer to a fund for an employee for a quarter do not otherwise reduce the employer’s **charge percentage** to nil under sections 22 or 23 of the SGAA, or
 - (b) an increase to an employer’s shortfall imposed by subsections 19(2A) and (2B) of the SGAA because the employer did not make the superannuation guarantee contributions to a fund that complies with the choice of fund requirements.

4. Determination

- (1) In order to avoid a superannuation guarantee charge liability, employers need to provide a minimum level of superannuation support for their eligible employees by making contributions (superannuation guarantee contributions) to a **complying superannuation fund or scheme** or a **retirement savings account** within 28 days after the end of each quarter (the quarterly due date) under Part 3 of the SGAA.
- (2) If the actual level of superannuation support made for an employee by the quarterly due date is less than the level of superannuation support prescribed in the legislation, the employer will have a shortfall under section 19 of the SGAA because the level of contributions made will not reduce the employer's shortfall to nil under sections 22 or 23 of the SGAA.
- (3) With effect from 1 November 2021, the Commissioner may reduce (including to nil) the amount of an employer's shortfall for an employee for the quarter in accordance with subsection 19(2F) of the SGAA where:
 - (a) the employer, or their agent, was most recently notified by the Commissioner that a fund was a **stapled fund** for an employee following the employer (or their agent) making a request in accordance with section 32R of the SGAA
 - (b) the employer attempted to make superannuation guarantee contributions to the most recently notified stapled fund for the employee
 - (c) the fund did not accept contributions from the employer for the employee
 - (d) the employee did not have a **chosen fund** at the time the employer attempted to make the superannuation guarantee contribution, and
 - (e) the employer subsequently made a superannuation guarantee contribution to a fund on behalf of the employee after the quarterly due date.
- (4) The Commissioner, in making a decision on whether or not to reduce the employer's shortfall, is required by subsection 21(2) of the SGAA to have regard to particular guidelines. This instrument sets out those guidelines.
- (5) The Commissioner will have regard to all the relevant facts and circumstances of each individual case in making a decision whether or not to reduce an employer's shortfall for an employee.
- (6) The Commissioner may apply the same level of reduction to the employer's shortfall for each employee in the group in a quarter where it is evident that the circumstances are similar for a group of employees.

Introductory period for single default accounts

- (7) The Commissioner will apply a transitional approach to making decisions on whether to reduce the employer's shortfall for a quarter during an introductory period of 12 months. This period commences on 1 November 2021, being the commencement of the stapled fund requirements and concludes on 31 October 2022.
- (8) During this introductory period, the Commissioner will reduce an employer's shortfall for one or more employees to nil where the circumstances set out in section 4(3)(a) to (e) of this instrument have been met and the employer has made reasonable attempts to comply with the choice of fund rules when making the late superannuation guarantee contributions.
- (9) If an employer has not made reasonable attempts to comply with the choice of fund rules during the introductory period, the Commissioner will determine whether or not to reduce

the employer's shortfall in accordance with the general Reduction guidelines outlined below.

Reduction guidelines

- (10) The Commissioner may reduce the amount of the employer's shortfall in whole or in part where all of the circumstances set out in section 4(3)(a) to (e) of this instrument have been met unless the employer has a ***superannuation guarantee charge*** (SGC) assessment for the quarter and has chosen to offset the late contributions against the SGC or chosen to carry forward the late contribution and apply it as a pre-payment of a future contribution for the same employee.
- (11) In determining the level of reduction to the amount of the employer's shortfall, the Commissioner will have regard to:
 - (a) whether the employer made the late superannuation guarantee contributions to a fund that complied 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.

Late superannuation guarantee contributions to a fund that complies with the choice of fund rules

- (13) It would be appropriate for the Commissioner to apply a greater level of reduction (including to nil) where an employer has made the late superannuation guarantee contributions to a fund that meets the choice of fund rules within a reasonable time following the most recently notified stapled fund not accepting the contributions. For example, contributions made to a fund the employee has subsequently chosen, a successor fund of the most recently notified stapled fund, another stapled fund notified by the Commissioner, and if notified that the employee did not have another stapled fund, the employer's default fund or a fund specified under a workplace determination or enterprise agreement made before 1 January 2021.
- (14) The Commissioner may apply a lesser level of reduction where an employer did not make the late superannuation guarantee contributions within a reasonable time of the non-acceptance by the most recent notified stapled fund or made the contributions to another fund that met the choice of fund rules without making a further request for a stapled fund.
- (15) The Commissioner may not apply a reduction to the employer's shortfall where before the employer made the late superannuation guarantee contributions to another fund:
 - (a) the employee had provided the employer details of their chosen fund
 - (b) the Commissioner had notified the employer of another stapled fund, or
 - (c) the Commissioner had notified the employer of an estimate of SGC or issued an SGC default assessment to the employer,unless there were other mitigating facts and circumstances or exceptional circumstances.

Circumstances that may decrease the amount of the employer's shortfall

- (16) Before making a decision on the level of reduction, the Commissioner will have regard to other factors to determine if the level of reduction should be increased to further reduce the amount of the employer's shortfall.
- (17) These other factors are mitigating facts and circumstances or exceptional circumstances that may have affected an employer's ability to meet the choice of fund rules, or impacted the making of superannuation guarantee contributions. They include but are not limited to:
 - (a) the date of commencement of employment of the employee 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
 - (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
 - (ii) ill health or affliction of the employer or a key employee of the employer
 - (iii) natural disasters (for example, fires and 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.

Circumstances where the amount of the employer's shortfall may not be further reduced

- (18) The Commissioner may determine it is not appropriate to further reduce the amount of the employer's shortfall in circumstances where the employer could have reasonably been expected to have understood and complied with the choice of fund rules and their superannuation guarantee obligations. For example, an employer has been previously subject to choice of fund rules compliance action, received guidance from the Commissioner in administratively binding advice or previous compliance activity, or had repeatedly made contributions to a fund that does not meet the choice of fund rules.
- (19) It would also not be appropriate for the Commissioner to further reduce the employer's shortfall simply because the amount of the shortfall may be relatively small.

Circumstances that may increase the amount of the employer's shortfall

- (20) The Commissioner will have regard to whether there are circumstances which would support an increase in the amount of the employer's shortfall.
- (21) It may be appropriate for the Commissioner to uplift the amount of the employer's shortfall by up to 20% where:
 - (a) the employer engaged in action to prevent or obstruct the Commissioner from determining the individual superannuation guarantee shortfall and / or the level of reduction, or
 - (b) an employer had a shortfall in the previous quarter because the late superannuation guarantee contributions they made after the most recently notified stapled fund did not accept the contributions were to a fund that did not comply with the choice of fund rules.
- (22) The Commissioner cannot apply an uplift that results in the employer's shortfall exceeding the original amount of the shortfall.

Notification of decision

- (23) The Commissioner must notify the employer in writing of the decision made under subsection 19(2F) of the SGAA. This written notice will contain the reasons why the particular decision was made irrespective of the level of reduction.

5. Definitions

A number of expressions used in this instrument are defined in *Superannuation Guarantee (Administration) Act 1992*, including the following:

- (a) **charge percentage**, has the meaning given by subsection 19(1)
- (b) **chosen fund**, has the meaning given by section 32F
- (c) **complying superannuation fund or scheme**, has the meaning given by section 7
- (d) **individual superannuation guarantee shortfall**, has the meaning given by subsection 19(1)
- (e) **RSA (or retirement savings account)**, has the meaning given by section 6 with reference to the *Retirement Savings Accounts Act 1997*
- (f) **stapled fund**, has the meaning given by section 32Q
- (g) **superannuation guarantee charge**, has the meaning given by section 6.