

# **PROVISIONS**

**Model Australian Double  
Superannuation Coverage Provisions  
for insertion into Bilateral  
Australian Social Security  
Agreements**

**Section A - Model Australian Double  
Superannuation Coverage Provisions**

**Section B - An Outline of the Australian  
Legislation**

# Section A: Model Australian Double Superannuation Coverage Provisions

## Introductory Notes

1. This document has been drafted for consideration as part of Bilateral Social Security Agreements between Australia and other States for the purpose of ensuring that employers and employees who are residents of Australia or the other Party to the Agreement do not have to make two amounts of contributions for an employee's retirement and associated contingencies (eg. permanent disablement) in respect of the same work undertaken by the employee. In other words, one amount under the legislation of Australia and a further amount under the legislation of the other Party.

The desired outcome is that employers and employees only make one amount of contributions in accordance with the coverage provisions of the Agreement.

2. The Australian legislation to which the coverage provisions apply is referred to in Australia as the 'superannuation guarantee legislation'. The term 'superannuation' means saving for retirement.
3. The categories of persons who are required to make contributions under the contribution schemes of countries varies between countries. These categories of persons may encompass employers only, employees only or both employers and employees. The Australian superannuation guarantee legislation provides for employers to make superannuation contributions for their employees.

The model coverage provisions set out in this document have been applied to both employers and employees to recognise the operation and/or possible future operation of the contribution schemes of the Parties. The coverage provisions assist the co-ordination of the schemes of the Parties but maintain the limits and autonomy of the schemes.

## **Amendments to insert coverage provisions into Bilateral Australian Social Security Agreements**

### **Consequential amendments to the general provisions of the Agreement (ie. the definitions and the legislative scope article of the Agreement)**

1. Consequential amendments to the Agreement are required to ensure that the definitions of "legislation", "competent authority" and "competent institution" and the legislative scope article of the Agreement take account of the coverage provisions.

Accordingly in relation to Australia:

- the "legislation" for the coverage provisions should be "the legislation concerning the superannuation guarantee";
- the "competent authority" for the coverage provisions should be "the Commissioner of Taxation or an authorised representative of the Commissioner"; and
- the "competent institution" for the coverage provisions should be "the institution which has the task of implementing the Australian legislation".

### **Insertion of coverage provisions**

2. An amendment is required to the Agreement to insert the coverage provisions into the Agreement (as a new Part of the Agreement):

#### **PART X – PROVISIONS ON COVERAGE**

##### **Article A - Purpose of the Part**

The purpose of this Part is to ensure that employers and employees who are subject to the legislation of XYZ or Australia do not have a double liability under the legislation of XYZ and Australia, in respect of the same work of an employee.

##### **Article B – Application of the Part**

This Part only applies if an employee and/or the employer of the employee would, apart from this Part, be subject to the legislation of both Parties in respect of work of the employee or remuneration paid for the work.

##### **Article C – Diplomatic and Consular Relations**

This Agreement shall not affect the provisions of the Vienna Convention on Diplomatic Relations of April 18, 1961, or of the Vienna Convention on Consular Relations of April 24, 1963.

#### Article D – Avoidance of Double Coverage

1. Unless otherwise provided in paragraphs 2, 3 and 4, if an employee works in the territory of one Party, the employer of the employee and the employee shall in respect of the work and the remuneration paid for the work be subject only to the legislation of that Party.
2. If an employee:
  - (a) is covered by the legislation of one Party ('the first Party');
  - (b) was sent, whether before, on or after the commencement of this Part, by the Government of the first Party to work in the territory of the other Party ('the second Party');
  - (c) is working in the territory of the second Party in the employment of the Government of the first Party; and
  - (d) is not working permanently in the territory of the second Party;

the employer of the employee and employee shall be subject only to the legislation of the first Party in respect of the work and the remuneration paid for the work.

[The term "Government" should be defined for the purposes of this paragraph in relation to Australia as *"includes, in relation to Australia, a political subdivision or local authority of Australia"*. This is to ensure that secondments by State, Territory and Local Governments are covered by the paragraph.]

3. If an employee:
  - (a) is covered by the legislation of one Party ('the first Party');
  - (b) was sent, whether before, on or after the commencement of this Part, by an employer who is subject to the legislation of the first Party to work in the territory of the other Party ('the second Party');
  - (c) is working in the territory of the second Party in the employment of the employer or a related entity of that employer;
  - (d) a period of 4 years from the time the employee was sent to work in the territory of the second Party has not elapsed; and
  - (e) is not working permanently in the territory of the second Party;

the employer of the employee and employee shall be subject only to the legislation of the first Party in respect of the work and the remuneration paid for the work.

[The proposed definition of the term "related entity" is as follows: *"an entity is a related entity of an employer if the entity and the employer are members of the same wholly or majority owned group"*. This is to ensure that seconded employees working temporarily for related entities remain subject to their home scheme.]

4. If an employee is working in the employment of an employer on a ship or aircraft in international traffic, the employer of the employee and employee shall in respect of the employment and the remuneration paid for that employment be subject only to the legislation of the Party of which the employee is resident.

#### **Article E - Exception agreements**

1. The competent authorities may for the purposes of this Part by agreement in writing:
  - (a) extend the period of 4 years referred to in sub-paragraph 3(d) of Article D for any employee; or
  - (b) provide that an employee is taken to work in the territory of a particular Party or to work on a ship or aircraft in international traffic under the legislation of a particular Party and is covered only by the legislation of that Party.
2. Any agreement made under paragraph 1 may apply to:
  - (a) a class of employees; and/or
  - (b) particular work or particular type of work (including work that has not occurred at the time the agreement is made).

#### **Consequential amendment to any arbitration clause of the Agreement**

3. In respect of the coverage provisions, the policy of Australia is to oppose arbitration clauses as a means of resolving disputes. While Australia recognises some merit in arbitrating disputes involving only questions of fact it has a number of difficulties (including difficulties from a constitutional and precedent perspective) with binding the Commissioner of Taxation to arbitration. Accordingly, Australia cannot agree to include an arbitration clause in the coverage provisions.

#### **Consequential amendment to the transitional provisions of the Agreement**

4. A consequential amendment to the Agreement is required to ensure that in the event that the Agreement is terminated, the Agreement continues to have effect in relation to all persons who immediately before the date of termination, are subject only to the legislation of one Party by virtue of paragraph 2 or 3 of Article D of Part X of the Agreement provided that the employee continues to satisfy the criteria of that paragraph.

**Other amendments**

5. Australia reserves its right to submit other amendments as appropriate.

## Section B: An Outline of the Australian Legislation

### INTRODUCTION

1. The Model Australian Double Superannuation Coverage Provisions apply to the *Superannuation Guarantee Charge Act 1992*, the *Superannuation Guarantee (Administration) Act 1992* and the Superannuation Guarantee (Administration) Regulations. These Acts and Regulations are collectively known as the Superannuation Guarantee legislation.

**What is superannuation ?** Superannuation means savings for retirement. An individual is considered retired and allowed access to their superannuation if they have reached preservation age and have demonstrated an intention never to engage in part-time or full-time paid employment again. The preservation age is currently 55 however the Government proposes to legislate for the phased increase in the preservation age from 55 to 60 (reaching age 60 in the year 2025).

2. The Superannuation Guarantee legislation was introduced in 1992 to:
- ensure that most employees receive superannuation support from their employer;
  - provide better incomes for employees in retirement; and
  - reduce the need for future generations of taxpayers to pay extra to fund age pensions for the increasing number of retired people.

**What is the age pension ?** The age pension is a revenue funded pension provided by the Government to retirees in need.

3. The Superannuation Guarantee legislation is an important component of the Government's retirement incomes policy. For background on the Government's retirement incomes policy refer to Attachment A at the end of this outline.

### SUPERANNUATION GUARANTEE LEGISLATION

#### **Employers must pay superannuation contributions or charge**

4. Under the Superannuation Guarantee legislation, employers must pay a minimum level of superannuation contributions for employees each financial year to a superannuation provider or pay a tax called the Superannuation Guarantee Charge ('the charge') to the Commissioner of Taxation ('the Commissioner').

**What is a superannuation provider ?**

A superannuation provider is an entity like a bank, life insurance company or trust that invests pre-retirement savings and pays benefits in retirement.

5. The charge is higher than the minimum level of superannuation contributions and includes:
- the minimum level of superannuation contributions (which may be higher than that which the employer failed to pay to a superannuation provider - see paragraph 12);
  - interest; and
  - an administration fee.

#### **The legislation is a self assessment system**

6. The Superannuation Guarantee legislation is administered on a self assessment basis (ie. no certificates of compliance are issued). Employers which have not paid the minimum level of superannuation contributions for employees for the financial year are required to notify the Commissioner and to pay the charge to the Commissioner. Severe penalties apply for breach of these requirements.

### **Commissioner redistributes charge to employee's superannuation provider**

7. The Commissioner then redistributes that part of the charge representing the minimum level of superannuation contributions and interest to a superannuation provider nominated by the employee.

### **Contributions must be paid to a resident superannuation provider that complies with Government rules**

8. The minimum level of superannuation contributions must be paid by the employer to a resident superannuation provider that complies with minimum standards. If an employer pays the contributions to any other provider, the employer will still be required to pay the charge and will not receive a tax deduction for the charge. Likewise, the Commissioner may only redistribute the charge to a resident superannuation provider that complies with minimum standards.

#### **What is a resident superannuation provider ?**

A resident superannuation provider is a superannuation provider that satisfies three criteria:

- the central management and control of the provider is in Australia;
- the provider's investment fund which contains the employee's superannuation was established in Australia or at least one asset of the fund (eg. an office tower) is in Australia; and
- the total superannuation of all Australian employees in the fund constitutes at least 50% of the fund.

#### **What are the minimum standards that are imposed on resident superannuation providers ?**

The minimum standards are rules governing the operation of resident superannuation providers that aim to ensure that:

- providers are prudentially administered;
- employees are adequately informed about their retirement savings; and
- the retirement savings are not used before retirement except in certain circumstances (eg. the employee is permanently incapacitated).

### **There is a strong incentive for employers to pay contributions**

9. There is a strong incentive for employers to pay the minimum level of superannuation contributions because:

- the charge is higher than the minimum level of superannuation contributions; and
- the charge is not deductible, for income tax purposes, to the employer whereas contributions paid to a resident superannuation provider are deductible.

### **What is the minimum level of superannuation contributions ?**

10. The minimum level of superannuation contributions depends on the relevant financial year:

1999/2000:	7% of the employee's earnings
2000/01 and 2001/02:	8% of the employee's earnings
2002/03 and subsequent years:	9% of the employee's earnings

11. The Superannuation Guarantee legislation contains rules to define what type of payments are considered part of an employee's earnings.



12. These rules are designed to apply the superannuation guarantee only to the 'guaranteed' or normal earnings of employees. Accordingly, overtime and other ad hoc and top-up payments are not counted as part of an employee's earnings. However, if the employer fails to pay the minimum level of superannuation contributions to a resident superannuation provider, then the charge will apply to the total earnings of the employee. This is an incentive for employers to pay the minimum level of superannuation contributions to a resident superannuation provider rather than incur the charge.

**Example:** Employer ABC employs a person whose normal earnings from ABC for the 1999/00 year are \$A40,000. The employee has also received overtime payments of \$A10,000 for the year with the total earnings of the employee being \$A50,000 for the year. Under the Superannuation Guarantee legislation, the minimum level of superannuation contributions for the 1999/00 year are calculated as 7% of the employee's normal earnings which is \$A2800 (7% of \$A40,000).

ABC fails to pay the \$A2800 to a resident superannuation provider within 28 days after the end of the year. As a result, ABC is now required under the Superannuation Guarantee legislation to pay 7% of the total earnings of the employee to the Commissioner which is \$A3500 (7% of \$A50,000). This amount of \$A3500 is \$A700 higher than the amount which the employer could have paid to a resident superannuation provider to avoid the charge.

ABC will also be required to pay interest on the \$A3500 and an administration fee to the Commissioner. The Commissioner will redistribute the \$A3500 and the interest to a resident superannuation provider nominated by the employee.

*Maximum limit on level of superannuation required*

13. There is an indexed maximum limit applying to the calculation of the employee's earnings to ensure that employers do not have to provide for the superannuation of high income employees beyond adequate retirement needs. Employers may disregard an employee's earnings which exceed the maximum limit for the purpose of calculating the minimum level of superannuation contributions for a year. The maximum limit is currently \$A100,960 (for the 1999/00 year).

**Who is an employee ?**

14. The Superannuation Guarantee legislation is employment related and only benefits employees and on their death, their estate and/or dependants. Social security arrangements provide coverage for all Australians in need (including non-employees).

15. The term "employee" is defined very widely in the Superannuation Guarantee legislation to include any person who receives salary or wages in return for their services or labour and any person who receives payments under a contract where the contract is primarily for their labour. There are a limited class of exemptions.

16. In practice, this wide definition of "employee" means that over 90% of employees are covered by superannuation guarantee arrangements. Superannuation guarantee covers employment within Australia (which includes the sea within 12 nautical miles of Australia and the territories of Cocos (Keeling) Islands and Christmas Island) and residents of Australia employed outside of Australia by an Australian resident employer.

17. Whether an employee or employer is a resident of Australia is a question of fact to be determined on the circumstances of each case, however the Commissioner issues rulings from time to time to provide guidance on the issue.

18. The limited class of exempt employees for whom employers are not required to provide superannuation are:

- non-resident employees employed outside Australia;
- resident employees employed outside Australia by a non-resident employer;
- foreign senior executives working in Australia for no longer than 4 years on a temporary business visa (eg. senior executives brought in to set up an Australian division of a multinational business);
- employees under age 18 and working not more than 30 hours a week;
- employees paid to do work of a domestic or private nature for not more than 30 hours a week (eg. part-time nannies and housekeepers);
- employees who have reached 70;
- employees earning less than \$A450 per month (the average Australian monthly salary or wages in 1998 was \$A3161); and
- employees who have excessive superannuation and elect not to have further superannuation contributions made for them (eg. because their employer agrees to provide other benefits for the employee). An employee has excessive superannuation when their superannuation exceeds an indexed amount. The amount is currently \$A971,382 (for the 1999/00 year).

19. Foreign employees covered under coverage provisions agreed to between Australia and other countries will also be considered exempt employees. Australia has not yet reached this stage however Australia is currently involved in negotiations with several countries.

20. Foreign employees (and emigrating Australians) who leave Australia on or after 1 July 1998 are not permitted to take their Australian superannuation guarantee contributions abroad unless they have reached preservation age and have retired (the preservation age is currently 55 however the Government proposes to legislate for the phased increase in the preservation age from 55 to 60 (reaching age 60 in the year 2025)). For foreign employees, coverage provisions will ensure that the superannuation part of their remuneration only accrues in their home country. For foreign employers, coverage provisions will ensure that they do not have a double superannuation liability in respect of a seconded employee.

21. A 'self employed person' (eg. an artist) is not considered to be an employee unless they receive payments under a contract primarily for their labour (eg. a contract solely for the artist to arrange exhibits for an art exhibition).

#### **Choice of superannuation provider**

22. With limited exceptions, the employer may choose the superannuation provider through which they provide superannuation for their employees. However, the Government has introduced legislation into Parliament which proposes that employers give their employees an opportunity to choose their own provider.

23. Currently, the superannuation of government employees is generally provided through Government administered providers whereas the superannuation of private sector employees is provided through commercial providers (eg. a bank or life insurance company) or through arrangements established by the employer, the employee or the industry in which the employee is employed (eg. an industry trust).

**The form of superannuation: how an employee's benefit is calculated**

24. The superannuation of government employees and the employees of large private sector employers is often provided in the form of a defined benefit promised to the employee by the employer. The amount of the benefit can generally be known in advance of retirement (if assumptions are made about the salary of the employee at retirement). The defined benefit is unaffected by investment conditions as the employer bears the investment risk associated with their promise.

25. The superannuation of other private sector employees is often provided in the form of an accumulation of what has been paid by or for the employee (ie. contributions plus interest less administration costs). The amount of this type of superannuation is dependent on the investment return on the contributions paid.

**Employees can choose how their superannuation is received: income stream or lump sum**

26. An employee may elect to receive their superannuation as a lump sum or income stream in retirement. The Government encourages income streams rather than lump sums by providing additional tax concessions to individuals who elect to receive income streams.

**CONCLUSION**

27. With an ageing population, the Superannuation Guarantee legislation is an increasingly important part of the Government's retirement incomes policy of encouraging Australians to provide for their retirement.

28. The Superannuation Guarantee legislation supplements but does not replace the age pension which is available for those in need.

## ATTACHMENT A: AUSTRALIA'S RETIREMENT INCOMES POLICY

The Australian Government's retirement incomes policy aims to encourage people to save for their retirement so that they can enjoy a higher standard of living than would be possible by reliance on the age pension. There are three pillars to the Government's retirement incomes policy:

### First Pillar: Social Security

The age pension and associated social security arrangements provide a safety net standard of living in retirement.

The age pension is available to people at or above age pension age, which is currently 61.5 years for women and 65 for men, who are considered to be residents for age pension purposes (ie. individuals who have been resident in Australia for at least ten years). The age pension age for women is increasing on a phased scale to 65 and will reach that age in the year 2013.

The income and assets of retirees (including superannuation) are tested to ensure that only retirees in need qualify for the age pension and that the rate of the age pension reflects the extent of the need of the retiree.

The age pension and associated social security arrangements are provided under the *Social Security Act 1991*. The Department of Family and Community Services advises the Government on social security matters and Centrelink makes social security payments and administers the operation of social security arrangements.

### Second Pillar: Superannuation Guarantee legislation

The Superannuation Guarantee legislation encourages employers to make a minimum level of contribution for their employees' retirement.

The Department of Treasury advises the Government on superannuation guarantee matters and the Commissioner of Taxation administers the Superannuation Guarantee legislation and advises the Government on issues arising from the administration of the legislation. The Commissioner (Mr Michael Carmody) and his officers are collectively known as the Australian Taxation Office.

### Third Pillar: Voluntary superannuation saving

Voluntary superannuation saving provides taxation incentives for people to make self-provision for their retirement. These incentives are set out in the *Income Tax Assessment Act 1936* and the *Income Tax Assessment Act 1997*.

Taxation incentives are also available for people to make provision for their spouse (if their spouse is not employed or is a low income spouse (ie. has an income less than \$A13,800)). Employers that provide superannuation for their employees can deduct the amount of superannuation provided from their income for taxation purposes (subject to maximum age based limits).

The Department of Treasury advises the Government on voluntary superannuation saving matters.

The *Superannuation Industry (Supervision) Act 1993* and the *Retirement Savings Accounts Act 1997* provide stringent prudential regulation of the superannuation providers in whom people entrust their retirement savings.

147

The Australian Prudential Regulation Authority is responsible for the prudential supervision of superannuation providers and the Australian Securities and Investments Commission regulates market integrity, disclosure and other consumer protection issues.