[Insert DD Month YYYY]

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[Insert Client Name]

[Insert Client Position]

[Insert Company Name]

[Insert Company Address]

[Suburb State Post Code]

Dear [Insert Client Name]

**Re: Superannuation Guarantee obligations**

As part of its ongoing compliance activities, the Australian Taxation Office (**ATO**) continues its audit scrutiny of compliance with the superannuation guarantee obligations by employers. Accordingly, it is prudent to briefly revisit the superannuation guarantee obligations facing employers and to consider the ramifications of non-compliance.

# Superannuation guarantee contributions

Superannuation guarantee contributions are generally required to be made by all employers to ensure that each individual employee receives a prescribed minimum level of superannuation support on a quarterly basis. The superannuation guarantee percentage for the year ended 30 June 2021 is 9.5 per cent. The prescribed minimum level of superannuation guarantee will increase by 0.5% each year until it reaches 12% in the 2026 income year. Therefore, for the income year starting 1 July 2021, the superannuation guarantee percentage will increase to 10%. Consideration should be given to employees' contracts to determine if the employees are paid inclusive or exclusive of superannuation to calculate extra amounts payable in the 2022 income year.

The amount of superannuation guarantee contributions provided by an employer on behalf of each of its employees is determined in accordance with the earnings base of the employee. The earnings base of an employee is their Ordinary Time Earnings (**OTE**). OTE includes, but is not limited to, the base-pay in respect of an employee’s ordinary hours of work, commissions and shift loadings received by the employee and pay for annual or sick leave taken. However, there are a number of payments that may be received by an employee that are excluded from OTE, including lump sum payments to employees on termination of employment in lieu of unused annual leave and unused long service leave. Further clarification on the amounts that will be regarded as OTE is set out in Superannuation Guarantee Ruling SGR 2009/2.

It should be noted that from 1 January 2020, salary sacrificed amounts contributed towards superannuation will be included in the earnings base for calculating the amount of superannuation guarantee contributions. As a result, employers will also need to make superannuation guarantee contributions on any salary sacrificed superannuation amounts.

The ‘maximum contribution base’ is $57,090 per quarter for the 2020-21 year, increasing to $58,920 for the 2021-22 year. An employer is not required to provide the minimum superannuation guarantee support for that part of an employee’s OTE above the quarterly maximum contribution base.

Employers must make superannuation contributions for their employees on a quarterly basis within 28 days of the end of each quarter, being 30 September, 31 December, 31 March and 30 June. However, whilst the superannuation guarantee contributions for the quarter ended 30 June are not due until 28 July, a deduction for any contribution will only be available if the fund received the contribution by 30 June.

It is important to note that the superannuation guarantee legislation has an extended definition of who is considered to be an employee which includes, amongst other things, a person who works under a contract wholly or principally for labour. Accordingly, organisations which engage independent contractors may wish to check whether superannuation guarantee contributions need to be made in respect of such persons. Further, different award arrangements may result in additional superannuation obligations.

Employers are generally required to report any superannuation contributions made in respect of an employee to the ATO using Single Touch Payroll (**STP**) enabled software. There are exclusions in certain situations such as micro employers or small employers who have 19 or fewer employees who don’t have to report payments to ‘closely held payees’ through STP or employers who are seasonal and intermittent employers or employ inbound assignees. Those small employers which only have closely held employees are not required to start STP reporting until 1 July 2021, while micro employers may be able to a concession where STP is not required if the micro employer is experiencing exception circumstances .

STP requires real time reporting of superannuation guarantee obligations, meaning that the ATO can quickly identify late and underpayments of superannuation guarantee because of data matching with SuperStream and superannuation fund reporting information.

If you are not capturing the appropriate employee/contractor information, or correctly calculating the amount of superannuation guarantee contributions, you may have a superannuation guarantee shortfall and this may trigger a full employer obligations audit by the ATO.

# Consequences of non-compliance

Employers that are found to have failed to provide the prescribed minimum standards of superannuation support for their employees will be subject to the Superannuation Guarantee Charge (SGC).

The SGC penalty consists of the shortfall between the minimum superannuation support required to be made each quarter and what was actually contributed by the employer in respect of each employee, plus an administrative component of $20 per employee per quarter and nominal interest amount (representing a proxy for superannuation earnings). The superannuation guarantee shortfall is worked out by multiplying the notional quarterly shortfall percentage by the employee’s salary or wages. In some cases, the employee’s salary or wages amount will exceed that of their ordinary time earnings. In calculating the shortfall for a quarter from 1 January 2020, the salary and wages base includes any sacrificed salary or wages amounts paid by the employer on behalf of the employer.

The SGC is not deductible for tax purposes. Other additional penalties that the ATO may impose are:

* an administrative penalty of 75% of the shortfall if you make a false or misleading statement which results in you paying less than the required SGC
* penalties for failing to keep adequate records and / or
* penalties for lodging the SCG statement late or failing to provide a statement or information when requested to do so during an audit (Part 7 penalty).

These penalties are not deductible for tax purposes.

A General Interest Charge (GIC) may also be imposed for any amount of SGC that remains outstanding after the due date for payment.

Recent legislation also introduced various measures to tighten SGC compliance including, amongst others, the creation of an offence where an employer which does not comply with a direction to pay an outstanding SGC liability which will be subject to court-ordered penalties which may include up to 12 months imprisonment and allowing the ATO to disclose more information about SGC non-compliance to affected employees.

# Director penalties

Directors are potentially personally liable for shortfalls in superannuation contributions which also include interest and penalties that apply to superannuation shortfalls. The directors are potentially personally liable even when the company has been placed into administration or has been liquidated.

**Superannuation Guarantee Amnesty**

A Superannuation Guarantee Amnesty (**Amnesty**) was introduced on 6 March 2020 and ended on 7 September 2020. The Amnesty related to the quarters starting from 1 July 1992 to 31 March 2018.

If an employer qualified for the Amnesty, previously unpaid SGC, including nominal interest, that was owed to employees was payable. However, the employer will be able to claim a tax deduction for the SGC amounts paid to the ATO and was not be required to pay the administration component or the Part 7 penalty.

In September 2020 the ATO issued Practice Statement Law Administration PSLA 2020/4 which deals with the remission of additional SGC. It is noted that recent legislative amendments restrict the ability of ATO officers to remit the additional SGC. It is therefore important that all employees ensure any superannuation guarantee requirements are met.

If you would like to discuss any matters in relation to how the superannuation guarantee provisions apply to your business, please do not hesitate to contact me on [insert telephone number].

Yours faithfully

**[Insert Partner name]**