

File Name: 2010/48

10 December 2010

The Hon Bill Shorten MP
Assistant Treasurer
Minister for Financial Services and
Superannuation
Australian Parliament House
CANBERRA ACT 2600

Dear Minister

RE: Reportable Employer Superannuation Contributions (RESC)

The government has announced its intention to review certain aspects of the definition of a reportable employer superannuation contribution (RESC) in the Tax Administration Act to deal with certain unintended consequences.

The purpose of this letter is to draw your attention to broader issues relating to the operation of the RESC definition and to seek consideration of the need for broader changes than those announced.

When the Reportable Employer Superannuation Contributions (RESC) provisions were announced the stated intention was to ensure that employment remuneration amounts that were salary sacrificed into superannuation would be reflected as income of the employee for a broad range of purposes. The announcement reflected concern of inequities that existed between those who were and those who were not able to salary sacrifice into superannuation or separately negotiate additional employer superannuation contributions. The capacity to do so enabled those individuals to enhance their access to a range of government entitlements and reduce certain taxation and other obligations.

Considerable doubt exists as to how Reportable Employer Superannuation Contributions (RESCs) must be determined in certain situations.

This concern has arisen from:

- The wording in the relevant legislation;
- A change over time in the ATO's interpretation of the legislative requirements;
- Apparent inconsistencies in the ATO's guidelines to employers as it attempts to reconcile the policy intent with the legislation; and
- The [media release](#) (No.080) issued by the former Minister, Chris Bowen, on 30 June 2010 announcing that the legislation would be amended (retrospective to 1 July 2009) to remove some unintended consequences (without specifically identifying the changes that would be made).

Many employers are confused as to how to determine the amounts to be reported. This has created problems in them meeting the legislated requirement to provide relevant details on Payment Summaries for terminating employees. ASFA considers it important that the position be

clarified quickly. This has compounding effects on employees whose superannuation contributions are at, or close to, the maximum permitted.

Recommendation

Whilst there are a number of ways of removing the confusion, it would appear that an early announcement of the specific issues that will be addressed, followed by amendments to the Act would provide the best path forward.

Specific matters of concern

Matters which ASFA considers need addressing in a ministerial announcement are as follows:

A clear statement of the underlying principles of the provisions

Where, if the contribution was not paid the amount of the contribution would not be payable to the employee (or related party) as some other form of remuneration, the contribution should not be considered to be a RESC payment. It is accepted that some restrictions or exceptions might be necessary to minimise possible abuse by small business operators. The basic principle should be that a RESC only arises where the member's choice of remuneration impacts on their other income. This is consistent with the intent of the legislation: To catch salary which has been converted into additional employer superannuation contributions.

The interplay between the Choice of Fund rules and the RESC provisions

The following example is indicative of the type of issues that require resolution.

An employer pays a higher level of contributions to the employer's default fund compared to the contributions which would apply if the employee chooses a different fund. The additional contributions are a specified amount either paid in accordance with:

- the rules of the default fund; or
- an agreement between the trustee and the employer

The additional contributions may be small (such as to cover the cost of administration or insurance costs charged by the default fund).

If an employee chooses another fund (Choice of Fund), no additional salary or other benefits are provided in lieu of the reduced employer contribution.

In early 2009 the ATO advised that in the above situation any additional contributions paid to the employer's default fund under arrangements such as the above **would not** be a RESC. This was considered to be appropriate and reflected the Government's intention.

In ATO ID 2012/10 the ATO has reversed this view stating that the legislation as enacted regards such contributions to be RESC payments even where choice of fund is not exercised by the employee. The ATO considers that the fact that the employee has a choice over which fund he/she joins (and hence the level of contribution) is determinative, even where such choice is not exercised.

ASFA considers this to be an unreasonable outcome. However, ASFA would agree with this outcome if, by choosing another fund, the employee had the option to take the additional contributions as additional salary (or fringe benefits).

The treatment of insurance premiums

A similar issue is where the relevant fund rules or agreement between the trustee and employer, require the employer to pay the cost of insurance premiums for a prescribed level of cover. As the contributions to pay these insurance premiums are effectively required by the rules of the fund, it would appear (based on the ATO Employer Guide) that these contributions are not RESCs. However the trust deed may include a provision which allows members to opt out of the insurance. While it is unclear why a member would make such an election, the ability to opt out of the cover would appear (based on ATO ID 2012/10) to make these contributions a RESC.

Additional matter of concern

Inconsistencies with ATO's Employer guide for reportable employer superannuation contributions

The degree of confusion with the operation of the provisions is highlighted by inconsistencies between ATO ID 2010/112 and the ATO's [Employer Guide](#) which was last updated on 16 September 2010, several months after the ID was issued.

The Guide indicates that a contribution which is the minimum required to be made under the trust deed or governing rules of a superannuation fund is not a RESC. This is inconsistent with the ID under which the additional contributions would be considered to be a RESC where the employee has choice of fund and the additional contributions are not payable to the chosen fund.

The Guide also indicates that a contribution to fund a defined benefit is not a RESC. (Defined benefit arrangements are generally excluded from the RESC regime as the ATO considers that contributions are determined by the actuary rather than the member.) However, as defined benefit members, with some exceptions, are also able to choose another fund, it is unclear why the arguments used in the ID, if they are valid, do not also apply to defined benefit arrangements. Please note that this is by way of example - we are not suggesting that the rules should apply to contributions with respect to a defined benefit interest.

These inconsistencies highlight the current confusion and the difficulties the ATO must be having in interpreting this legislation. Amending the legislation along the lines of our recommendation above would enable many of these inconsistencies to be resolved.

We urge the Government to promptly clarify the intent of the legislative requirements so that employers are able to ascertain what needs to be reported.

Yours Sincerely



David Graus

Director Policy and Industry Practice