



DRAFT

Role of the Internal Revenue Commission (IRC) in assisting the superannuation industry achieve compliance with the Act

Purpose

The purpose of this paper is to develop a proposal for adoption by the IRC to ensure employer compliance with the Superannuation 2000 Act.

Background

On the 5th of December 2005, the Superannuation Taskforce met with industry representatives, Central Bank and the Internal Revenue Commission (IRC) to discuss a number of issues including employer compliance and data matching.

Current Position

Currently the enforcement of employer compliance is three fold.

1. It is up to the individual ASF to basically “door knock” to find non complying employers and seek compliance
2. In the advent that the employer procrastinates or refuses to co-operate, the ASF can notify the Central Bank and enlist their support for compliance and or
3. The Central Bank independently seeks compliance by the employer.

Similarly, the ASF can instigate legal action against the non-complying employer and seek compliance of the Act.

Problems with current methodology

Currently a number of issues arise under the current system

1. Many ASF’s do not have the resources to be chasing employer compliance
2. Litigation against a non-complying employer could result in the employer going to another ASF as “punishment” for issuing a writ against them.
3. The role of the Central Bank vs the role of the individual ASF in seeking employer compliance under section 114 of the Act is less than clear. (This also needs to be reviewed by the Taskforce)

Seeking Involvement by the IRC

Before discussing the possible role the IRC could play in employer compliance, there is a need for definitional certainty on what constitutes an employer under the Act

Definition of what constitutes an employer under the Act

There remains in the Superannuation Act an ambiguity in that while for all intents and purposes a company may have in excess of 20 employees as a combined entity (through subsidiaries and related entities), the structure of the employer company maybe such that no company within the group has the minimum 20 employees to ensure mandatory contribution to superannuation. We are aware of some employers who deliberately set up their company structure in such away so as to avoid their responsibilities under the Act. Clearly it was not an intention of the Act to allow employers to rearrange their affairs in such away as each related entity held under 20 employees and therefore avoid the Superannuation Act.

There are three definitions that relate to the “employer” in the Act

1. “employer” means an entity that employs a person under a contract of service.
2. “entity” means an individual, a statutory authority, unincorporated partnership or body or corporation, as the context permits and
3. “related corporation” means a corporation that in accordance with the Companies Act 1997, is taken to be related to another corporation

The problem with the current definition of “employer” is that the definition of “related corporation” has not been dove tailed into the definition of “entity.” As such related corporations of an entity are completely side lined in the interpretation of what constitutes an employer.

We recommend that the definition of entity be changed to

“entity” means an individual, **corporation, related corporation**, statutory authority, unincorporated partnership or body, as the context permits

Changing the definition of “entity” will ensure that all related corporations of a business house will be covered in what constitutes an establishment with 20 employees.

Role of the IRC

Moving on, we now need to set a basic principle of what we want from the IRC in terms of seeking employer compliance.

In countries where it is mandatory to contribute to superannuation, there is usually a roll to be played by the respective taxation authorities. It could well be argued that an effective compliance regime is almost impossible without the involvement of the Internal Revenue Commission (IRC). Simple changes to the Income Tax Act to allow

the IRC to seek the certain information (much is all ready currently collected) would ensure greater compliance of the Act.

We argue that there should be a further schedule incorporated into the tax returns by an employer. The most suitable schedule would be an expansion of the current Training Levy Form (TL). This could be renamed the Training Levy and Superannuation Compliance Return.

The IRC should be able to obtain in the filing of the TL return the

- total employees that a company has on its payroll.
- total employees within the group of companies that it is associated with and
- total superannuation contributions paid to employees

The IRC should be able to ask for a simple reconciliation of total contributions paid and compare to employee payroll payments which is already provided on the TL Return. The TL Return could actually make the employer do their own reconciliation.

The IRC should then be empowered to impose **a fine** equivalent to the amount of superannuation avoided by a non-complying company with a margin for collection costs. This should include the employer and employee portion. Since these amounts could be considerable i.e. (a 30 employee firm on average salary of K7500 would mean a fine of K30,000) there is an incentive for the IRC to chase non complying employers.

Similarly, we are sure that once non – complying employers realise that if they do not contribute to superannuation for their staff they will have equivalent total employee and employer contributions imposed as a fine by the IRC, there will be limited discussion on whether they should be meeting their statutory obligations.

Liaison Role between Central Bank and IRC

Every year, the IRC should furnish a list of non-complying employers to the Central Bank obtained from the TL Return. The Central Bank will as a matter of course alert the non-complying employer by letter that they are in breach and seek compliance by furnishing a list of ASF's that the non-complying employer can join. This would ensure that the Central Bank meets its responsibilities under section 7(2)(c) and avoid the last resort under section 114 for non-compliance.

Recommendation:

1. That the IRC should be able to collect data on superannuation compliance and impose fines equivalent to superannuation not paid in any year on non-complying employers.
2. That a schedule be prepared (or the current TL form modified) to ascertain those employers (inclusive of related corporations) that are non complying

3. The definition of employer be made more specific to ensure employers do not rot the system through a myriad of companies each employing under the prescribed number and
4. Every year the IRC reports to the Central Bank the number of firms not complying with the Act in regards to paying superannuation.
5. The Central Bank continues to be charged with enforcement of the Act by writing to non-complying employers with a list of ASF's they can join to avoid similar fines being imposed by the IRC.

Proposer: Rod Mitchell
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