



Australian Government
Department of Employment

Senate Economics References Committee

Inquiry into

Superannuation Guarantee non-payment

Submission of the

Department of Employment

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Introduction and purpose of the submission

1. The Department of Employment (the Department) welcomes the opportunity to make a written submission to the Senate Economics Reference Committee inquiry into the impact of non-payment of the Superannuation Guarantee (SG) by Australian employers.
2. The Department advises Government on national policies and programmes that help Australians find and keep employment and to work in safe, fair and productive workplaces.
3. The Department administers the *Fair Entitlements Guarantee Act 2012* (FEG Act).
4. The FEG is a safety net scheme of last resort which protects employees who lose their job through bankruptcy or liquidation and are left with certain unpaid employment entitlements.
5. The Department also advises the Government on enforcement of workplace laws, including the role and powers of the Fair Work Ombudsman (FWO).
6. The FWO is the national regulator responsible for ensuring compliance with workplace relations laws through advice, education and where necessary enforcement.
7. The Department's submission addresses only the terms of reference that fall within its responsibilities, including the impact of expanding the scope of the FEG in order to cover unpaid superannuation in the event of employer insolvency and the role of the FWO in superannuation guarantee non-payment. The Department notes the Australian Taxation Office (ATO) has provided a comprehensive submission.

Fair Entitlements Guarantee Scheme

FEG is a safety net of last resort to protect accrued basic employment entitlements

8. FEG is a basic payment scheme which operates as a last resort to cover certain employment entitlements left unpaid when employees lose their job through insolvency of their employer.
9. FEG commenced as a legislated scheme on 5 December 2012 and replaced the previous administrative versions of the scheme including the General Employee Entitlements and Redundancy Scheme (GEERS), which commenced in September 2001 and the inaugural Employee Entitlements Support Scheme, which commenced on 1 January 2000.
10. In policy design, FEG and its predecessor schemes were not intended to be an all-encompassing form of insurance to compensate employees for any and all unpaid amounts owed by their employer. The design of FEG provides for protection of limited categories of 'employment entitlements' aligned to those entitlements that an employer is obligated to provide in the National Employment Standard under the *Fair Work Act 2009*.
11. As a publicly funded safety net, FEG assistance is administered in line with monetary caps, and is triggered only as a last resort where the employee has lost their job and the employer is in liquidation or bankruptcy and there is no other source available to pay entitlements.
12. The following five basic employment entitlements are covered under FEG:
 - i. unpaid wages (capped to 13 weeks)
 - ii. unpaid annual leave
 - iii. unpaid long service leave
 - iv. payment in lieu of notice (capped to 5 weeks)
 - v. redundancy pay (capped to a 4 weeks per full year of service).

Note: all payments are calculated subject to a capped weekly wage amount, currently \$2451 per week.
13. In addition to limits on the categories and amounts payable under the FEG, a range of eligibility conditions apply to reflect other policy principles underpinning the scheme, including that:
 - i. the person's employment has ended due to the employer's insolvency
 - ii. the person is an employee within the meaning of an employee at common law. Contractors are not covered which recognises the particular vulnerability of employees (particularly long term employees) as the least diversified creditors in an insolvency)

- iii. the person is an Australian citizen or permanent resident. This recognises that publicly funded welfare assistance in Australia is reserved for those people who have established a long term connection with Australia
 - iv. the person took reasonable steps to recover their debt before the insolvency event (where an employment entitlement debt fell due prior to an insolvency event which would commonly be the case with unpaid superannuation).
14. The FEG scheme presents a “moral hazard” in that it potentially shifts the cost of employer accountability for employee entitlements obligations to the tax payer. The availability of government support for employee entitlements in insolvency encourages employers to take on more financial risk, safe in the knowledge that FEG can step in to meet employee entitlements if needed. FEG is not intended to weaken the employer’s principal accountability for paying employee entitlements.
15. There is increasing evidence that some employers are deliberately structuring their corporate arrangements to avoid paying their employees’ entitlements in the event of insolvency. FEG is not intended to support employers by providing what is effectively a “subsidy” to assist with the costs of restructuring their business. Such corporate misuse of the FEG scheme is contributing to its increasing costs and in several recent cases, sharp business practices have been openly employed to shift the cost of employee entitlements onto the FEG scheme.
16. Significant government effort is being deployed to address moral hazard and maintain the integrity of FEG, including through funding of the FEG Recovery Program and pursuit of law reform to tackle corporate behaviours that result in improper reliance on the scheme for business restructuring.

In its current form, FEG represents a significant cost to taxpayers

17. Demand under FEG in any given year is influenced by a range of factors, including:
- i. the number of insolvencies that occur
 - ii. the proportion of insolvent companies that are unable to pay employee entitlements
 - iii. the employment conditions for the cohort of employees made redundant due to insolvency
 - iv. the average length of service for the cohort of employees made redundant
 - v. changes to capping arrangements under the scheme
 - vi. sharp practice and corporate misuse of the scheme.
18. Over the total life of FEG and its forerunner schemes from 2000 to 30 June 2016, \$2.1 billion has been paid to 180,148 people. Demand and cost doubled following the Global Financial crisis in 2007 and have remained at high levels since. In some instances, industry transitions resulting in corporate collapse of large, longer term employers have

also resulted in significant cost. There is also increasing evidence of sharp business practices or structuring shifting costs for employee entitlements to FEG. In terms of four year budget estimate cycles, cost growth is illustrated in Table 1.

Table 1

Period	Claimants Paid	Total Cost
1 July 2004 – 30 June 2008	32,441	\$249.7 million
1 July 2008 – 30 June 2012	56,047	\$600.7 million
1 July 2012 – 30 June 2016	60,908	\$1.05 billion

Superannuation Guarantee

Employer superannuation is related to retirement planning, not immediate redundancy support

19. The compulsory employer superannuation contributions regime commenced on 1 July 1992 with the enactment of the *Superannuation Guarantee (Administration Act) 1992*. Australia's Superannuation System (including objectives, adequacy and overarching framework and design) is a feature within Australia's retirement income policy. Accordingly, employer superannuation policy is positioned within the Superannuation System administered through the Treasury.
20. Despite the earlier commencement of Australia's compulsory employer superannuation regime, unpaid compulsory superannuation contributions owed by an insolvent employer have never been included in the policy design of FEG or its predecessor schemes. Superannuation has a different policy genesis and intent than the employment entitlements covered under the FEG. Employer superannuation contributions under the Superannuation Guarantee (SG) are not an item paid directly to employees as they fall due, nor do they become payable directly to an employee on redundancy. Rather, SG contributions are accumulated in a superannuation fund and accessed at a later time on an employee's retirement from the workforce.

Superannuation compliance is administered by the ATO

21. SG contributions are administered by the ATO. Employers discharge their SG obligations by making quarterly contributions to the employee's chosen superannuation fund. The ATO can raise an SG Charge (which includes the contribution and interest) on employers when they have not paid contributions into their employees' accounts on time.
22. The ATO's existing role in administering the SG is comprehensive and includes:
 - i. educating employers and employees about their responsibilities for SG
 - ii. monitoring employer compliance with SG obligations
 - iii. receipt and redistribution of the SG Charge to the employee's fund

- iv. investigating employers for possible breaches of the SG legislation.

23. The FEG has no existing role in covering unpaid employer superannuation contributions.¹

There is a small superannuation compliance presence in workplace relations policy

- 24. Under the *Fair Work Act 2009* (FW Act), the Fair Work Ombudsman (FWO) has limited direct functions relating to superannuation entitlements, generally confined to providing advice about, and enforcing compliance with modern awards and enterprise agreements requiring employers to make superannuation contributions, and record keeping and payslip requirements relating to superannuation contributions.
- 25. The FWO responds to complaints of underpayment made by employees by gathering payment information from both the employee and the employer. FWO does not have statutory access to payment information from employers or superannuation funds in the same way as the ATO. Therefore FWO is not able to proactively monitor SG and in the majority of circumstances, will forward on complaints regarding SG contributions to the ATO for action.
- 26. The ATO and the FWO work collaboratively within their legislative frameworks to share information where appropriate in order to assist the other agency in investigating issues under their respective jurisdiction. For example, under the FWO/ATO memorandum of understanding, the FWO provides twice-yearly reports to the ATO with details of employers who appear to have not paid superannuation guarantee contributions.
- 27. The FWO has powers to seek court orders for the underpayment or non-payment of wages, including court orders for a contravention of a modern award term or enterprise agreement. If a court finds that an employer has breached its obligations to pay wages or superannuation, the employer may be liable to a pecuniary penalty, in addition to repayment of unpaid wages and unpaid superannuation guarantee contributions.
- 28. Requiring payslips to record actual superannuation guarantee contributions may confuse employees. It would result in payslips generally recording a \$0 contribution, except the four times a year when a superannuation guarantee contribution is required to be made. Requiring payslip reporting would only make a material difference if superannuation payments were aligned with when payslips are issued. There would be compliance costs as employers would generally need to update payroll software.
- 29. In relation to employees monitoring their own superannuation payments, currently, payslips are required to include either the actual superannuation contribution amount paid during the pay period or the amount that is payable by the employer. Individuals can also detect underpayment by either looking at their fund's annual statement or by directly checking with their fund more frequently (for example, through an online portal).

¹ In certain limited circumstances, FEG may cover voluntary employee contributions deducted from the employee's wage but not passed on to the employee's superannuation fund. Such amounts are covered within the scope of unpaid wages. The FEG applies the same approach to other amounts that are voluntarily deducted from an employee's wage but not passed on to the payee during the wages entitlement period. Other amounts that may be covered as wages include mortgage or child support payments.

EXTENDING FEG TO INCLUDE UNPAID SUPERANNUATION GUARANTEE

Employers bear the corporate responsibility to meet employee entitlement obligations of workers

30. Notwithstanding the availability of FEG as a last resort safety net, the Government has stated clearly that it is the responsibility of an employer to meet its employee entitlement obligations to its workers.
31. As the scheme has become more generous over time, the moral hazard risk that insolvent employers rely on the scheme to meet employee entitlements has increased. Indicators suggestive of an increased reliance on FEG include:
 - i. The increasing proportion of insolvent entities in any given year where employees apply to FEG for assistance with unpaid employment entitlements. This increased from an average of 14.7% of insolvent companies between 2007-08 and 2010-11, to 16.9% from 2011-12 to 2015-16
 - ii. The increasing proportion of workplace agreements that provide a total maximum redundancy payment of more than 16 weeks. This increased from 22.3 per cent of agreements approved in Quarter 1 of 2011 to 33.6 per cent of agreements approved in Quarter 2 of 2016
 - iii. The increasing use of sharp corporate practice resulting in improper reliance on FEG, including use of company structures that separate employment entities from asset entities, creating a new company to continue the same business and liquidating the old company to deliberately avoid debts (phoenixing arrangements).
32. The obligations of employers are clearly set down in workplace relations laws, superannuation laws and corporation laws. FEG is not intended to allow employers to abrogate these responsibilities to the taxpayer, rather it operates as a safety net of last resort to mitigate some of the financial hardship faced by certain categories of workers where the employer fails to meet its responsibilities in insolvency.
33. Taxpayers should not have to provide a comprehensive and unlimited source of funding to compensate employees where the employer fails to make adequate provision for the accrued entitlements of its workers. Respective Governments have agreed their role is to provide the framework for the fair and equitable treatment of employees and to administer regimes which assure employer compliance with relevant Australian laws. This framework includes the provision of last resort safety net schemes such as the FEG for protection of employee entitlements in insolvency.

Including unpaid SG contributions in FEG would significantly increase costs in the scheme

34. Insolvency statistics prepared by the Australian Securities and Investment Commission² illustrate that significantly more insolvent entities have unpaid SG contributions than other unpaid employment entitlements. In 2014-15, unpaid superannuation was owed by 42.6 per cent (3558) of companies being wound up. By way of comparison, FEG data illustrates that between 2007-08 and 2015-16, around 16.4 per cent of companies wound up resulted in employees accessing FEG for payment of employee entitlements.
35. The department estimates that including unpaid SG contributions in FEG will likely result in a significant increase (around 47 per cent) in the number of FEG claims in the scheme. This in turn will result in a significant additional administered expense for Government, which the department has estimated at \$801 million over the forward estimates.
36. In addition to increased claim payments, changes to business systems would be required to administer assessment and payment of the superannuation component of claims. Two separate payments would be needed for each claim due to the requirement to pay the SG component to the superannuation fund and the remainder direct to the employee. The department estimates that additional resources to administer claim and payment activity, as well as adapt business systems would require additional departmental expenses of \$39 million over the forward estimates.

Item	2017-18	2018-19	2019-20	2020-21	TOTAL
Administered Expense (claim payments)	\$180.6 m	\$193.2 m	\$206.6 m	\$220.9 m	\$801.2 m
Departmental Expense (ASL and system change)	\$5.41 m	\$8.49 m	\$8.47 m	\$8.52 m	\$39.34 m

37. Cost offsets would need to be identified from other government programs to fund inclusion of SG contributions in FEG, potentially compromising delivery in other areas of government services.

Including unpaid SG contributions in FEG would exacerbate existing moral hazard in the scheme

38. The availability of SG contributions in FEG would exacerbate existing moral hazard in the scheme. It will create a perverse incentive for more employers to stop making regular superannuation contributions in order to increase cash flow, safe in the knowledge that unpaid superannuation will be covered by a government scheme in the event of insolvency. As noted in paragraph 31 the growing emergence of this behaviour is clearly evident.

² ASIC Insolvency Statistics, Series 3. <http://download.asic.gov.au/media/4110150/2004-2016-asic-insolvency-statistics-series3-3.pdf> (accessed 4 January 2017)

39. Company directors may become more inclined to arrange company affairs to take advantage of FEG. There would be an increase in the incidence of unscrupulous employers adopting sharp practice to engineer corporate structures and insolvencies in such a way that employee entitlements are met through FEG rather than the company.
40. Employees would also be less vigilant in taking prompt action to initiate recovery or enforcement action in relation to unpaid superannuation during the life of the employment relationship. Encouraging more reliance on Government to fund retirement income would be contradictory to existing policy encouraging self-funded retirement.

Including unpaid SG contributions will create unnecessary policy and administrative complexity

41. Extending FEG to include SG contributions would represent a significant shift in the policy intent and nature of FEG. As highlighted earlier in the submission, FEG is presently legislated to protect only certain entitlements, for a certain category of worker in certain circumstances.
42. Extending FEG to include SG contributions would require legislative amendment to the FEG Act and possibly the SG Act and other legislation. It can be anticipated that significant complexity will be encountered in effectively straddling the overlap between FEG and the ATO in managing non-payment of SG contributions. The ATO already has regulatory and compliance responsibility for SG contributions. Including SG contributions in FEG will work at cross purposes to the existing compliance regime including the SG Charge³ arrangements, possibly resulting in a higher level of non-compliance.
43. The department recommends that the committee instead consider measures to strengthen the powers available to the ATO to manage SG compliance in order to improve employer compliance with SG obligations. Amending the FEG to include SG contributions is not likely to achieve the desired result of improving compliance in employers meeting their ongoing SG obligations.

³ If employers do not pay the minimum amount of super guarantee (SG) for their employee into the correct fund by the due date, the employer may have to pay the super guarantee charge (SGC). Source – [https://www.ato.gov.au/business/super-for-employers/paying-super-contributions/missed-and-late-payments/the-super-guarantee-charge-\(sgc\)/](https://www.ato.gov.au/business/super-for-employers/paying-super-contributions/missed-and-late-payments/the-super-guarantee-charge-(sgc)/) (accessed 19 December 2016)