Dear Secretary,

Inquiry into the impact of non-payment of the Superannuation Guarantee (and wider issues and suggestions)

1. I welcome the opportunity to make submissions on the above subject, to the Committee. As will become clear below, the inadequacy of the SGC system begs what else might be done. I have clear views about this, which I set out below.

2. **It is, in my opinion, a disgrace** that, in this country, employees can be deprived of an important part of their remuneration, with no effective remedy, when it is not paid.
(a) It is very unacceptable that the underlying obligation to pay super is a tax, so that there is nothing an employee can do except complain to the ATO, wait for them to investigate, wait for them to issue assessments, wait to see if the ATO can recover anything and wait for anything collected to find their way into their superannuation fund.
(b) It is very unacceptable that many employees have no idea whether the relevant/agreed amount of superannuation has been paid into their fund (making recovery by the ATO even less likely as it depends on audit capacity of the ATO).
(b) It is very unacceptable that super is only paid quarterly - at least, generally - by which time there are many employers who can't pay this portion of the employee's remuneration.
(d) It is unacceptable that the ATO bears the main responsibility for getting these retirement moneys into the super fund.

3. **So here are my suggestions**.
(a) **The most important** things to do are the following:
(i) Employers should be liable to make employee super contributions 'AT THE SAME TIME' as paying wages (this can be done electronically now and throws no greater administrative burden on the employer). This would substantially reduce non-collection risk at the amounts would not be building up and there'd be earlier warning if things were going off the rails.
(ii) The contributions should be collectable, and the contracts enforceable, by the employee (even though the contribution has to be paid to a fund).
(iii) The Funds must be obliged to give members immediate/prompt electronic confirmation each time a contributions is made for them (and advise the person who made the contribution). This way the employee will be alerted, to any superannuation default, at the same time as they get their salary. They could then take any of the actions available to them, such as:
(A) resign;
(B) alert their fund to collect the money by delegation under their personal rights (or the fund might have its own right to collect super the employer owes the fund);
(C) alert any relevant union, who might collect the relevant contributions, collectively, by way of a 'friendly' visit to the employer, industrial action or in the Courts.
(D) alert Fair Work (who, I think, can enforce award conditions);
(E) alert their lawyer (who might be a 'no-win no-fee', class action, debt collecting kind of firm).
(E) alert the ATO, who might then assess SGC immediately, with the benefit of actual numbers supplied by the employees (rather than having to make estimates and collect on those). SGC can be imposed on the directors, too, if they haven't lodged returns within three months.

(iv) Change the SGC legislation so that the charge can be imposed immediately it remains unpaid (which will be from time, and each time, wages were paid or due to be paid.
(v) Give superannuation funds the right to collect arrears of employer contributions for members who have nominated that fund as the destination for their employer's contributions.
(vi) Make employers liable for the 'taxed' legal costs of collecting the funds (or some fixed percentage of the contribution) so the employee doesn't bear the cost of collection.
(b) **The benefits** of this would be as follows.
(i) The non-collection risk would be drastically reduced as the super could be no more delayed than wages and broadly, with the same consequences to the employers capacity to keep trading.
(ii) Employees would be alerted at the same time as getting their wages, and, as the people with the most to lose, would form an army of self interested police to enforce these obligations.
(iii) Those with the best resources could be used to collect arrears of contributions (eg. super funds, unions, debt collection firms, etc).
(iv) The would be efficiency in 'grouping' recovery of similar claims.
(v) This empowers members, who can't escape the collection risk (unless legislated). I note that employees don't have the risk of not collecting PAYG withheld from the wages. As soon as the employer withholds an amount, the risk goes to the ATO, as the employee can claim the PAYG(w) credit, whether the ATO gets the money or not.

4. **Establishing the legal rights,** to do all of this, will be important. Here's a brief survey of the issues I can think of. I'll start with the easiest first (bearing in mind there are some Constitutional issues to straddle).
(a) The Commonwealth has a taxing power and can change the SG legislation so as to impose the Charge immediately it is overdue (which will be zero days after the wages are paid or due, which ever is earlier).
(b) The SGC legislation and/or the *Superannuation (Industry) Supervision Act* (**SIS**) already requires (I think) funds to be capable to receive contributions electronically - even SMSF's. If I'm wrong about that, then one or both of those laws ought to be changed so that an employer must contribute to such a fund electronically (to avoid the SG Charge).
(c) The SIS Act could also be amended to allow the Fund to collect contributions that are overdue from an employer.
The Commonwealth has already established that it has the power enact the SIS Act and relevant regulations (viz: the corporations power or the age pensions power). This Act might even be able to require employers to advise wage payment dates and rates, so that the fund knows when a contribution is overdue, by how much and can commence recovery action.
(d) The SIS Act/Regs could be changed to oblige superannuation funds to advise members, electronically, as soon as an employer contribution is received (viz: the employer and the amount).
(e) The Industrial Awards system could be used to establish this regime - inserting these rights and obligations into the relevant emmployment contracts. The Constitutional basis for this legislation has long been established.
(f) The Fair Work legislation might act as a 'catch all' or impose over-arching obligations - to this effect.
(g) There needs to be a more general contractual basis for achieving these results. Most written agreements say something about super these days, but not all of the above and then there are all the oral agreements.
(h) The Commonwealth's incidental power might be enough for it to legislate contract terms to this effect - for instance: as incidental to its taxation power by changing the SGC

law; or incidental to the various heads of power under which the 'Fair Work' legislation is enacted or incidental to the powers under which the SIS legislation is enacted (corporations and age pension powers).

(i) If the Commonwealth's powers did not go far enough, the State's could transfer their power to the Commonwealth, as they did for national/Federal companies legislation.

(j) Alternatively, the States (or some of them) might be prepared to legislate on a uniform basis or even individually. Even individual state laws could have wide jurisdictional reach. For instance, it could operate on employers in their state (no matter where the employee is). It could operate in relation to employees in their state Australia (no matter where the employer was). It could operate where there was infrastructure or equipment in their state. It might legislate extra territorially and see if the validity of the law was upheld by the High Court. It would only require NSW and Vic to so legislate and a huge proportion of employees would be covered. Those states have legislated on a 'uniform' basis to regulate the legal profession capturing (perhaps) 80% of the lawyers in Australia.

5. **Finally**, I note that I've practiced in taxation and superannuation law for over 30 years. In that time, I've been a partner in three national legal firms before going to the Victorian Bar, where I've been for over 12 years. I'm a member of the Law Council of Australia's (LCA's) Taxation Committee and also a member of the Law Institute of Victoria's (LIV's) Taxation Committee. I've submitted much the same to the LIV, however, I wanted to make this submission directly to the Committee, also. Having said all this, I want to make it clear that the views expressed above are my own and should not be attributed to either the LCA or the LIV until or unless they say so for themselves. I also advise that I understand that these submissions will be made public eventually and I have no objection to that.

Cheers,

F John Morgan
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Nationally Accredited Mediator