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Senate Standing Committees on Economics  
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Canberra ACT 2600

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Dear Committee Secretariat

Please find attached the views of Cbus Super in response to the Committee's Inquiry into Insolvency in the Australian construction industry.

Cbus welcomes the opportunity to provide comments and views based on our experiences of non-compliance with superannuation payments in the construction and building industry.

We stress the seriousness with which Cbus takes its Trustee obligations to ensure that the monies owed to Fund members are paid in accordance with our Trust Deed and with SG requirements.

Our submission focuses on the broader issue of non-compliance with the superannuation guarantee to which losses due to insolvency across the economy are estimated at \$200 million per annum with construction being one of the largest affected industries.

We encourage the committee to review and support pro-active reform that provides some certainty to industry and employees. Reforms such as those canvassed throughout the Collins Inquiry in NSW and recommendations in the report emanating from that Inquiry provide a worthwhile platform.

We also encourage the Committee to look at the role, resourcing, inter-agency and industry cooperation of the relevant regulatory authorities charged with monitoring compliance with the laws, including the payment of the superannuation guarantee and superannuation more generally.

Yours sincerely

**David Atkin**  
**Chief Executive Officer**



**Senate Standing Committee on Economics**  
**Insolvency in the Australian construction industry**  
**Cbus (United Super Pty Ltd) Submission**  
**April 2015**

## **Cbus views on Insolvency in the Australian construction industry.**

### **Executive Summary**

The level of non-compliance with payment of the superannuation guarantee, as estimated by Tria Investment Partners, is \$2.5 billion per annum, affecting 650,000 working Australians.

The four main sources of this problem are employer non-compliance estimated at \$1.3 billion, effects of the cash economy at \$0.7 billion, sham contracting at \$0.2 billion and employer insolvency at \$0.2 billion.

The construction industry is the most affected industry being the biggest contributor to the cash economy, having a high level of small businesses, being prominent in insolvency, having one-third of the nation's independent contractors and being the highest represented sector in illegal phoenixing activity.

As an industry fund with a strong affinity and understanding of the construction and building industry, Cbus maintains a rigorous and robust arrears process as part of its overall Trustee obligations.

The success of this process has seen the recovery of in excess of \$110 million in members' funds in the 13/14 financial year alone and results in minimal referral of files to the ATO for them to action.

It is Cbus' experience that the failure in payment of employee entitlements, such as superannuation, is often a sign of a deeper cash-flow problem that may be a precursor to insolvency. We are continually improving our processes around superannuation arrears processes to improve predictive modelling that may assist in averting the loss of entitlements through early intervention.

Cbus welcomes the efforts of the ATO and the ASIC in more recent times to build relationships with the Fund and its service providers, work jointly and share information and encourages further like activities particularly where predictive models could be developed or enhanced.

Cbus also welcomes the work that the ATO is undertaking with the ASIC and the Fair Work Building and Construction Commission in jointly investigating phoenix activities on large construction sites.

However, Cbus remains concerned that resourcing limitations continue to curtail the proactive work that the ATO can undertake in the SG non-compliance area and notes that further efficiency dividends and reductions in the public sector will further erode this capacity.

Cbus supports those calls for greater assurance in the payments system for sub-contractors and for a nationally consistent licensing scheme that ensures companies bidding for work are in appropriate financial circumstances to undertake such work.

Cbus recommends in the public policy context:

1. That the Inquiry give attention to SG non-compliance as a consequence of insolvency and illegal practices of 'phoenixing', sham contracting and recommend that Government ensure appropriate resourcing levels required to regulate compliance.
2. Given the advancement in technology platforms and the ability to effect electronic payments with relative administrative ease and given that superannuation is, in effect, the deferred wages of employees and a legal requirement that employers must meet, consideration be given to amending the SG Act and/or any other relevant Act to require SG to be paid congruently with the payment of wages.
3. Give consideration and review extending SG compliance regulation to the Fair Work Ombudsman either in conjunction with the ATO or as the sole regulator. Ensure levels of resourcing of the regulatory body are maintained at levels commensurate with ensuring effective compliance of the SG Act.
4. Amend ATO provisions to allow for superannuation insolvency dividends to be paid by Insolvency Practitioners direct to affected employees Fund accounts.
5. Amend Privacy provisions to allow for greater flow of information between the ATO and APRA regulated superannuation funds under binding Memorandums Of Understanding.
6. Amend the SIS Act to require and empower all APRA regulated funds to pursue payment of SG entitlements.
7. Ensure that quality filters are observed in the selection of default superannuation funds for industrial awards and agreements, over and above MySuper accreditation, that include specific requirements for such funds to have in place rigorous arrears collection processes.
8. Examine the recommendations of the Collins Inquiry in NSW and recommend national adoption of key measures including: the establishment of and operation of trusts to ensure payments are properly directed; and reviewing the efficacy of a licensing system for contracting employers that establishes a financial capacity qualification for construction firms and applies a fit and proper person test to contracting company directors.

In the practical context of the ATO and regulators:

1. Continued and increased contact and interaction between Funds, their administrators and service providers and the relevant regulatory bodies;
2. Increased pro-active measures being undertaken by the ASIC, the ATO and the Fair Work Building and Construction Commission (FWBCC) in relation to insolvency, phoenixing and SG compliance, including, but not limited to, developing predictive models, conducting a greater number of audits, working cooperatively inter-agency and with industry participants and targeting known 'problem' industries such as construction.

3. Improved communication between the ATO and APRA regulated funds, particularly in assisting in tracking recovery payments.
4. Improved practices around the recovery of SG debts in insolvency matters that allow for Insolvency Practitioners to direct dividend payments to the default fund for affected employees.

### **About Cbus**

Cbus was established in 1984 as one of the first truly national industry based superannuation funds, predominantly representing employees and employers in the construction and building industry.

Cbus, originally known as BUS (Building Union Superannuation Scheme), was established as a not-for-profit trust to receive the deferred wages of construction and building workers delivered as a result of industrial campaigns by building trade union members.

The Fund's Trustee, United Super Pty Ltd, was formed on the basis of equal representation between construction and building employer associations and employee trade unions. That equal representation governance model remains current and reflects both the industrial origins of superannuation and the continued affinity with the construction and building industry.

Over the past 30 years, Cbus has grown in membership and funds under management, becoming a full public offer fund in 1996. Today, Cbus has over 700,000 Fund members, approx. 90,000 participating employers (the majority of which are still drawn from the construction and building industry), with more than \$30 billion FUM.

Cbus is regulated by the Australian Prudential Regulatory Authority (APRA) under the provisions of the Superannuation Industry (Supervision) Act 1993 (SIS).

### **Inquiry terms of reference**

In accordance with the Inquiries terms of reference, Cbus offers the following information:

#### **Level of non-compliance with Superannuation Guarantee**

While more broad than the loss of money by secured and unsecured creditors through insolvency, it may interest the Committee to be aware of the overall level of non-compliance with the Superannuation Guarantee

There have been a number of attempts at estimating the level of non-compliance of SG throughout the community.

We note that a July 2009 joint submission to the Review into the Tax Office's administration of the Superannuation Guarantee Charge by the ACTU, Industry Super Network, IFCC and the Australian

Institute of Superannuation Trustees, estimated that around 500,000 employees were not receiving their full SG entitlement and that roughly \$900 million was outstanding.<sup>1</sup>

We also note that the Inspector-General of Taxation report into the ATO's administration of the SG charge cited figures of known SG non-compliance to be in the vicinity of \$1.5 billion, however this was only based on what has been raised through employers lodging a SGC statement or the ATO issuing default assessment. In their terms "The actual SG non-compliance could actually be much greater than the figures suggest."<sup>2</sup>

As significant a figure as that was, Cbus is aware that the size and scope of the problem has ballooned since then, pointing to an issue that requires remedial action on behalf of policy makers and signalling that it is an issue beyond the policing control of the ATO.

Cbus commissioned research by Tria Investment Partners part of NMG Consulting in August last year to investigate the extent of SG non-compliance and what it is costing employees.

Tria estimates that non-compliance with the superannuation guarantee cost employees \$2.5 billion in 2012.

In arriving at this estimation Tria points to four main sources of non-compliance:

- \$1.3 billion in employer non-compliance (SG contributions are not made at all, or only in part);
- \$0.7 billion cash economy (SG is part of avoidance of PAYG and other employer obligations)
- Sham contracting \$0.2 billion
- **Employer insolvency \$0.2 billion**

Further, Tria states that the construction industry is the most affected industry. This is because the ABS estimates that the construction industry is by far the biggest contributor to the cash economy and is prominent in SG losses arising from insolvency.

The construction industry is also highly represented in the amount of small businesses operating in the sector, has nearly one-third of the nation's independent contractors and is the highest represented sector in phoenixing activity.

Further evidence is provided by employee SG complaint analysis, which similarly indicates an elevated level of non-compliance in construction and a high level of failure to complain.

The current average Cbus member retires at age 63 with an average superannuation balance of \$50,000. This is the result of a number of factors, including the transient and physically demanding nature of work and the relative immaturity of Australia's superannuation system.

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<sup>1</sup> ACTU, ISN, IFCC & AIST "Review into the Tax Office's administration of the Superannuation Guarantee Charge" July 2009

<sup>2</sup> Inspector-General of Taxation "Review into the ATO's administration of the Superannuation Guarantee Charge - Report to the Assistant Treasurer" March 2010.

This position is expected to improve as the system matures and more members benefit from larger contributions being made over a longer period.

Nevertheless, the extent of non-compliance as estimated by Tria paints a disturbing picture of the extent of avoidance of SG obligations that has the capacity to undermine expectations of the superannuation system, resulting in poor retirement savings outcomes and increased reliance on Government assistance.

### **Cbus arrears policy and practice**

Being an industry fund, Cbus has maintained a strong affinity with the building and construction industry throughout its 30 year existence which has resulted in an intimate understanding of the issues confronted by businesses and employees in the sector.

Business and employment in the industry is largely precarious because of the project nature of the work. In the 2012/13 financial year, some 57,000 businesses exited the industry with some 36,000 entering. The ABS notes that nearly all of the businesses working in the construction industry are small businesses and collectively are responsible for 82 per cent of all employment in the industry.

The industry employs over 1 million people. Many of those are self employed, with the industry having the second highest amount of self employed behind farming. The Inspector-General of Taxation (IGT) review into the ATO's administration of SG in 2010, noted ABS figures that showed at that time there was almost 1 million independent contractors, with nearly a third of those in construction.

Many more are employed on a project-to-project basis through labour hire firms.

The transient nature of the workforce is known and understood by Cbus and is one of the key drivers to the establishment of a national, portable, industry based superannuation fund.

The majority of Cbus' 90,000 participating employers accept the terms and conditions of the Cbus Trust Deed and their legal obligations to pay SG entitlements to their employees.

But the transient nature of the industry does present significant challenges in ensuring employee entitlements are being properly paid and that gaming the system or non-payment is not occurring by a minority of businesses for the purposes of establishing an unfair and unlawful cost arbitrage between business competitors.

Such gaming, as experienced by Cbus, includes 'short' or non-payment of superannuation entitlements.

Exacerbating this challenge is the incidence of sham contracting in the industry which sees some employers transferring obligations such as superannuation to individual workers.

The industry also has relatively high incidences of insolvency and company 'phoenixing'. The Australian Securities and Investment Commission (ASIC) stated recently that "The construction industry is the highest represented sector in illegal phoenixing activity."<sup>3</sup>

Cbus' Trustee, United Super Pty Ltd and its Board of Trustee Directors, has always taken very seriously its role in ensuring the fund is administered effectively, including its responsibility to ensure that superannuation monies owed are paid to members.

To meet this challenge, Cbus has in place a rigorous arrears process designed to establish a level playing field of payment timing across the industry with a built in early detection process of payment failure.

It is the Fund's experience that time counts in ensuring compliance with SG payments. Early detection of non-payment and intervention means a much greater likelihood of recovery of monies.

The Cbus Trust Deed provides that participating employers make superannuation payments on behalf of their employees monthly by the 1st day of the following month. Employers, upon joining the Fund, enter a contract accepting these payment terms.

Failure to make payment within 18 days of the due date triggers an arrears letter to be sent to the employer reminding them of their obligations under the Trust Deed of the Fund, requesting payment and offering assistance.

Should payment still not be received after the elapse of 28 days from the due date, a further arrears letter is triggered reminding employers of their obligations and the possibility of being subject to legal action. Employers with greater than 10 employees are also contacted by phone if they have not responded to the 1<sup>st</sup> arrears letter.

Through these interactions Cbus estimates that approximately \$53.5 million dollars in SG payments was collected in the FY13/14 on behalf of app. 96,000 members.

Coupled with our own efforts, our sponsoring organisations, trade unions and employer associations, also play a role in both educating members about Cbus requirements and in being parties to industrial agreements that often stipulate amounts of superannuation to be paid on behalf of employees, the fund to which they are paid and the timings of those payments.

The parties to those agreements have an interest and responsibility in ensuring that those agreements are complied with on behalf of their members and the industry at large. Our trade union sponsors effectively work with employers, employees and the Fund in ensuring SG payments are made.

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<sup>3</sup> "Big construction projects could be hiding phoenix scams" Australian Financial Review, 27 August 2008.



Should the Funds approach to employers via arrears letters not succeed in eliciting payment 48 days from the due date, we ask our credit control agency, Industry Funds Credit Control (IFCC) to take over the process.

With the non-payment issue being moved to IFCC, a 7 day demand call is placed to the employer. This is often a customer service type interaction in which a discussion is had to determine the reasons why payments have not been made and what action is required including establishing a repayment agreement if required.

Should a further 10 days elapse and payment not be received, a solicitors letter will be sent to the employer.

Should payment still not be received 48 days from the matter being transferred from the Fund to IFCC a demand call will be placed. Should this not result in a repayment agreement, legal action will be commenced that may lead to insolvency.

IFCC recovered more than \$55 million in unpaid Cbus members' superannuation in FY13/14. Over the past 20 years of its operation IFCC has recovered approximately \$1 billion in unpaid superannuation, the vast bulk of which would be SG.

Turning specifically to loss of superannuation through insolvency in the construction industry, IFCC statistics show that across a 10 year period, the number of Cbus insolvency cases (and therefore likely construction and building businesses) dealt with as a percentage of the total for all industry superannuation funds was 23.5%.

The IFCC statistics reveal:

#### **2003 to 2014**

1. No. of Insolvency Cases over the past 10 years:	<b>28,000 all industry Funds.</b>
2. No. of Cbus Cases:	<b>6590</b>
3. Amount of Money Recovered on Cbus Cases delivered to the Fund:	<b>\$ 15,226,214.20</b>
4. Amount of Money Recovered on Cbus Cases delivered to the ATO:	<b>\$ 13,490,821.29</b>
5. <b>*Amount of Estimated superannuation debt from insolvencies of Cbus employers across the period:</b>	<b>\$120,305,685.00</b>

**NOTE:** *\*The amount estimated superannuation amount is not always the actual debt from the books and records of the company; it may be based on the records of the Superannuation Employer Account. The estimated debt is calculated when the Insolvent Practitioner does not have reliable books and records to quantify the Insolvent Companies superannuation debt. We note that IFCC will not lodge a Proof of Debt if the Insolvency Practitioner advises that there will not be a dividend payment from the Insolvent action. Hence, the value of this debt in reality is far greater.*

Tria Investment Partners, drawing on ABS statistics and ASIC Insolvency Statistics estimate that insolvencies in the Australian construction industry saw \$34 million lost in SG payments in 2012 alone.<sup>4</sup>

An even more damning report was undertaken by Kingsway Financial Assessments Pty Ltd in 2012 looking into key findings from AISC insolvency data from 2010 – 2011.<sup>5</sup> Consistent with IFCC figures, the report found that there was 1,862 construction industry insolvencies in 2010/11 or 23% of all Australian insolvencies.

Kingsway estimated the total amount of money lost by creditors in construction related insolvencies at \$2.64 billion annually, noting, that of those creditors, employees “..In addition to losing their jobs, employees may lose superfund contributions...”<sup>6</sup>

The more recent ASIC Report 412 on Insolvency Statistics for July 2013 to June 2014 suggests that this figure continues to grow with 2,153 Initial external administrators reports lodged from the construction sector.<sup>7</sup>

Cbus acknowledges the flow-on implications of insolvency in the construction sector where a contract and sub-contract business chain is apparent. Clearly, a failure in this chain of contractual arrangements and payments can result in more than one company becoming insolvent as payment failure spreads downstream and where potential cost and time blow outs spread upstream.

The continued increase in the numbers of insolvency incidents and their impact on the construction industry, its employees and their entitlements warrants serious concern and response by governments at all levels.

#### Effects of losses of superannuation on employees

Again, while broader than just the implications of superannuation money lost due to insolvency in the construction industry alone, the economic and social effects of the impact of total non-compliance with SG payments may be instructive.

Tria estimates that some 650,000 working Australians miss out on some or all of their super contributions each year and that, on average they forego \$3,750 or nearly 9 months worth of superannuation contributions meaning they are 2% worse off in retirement for each year this persists (assuming 40 years of contributions).

This is magnified for low income and younger members. An average 25 year old impacted by SG non-compliance for 5 years loses 14% of their retirement income.<sup>8</sup>

The economic and social implications of such losses may be the impairment of Australian's to save enough superannuation to enjoy a comfortable retirement with the resulting affect being a greater reliance on the taxpayer through the Age Pension.

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<sup>4</sup> Tria Investment Partners, Superannuation Guarantee non-compliance, September 2014

<sup>5</sup> Kingsway Financial Assessments Pty Ltd, Corporate Insolvency in the Australian Construction Sector. February 2012. [www.kingswayassessments.com.au](http://www.kingswayassessments.com.au)

<sup>6</sup> Ibid, pg.3

<sup>7</sup> Australian Securities and Investment Commission, Insolvency Statistics: External administrators reports (July 2013 to June 2014) September 2014.

<sup>8</sup> Tria Investment Partners, Superannuation Guarantee non-compliance, September 2014, pg. 15

More broadly, extracting from the \$2.5 billion of non-compliance, the economy foregoes some \$375 million a year in tax revenue from this lost superannuation contribution.

According to Kingsway, \$2,644,725,000 is the estimated overall deficiency for insolvencies in the construction sector.<sup>9</sup> They go on to claim that this amount is roughly evenly divided amongst secured and unsecured creditors and that in 92% of cases “there is no return to unsecured creditors whatsoever”. Employee superannuation is treated as an unsecured ‘priority’ creditor.

The ASIC Report 412 states that “The dividend estimated as payable to unsecured creditors was less than 11 cents in the dollar for most reports (97%).”<sup>10</sup>

Of all the categories of Employee Entitlements, Unpaid Superannuation features most prominently in insolvency with nearly 42% of cases reporting amounts owed in unpaid superannuation.

Kingsway also make note in their 2012 report that the social impact of insolvencies in the construction industry “is a matter considered so serious that there is currently government funded research being initiated for the impact to be assessed.”<sup>11</sup>

Cbus would commend any existing work and recommend further work be undertaken in this area to better define the true economic and social cost of the problem.

#### Causes of construction industry insolvencies

The principle causes of insolvency in the construction industry, other than companies or contractors caught in the knock-on effects of the failure of upstream companies, rests with the adequacy of company management.

Kingsway’s report ranks the reasons as being:

1. Inadequate cash flow or high cash use
2. Poor strategic management of business
3. Poor financial control including lack of records
4. Poor economic conditions
5. Trading losses
6. Under capitalisation<sup>12</sup>

This is further supported by ASIC’s Report 412 that lists the top three nominated causes of failure for companies as:

1. Inadequate cash flow or high cash use (42.6% of reports)
2. Poor strategic management of business (42%)
3. Trading losses (32.5%)<sup>13</sup>

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<sup>9</sup> Kingsway Financial Assessments Pty Ltd. Pg. 10

<sup>10</sup> Australian Securities and Investment Commission, Insolvency Statistics: External administrators reports (July 2013 to June 2014) September 2014. Page 43

<sup>11</sup> Ibid pg.3

<sup>12</sup> Kingsway Financial Assessments pg. 6

<sup>13</sup> ASIC as cited

This tends to present an alarming, but perhaps not surprising, picture of business acumen and practice across the industry.

Cbus' experience of the non-compliance with the payment of superannuation as described above would support these findings. Coupled with sophisticated measures of avoidance, such as paying superannuation for a lesser amount of workers than are actually employed or only paying salary sacrifice amounts and not SG payments, the non-payment of superannuation equates with inadequate cash flow, high cash use (and the black economy) and poor financial control including lack of records.

On this latter point, Cbus' arrears process and field work exercises significant resources in ensuring payments made match up with member accounts and the lists of employees provided by management. It is not unusual for the records kept and submitted by businesses to be inadequate.

This highlights the need for an uplift in both the regulation of businesses through a more robust licensing regime and the skills requirement for business financial management.

Cbus would be supportive of measures designed to ensure that contractors or sub-contractors were able to demonstrate a financial capacity and wherewithal to meet the level of contract they are seeking through an appropriate licensing regime.

Such a regime may be coupled with qualification or adequacy checks of financial management skills and practices.

Cbus would also advocate the merits in trusts being established through which payments are set aside to ensure that those payments reach the sub-contractors or suppliers that they are intended for and are not used up in cash purchases for other related or non-related matters.

Cbus also believes that there is merit in exploring changes to the SG Act to align the payment of superannuation with the payment of wages to avoid non-compliance.

#### Phoenix Companies

Cbus has had many dealings with members who have lost superannuation money as a result of company "phoenixing" in the construction industry.

In most of these instances Cbus members lose superannuation entitlements without recourse.

Cbus often learns of 'phoenixing' like behaviour directly from members who have lost entitlements and seek assistance from the fund in trying to regain their monies.

Cbus can become aware of 'phoenixing' like operations when an employer liquidates their company, owing superannuation, however advice is then received that the companies employees have all transferred to another company often with the same directors or senior personnel operating in identical sectors of the industry.

However, phoenix trading is not always so obviously apparent to the Fund, unless investigations are triggered by a further failure in payment of superannuation entitlements.

Such investigations may lead to the discovery that the directors of a company may be the same as those of other known liquidated companies or examination of members details may result in the

discovery that they were previously employed by the liquidated company with the same directors as their current employer.

Attendance at creditor's meetings can also reveal that directors of a liquidated company opened up another company prior to voluntary administration, transferred employees to the new company leaving secured and employee debts unpaid, transferring assets and continuing to trade under a new company name.

There is very little that Cbus can do to ensure the payment of members' superannuation entitlements in such circumstances other than alert the relevant regulators to the suspected behaviour.

It is Cbus' observation that while the current laws and regulatory framework are robust in the context of phoenix behaviour, the regulators, the ASIC and ATO, simply do not have the resources to investigate and pursue illegal activity.

Nor do we believe that there is satisfactory cross referencing of records occurring of company directors that would allow for the flagging of those directors who had been involved in insolvencies.

However, more methods of 'phoenix' like trading are being deployed to avoid simple scrutiny of individual directors. Relationships must also be considered as often, to avoid detection, new companies will emerge under the directorship of family members of the previous liquidated company's director.

Cbus is continuing to develop its arrears process to better enable the Fund to pro-actively identify employers with histories of non-compliance with superannuation payment. One step that we will look to deploy is greater tracking of company directors and flagging known directors that have been involved in company insolvencies.

Cbus welcomes recent reports of the ATO's involvement with ASIC and the Fair Work Building and Construction Commission in investigating large construction projects for the existence of phoenix activities by contractors. This type of cross-regulator cooperation and pro-active investigation is to be encouraged.

We would also encourage closer work between regulators and industry participants such as Cbus to allow for greater information sharing, noting that such steps are being taken by the ASIC and the ATO.

### **Current law and regulatory framework**

The instances of insolvency across the construction industry continue to increase as demonstrated by the most recent ASIC figures.

Couple this increase in numbers of insolvency with the recognised problems of 'phoenix' activities, sham contracting, the prevalence of cash economy trading and avoidance of statutory obligations such as superannuation guarantee payments, and it would appear that the current law and regulatory framework is not operating effectively.

The ASIC Report 412 states that of the 13,950 initial external administrators' reports in 2013/14, 9,902 or 71% held evidence of possible breaches to civil obligations. A further 55 held possible criminal offences and a further 155 held possible misconduct.

Specific measures that the Committee should explore in relation to construction industry insolvency include those canvassed in the recent Collins Inquiry in NSW.

Cbus believes that there is merit in reviewing processes that may obviate insolvencies and there knock-on impact including the use of trusts to ensure payments are directed down the chain to sub-contractors and suppliers as undertaken and in a timely fashion.

The Collins Inquiry also investigated the practicality of a licensing arrangement that deems a contracting company financially fit and proper to undertake certain levels of contracted work. While such a scheme should be designed with relevant safeguards to avoid it being used to inhibit competition, innovation and potential, at certain budget levels such a system may have merit.

The additional benefit of a national licensing system could be to incorporate fit and proper person tests on the contracting company's directors, including, but not limited to:

- whether or not they had been associated with previous insolvencies and the circumstances of such insolvencies; and
- the extent of financial management skill retained in the company – including an audit of financial records and record keeping.

More broadly, in the matter of regulating the problem this submission highlights with the non-compliance with the payment of superannuation and a lack of pro-active regulation, Cbus submits that the regulatory framework is not sufficient, effective or adequate.

In part, this is a result of the lack of resources provided to regulation agencies such as the ATO and the ASIC.

As mentioned, Cbus' experience is that time counts when it comes to intervention to avoid loss of superannuation payments. Predictive and proactive activities by the ATO may have a significant bearing on compliance with SG and in understanding and assisting companies to avoid insolvency.

However, most of the ATO's resources given to SG compliance are absorbed in complaint handling. Complaints are usually not received until some 22 months from when the SG shortfall occurs and when an employee lodges a complaint with the ATO. This means that there is usually a 2 year gap between an investigation starting and the incident.

It is Cbus' experience that non-payment timeframes of beyond 6 months generally indicate that employers are in severe financial difficulty, require payment plans or are looking at insolvency.

While it is a very important task for the ATO to follow up all employee complaints, greater resourcing is needed to do this whilst also implementing greater proactive measures around compliance activities.

That appears less and less likely as efficiency dividends and planned reductions in the size of the public service announced by the current Government mean fewer staff and impacts on service standards.

The 2013 Annual Report of the ATO – report to the House of Representatives Standing Committee on Tax and Revenue in March this year revealed that the ATO had identified the need to reduce staffing by 900 Full Time Equivalent (FTE) employees. With the Commissioner indicating that there may be a reduction in service standards.

Unfortunately, such continued decreases in resources will not enable the ATO to expand its activities in the non-revenue raising sectors of their operations such as SG compliance, will continue to undermine stakeholder and public confidence and will likely embolden non-compliers.

Cbus is cognisant of the legislation passed following the 2010 IGT review of the ATO SG compliance, specifically the requirement to disclose superannuation payment amounts on payslips and the expansion of the Director penalty regime for unpaid SG monies.

While Cbus supports the reforms, the continued growing levels of SG non-compliance would seem to indicate that their effect has been limited. This may be a further consequence of the resourcing and policy restrictions binding the ATO in launching and promulgating prosecutions.

It may be advantageous for the regulation of compliance with superannuation payments that the investigative powers under the SG Act be transferred to the Fair Work Ombudsman (FWO).

The FWO is a body that is experienced in investigating businesses employment practices to ensure compliance with the payment of wages and allowances. Their checking of superannuation compliance would not entail a vast new activity as it could be undertaken as part of normal inspections.

The FWO is intimately acquainted with workplace law and provides information and assistance to businesses and employees. It employs an inspectorate and has a successful record of recovering unpaid entitlements.

#### **Recommendations:**

1. That the Inquiry give attention to SG non-compliance as a consequence of insolvency and illegal practices of 'phoenixing', sham contracting and recommend that Government ensure appropriate resourcing levels required to regulate compliance.
2. Given the advancement in technology platforms and the ability to effect electronic payments with relative administrative ease and given that superannuation is, in effect, the

deferred wages of employees and a legal requirement that employers must meet, consideration be given to amending the SG Act and/or any other relevant Act to require SG to be paid congruently with the payment of wages.

3. Give serious consideration and review extending SG compliance regulation to the Fair Work Ombudsman either in conjunction with the ATO or as the sole regulator. Ensure levels of resourcing of the regulatory body are maintained at levels commensurate with ensuring effective compliance of the SG Act.
4. Amend ATO provisions to allow for superannuation insolvency dividends to be paid by Insolvency Practitioners direct to affected employees Fund accounts.
5. Amend Privacy provisions to allow for greater flow of information between regulators and APRA regulated superannuation funds under binding Memorandums Of Understanding.
6. Amend the SIS Act to require and empower all APRA regulated funds to pursue payment of SG entitlements.
7. Ensure that quality filters are observed in the selection of default superannuation funds for industrial awards and agreements, over and above MySuper accreditation, that include specific requirements for such funds to have in place rigorous arrears collection processes.
8. Examine the recommendations of the Collins Inquiry in NSW and recommend national adoption of key measures including: the establishment of and operation of trusts to ensure payments are properly directed; and reviewing the efficacy of a licensing system for contracting employers that establishes a financial capacity qualification for construction firms and applies a fit and proper person test to contracting company directors.

In the practical context of the ATO and regulators:

1. Continued and increased contact and interaction between Funds, their administrators and service providers and the relevant regulatory bodies;
2. Increased pro-active measures being undertaken by the ASIC, the ATO and the Fair Work Building and Construction Commission (FWBCC) in relation to insolvency, phoenixing and SG compliance, including, but not limited to, developing predictive models, conducting a greater number of audits, working cooperatively inter-agency and with industry participants and targeting known 'problem' industries such as construction.
3. Improved communication between the ATO and APRA regulated funds, particularly in assisting in tracking recovery payments.

Improved practices around the recovery of SG debts in insolvency matters that allow for Insolvency Practitioners to direct dividend payments to the default fund for affected employees.