

Chapter 2

Background

Operation of the Superannuation Guarantee

2.1 The Superannuation Guarantee (SG) was introduced on 1 July 1992 with the enactment of the *Superannuation Guarantee (Administration) Act 1992* and the *Superannuation Guarantee Charge Act 1992*.¹

2.2 In conjunction with voluntary superannuation contributions and a means tested, government funded age pension, the SG system forms an integral part of Australia's retirement income policy. As noted by the Inspector-General of Taxation, the SG system 'relies upon the effective interaction and information flows between employers, employees and superannuation funds who all have a role to play.'²

2.3 Generally, if an employee is over 18 years of age and earning over \$450 per month, their employer is obligated make SG contributions on their behalf. The amount of SG that an employer is required to pay is a percentage of the employee's ordinary time earnings (OTE). OTE is, in the main, salary and wages paid less bonuses, overtime and termination payments related to unused annual leave. The current SG percentage commenced in July 2014 and is 9.5 per cent of OTE. It should be noted that the SG contribution rate is the minimum amount that must be contributed by employers, and that some awards and enterprise agreements require a higher rate be paid.³

2.4 Employers are generally required to make SG contributions to the complying superannuation fund of the employee's choice four times per annum. However, some superannuation funds, industrial awards, or contracts require that SG is paid more regularly (e.g. monthly). The quarterly payment due dates are set out in Table 2.1.

1 Australian Taxation Office, *Submission 6*, p. 5.

2 Inspector-General of Taxation, *Submission 21*, p. 1.

3 Australian Taxation Office, *Submission 6*, p. 6.

Table 2.1—quarterly timeframes for superannuation payments⁴

Quarter	Period	Payment due date
1	1 July–30 September	28 October
2	1 October–31 December	28 January
3	1 January–31 March	28 April
4	1 April–30 June	28 July

2.5 If an employer does not pay the correct SG contribution to an employee's nominated fund by the quarterly payment due date, they may be liable for the SG charge (SGC), payable to the Australian Taxation Office (ATO).⁵

2.6 The SGC is made up of three components:

- the shortfall amount (i.e. the amount of SG not contributed);
- nominal interest (currently set at 10 per cent from the beginning of the period); and
- an administration fee (currently \$20 per employee, per quarter).⁶

2.7 An employer subject to the SGC must lodge a SGC statement with the ATO, calculate the amount payable, and pay the charge by the due date for the relevant quarter. The ATO then forwards the shortfall and nominal interest component to the employee's superannuation fund.⁷

2.8 As the ATO noted in its submission:

The system was designed for employers to pay adequate and timely SG contributions direct to an employee's super fund. The SGC introduced a strong deterrent for employers not paying as they would incur significant penalties and administration fees.⁸

2.9 The administrative arrangements for the operation of the SG system are set out in the *Superannuation Guarantee (Administration) Act 1992* (SGA Act). The

4 Australian Taxation Office, *When to pay super*, www.ato.gov.au/Business/Super-for-employers/Paying-super-contributions/When-to-pay-super/, (accessed 2 March 2017).

5 Australian Taxation Office, *Submission 6*, pp. 6–7.

6 Australian Taxation Office, *Submission 6*, p. 7.

7 Australian National Audit Office, *Promoting Compliance with Superannuation Guarantee Obligations*, Audit Report No. 39, 2014-15, p. 14, www.anao.gov.au/sites/g/files/net2766/f/ANAO_Report_2014-2015_39.pdf (accessed 15 March 2017).

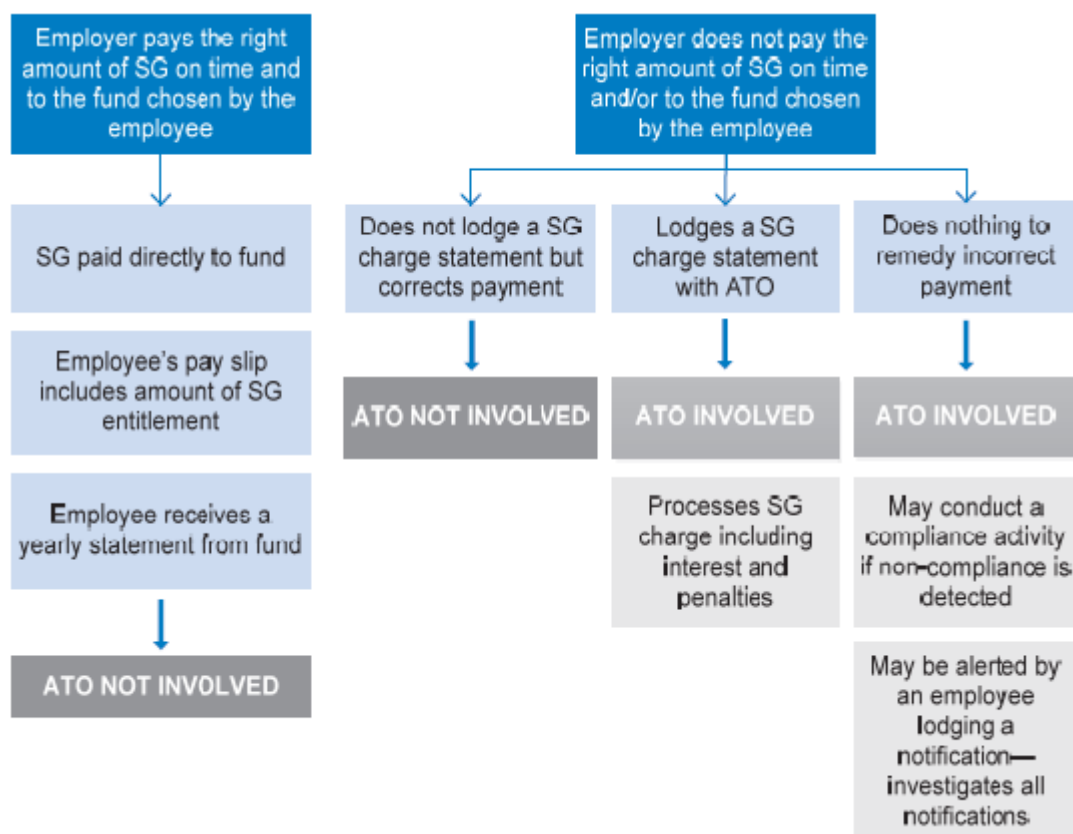
8 Australian Taxation Office, *Submission 6*, p. 5.

Commissioner of Taxation is responsible for the day-to-day administration of the SGA Act, and the ATO has a range of responsibilities under it. These responsibilities include:

- educating employers and employees about their responsibilities for SG;
- monitoring employer compliance with SG obligations;
- the receipt and redistribution of the SGC; and
- investigating employers for possible breaches of the SG legislation.⁹

2.10 In its 2015 performance audit report, the ANAO characterised the ATO's role in administering the SG system as follows:¹⁰

Figure 2.1—ATO's role in administering the SG scheme



2.11 The operation of the SG system also directly involves other stakeholders, such as superannuation funds. The *Superannuation Industry (Supervision) Act 1993* categorises superannuation funds into large funds, which are regulated by the

⁹ Australian Taxation Office, *Submission 6*, p. 6.

¹⁰ Australian National Audit Office, *Promoting Compliance with Superannuation Guarantee Obligations*, Audit Report No. 39, 2014-15, p. 37.

Australian Prudential Regulation Authority; and self-managed superannuation funds (SMSFs), which are regulated by the ATO.¹¹

2.12 Industry funds hold almost 40 per cent of all member accounts and under certain circumstances can intervene to pursue and collect superannuation contributions in arrears, which may include employing debt collection services.¹² Further discussion on the ability of third parties to detect and recover unpaid SG can be found in chapter 6 of this report.

2.13 For example, Industry Fund Services (IFS) provides a range of services to not-for-profit superannuation funds, with unpaid superannuation services covering arrears collection, enforcement and participation in insolvency proceedings. IFS acts on behalf of nine not-for-profit superannuation funds with members across a range of industries.¹³

2.14 The committee did not receive any evidence from retail superannuation funds, and as such is unable to comment on what actions they take in regard to following up unpaid SG for their members.

2.15 An employee who has cause to believe that their SG contribution has not been paid, or has been paid incorrectly, can lodge an enquiry (known as an employee notification or EN) with the ATO. The ATO aims to investigate all employee notifications and, where it considers it appropriate, audit employers to verify that the correct payments have been made.¹⁴ The ATO aims to commence 99 per cent of ENs within 28 days of receipt, and where an EN proceeds to audit, it aims to complete 50 per cent of compliance cases within 4 months, and 90 per cent within 12 months.¹⁵

2.16 According to the ATO's submission:

All ENs are investigated to establish the accuracy of the report through an initial review or audit action against the reported employer. Some 28 per cent of reports do not need to proceed to an audit case due to finding that the:

- employer is already being contacted
- employee withdraws report
- employee is covered by assessments already raised

11 Australian Taxation Office, *Submission 6*, p. 51; see also Australian National Audit Office, *Promoting Compliance with Superannuation Guarantee Obligations*, Audit Report No. 39, 2014-15, pp. 37–38.

12 Australian National Audit Office, *Promoting Compliance with Superannuation Guarantee Obligations*, Audit Report No. 39, 2014-15, pp. 37–38.

13 Industry Fund Services, *Submission 53*, p. 1.

14 Australian National Audit Office, *Promoting Compliance with Superannuation Guarantee Obligations*, Audit Report No. 39, 2014-15, p. 14.

15 Australian Taxation Office, *Submission 6*, p. 37. See also Chapter 6.

-
- employer is insolvent/bankrupt and the ATO is unable to pursue the debt
 - employment was more than 5 years ago and the employer is no longer required to keep records.¹⁶

Previous reviews into the operation of the SG system

2.17 Over many years there have been numerous reports examining the operation and administration of the SG system and various measures have been recommended to improve rates of SG compliance.

2.18 As far back as April 2001, the Senate Select Committee on Superannuation and Financial Services (the select committee) tabled its report into the enforcement of the Superannuation Guarantee Charge. Many of the concerns and suggestions the select committee noted in its report were similar to those raised during the course of the current inquiry. For example, the ATO's apparent lack of activity in pursuing defaulting employers and addressing individual complaints, the complexity of the SG system, and low levels of education among employers and employees with regard to superannuation rights and responsibilities were mentioned. In addition, the report noted support for more frequent SG payments and observed calls for more effective protection for employees who lose their SG contributions through employer non-compliance or insolvency.¹⁷

2.19 In March 2010, the Inspector-General of Taxation (IGT) published a review report titled 'Review into the ATO's administration of the Superannuation Guarantee Charge'.¹⁸ The report found that while the SG system worked well for the majority of individuals, those employees most at risk within the system were amongst the most vulnerable in society. The IGT made seven recommendations aimed at better supporting the underlying SG policy intent and improving compliance with the relevant obligations. The IGT submission to the inquiry noted that the government and the ATO had implemented a number of these recommendations, resulting in a degree of alleviation of the difficulties faced. However, the IGT noted that, as evidenced by the ongoing complaints regarding unpaid SG entitlements and the frustrations encountered by employees in recovering unpaid amounts, challenges still exist in the administration of the SG system.¹⁹

16 Australian Taxation Office, *Submission 6*, p. 27.

17 Senate Select Committee on Superannuation and Financial Services, *Enforcement of the Superannuation Guarantee Charge*, April 2001, pp. xi–xii, www.aph.gov.au/Parliamentary_Business/Committees/Senate/Former_Committees/superfinan/completed_inquiries/index (accessed 17 March 2017).

18 Inspector-General of Taxation, *Review into the ATO's administration of the Superannuation Guarantee*, 2010, <https://cdn.tspace.gov.au/uploads/sites/16/2014/12/super-guarantee-charge.pdf> (accessed 17 March 2017).

19 Inspector-General of Taxation, *Submission 21*, pp. 1–2.

2.20 More recently, in 2015 the Australian National Audit Office (ANAO) published a performance audit of the ATO and its work in promoting compliance with SG obligations.²⁰ As outlined by the ANAO at its appearance at a public hearing:

The audit concluded that the ATO's administration of the super guarantee scheme had been generally effective, particularly having regard to the scale of the scheme and the substantial flow of legislative revenue generated. The audit noted that the ATO carries out a wide range of activities to promote compliance and to help employers and employees understand their super guarantee rights and obligations... The audit identified scope for the ATO to better target its compliance activities and more effectively promote employer compliance with super guarantee obligations. In particular, the ATO should gain a greater understanding of the level of noncompliance with super guarantee obligations across industry sectors and types of employers.²¹

2.21 The audit contained four recommendations directed at the ATO, centring around: better analysing non-compliance and further engaging with superannuation stakeholders; emphasising the enforcement role of the ATO in education material; better coordinating compliance activities within the agency; and evaluating the effectiveness of compliance activities. The ATO agreed with all four recommendations.²²

2.22 The IGT also informed the committee that in 2016 it completed a review into the ATO's employer obligations compliance activities, which included an examination of opportunities to reduce employers' regulatory burden in complying with SG obligations whilst improving voluntary compliance.²³ The terms of reference focused on easing the compliance burden for employers and evaluating the ATO's conduct of compliance activities. The full terms of reference can be found at Appendix 3.²⁴

2.23 The IGT noted in its submission that the review report is currently with the Minister and not yet publicly released.²⁵

20 Australian National Audit Office, *Promoting Compliance with Superannuation Guarantee Obligations*, Audit Report No. 39, 2014-15.

21 Mr Andrew Morris, Executive Director, Australian National Audit Office, *Committee Hansard*, 3 March 2017, p. 30.

22 Australian National Audit Office, *Promoting Compliance with Superannuation Guarantee Obligations*, Audit Report No. 39, 2014-15, pp. 28–30.

23 Inspector-General of Taxation, *Submission 21*, p. 2.

24 Inspector-General of Taxation, *Review into the ATO's Employer Obligations Compliance Activities – Terms of Reference and Submission Guidelines*, <http://igt.gov.au/publications/reports-of-reviews/atos-approach-to-employer-obligations-compliance-activities/> (accessed 6 March 2017).

25 Inspector-General of Taxation, *Submission 21*, p. 2.

Multi-agency working group on SG non-compliance

2.24 On 25 January 2017, the Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP, announced that in December 2016 a multi-agency working group had been established to investigate and develop practical recommendations to deal with SG non-compliance.²⁶

2.25 The working group is comprised of senior representatives from the following government bodies:

- the Australian Taxation Office;
- the Department of the Treasury;
- the Department of Employment;
- the Australian Prudential Regulatory Authority; and
- the Australian Securities and Investments Commission.²⁷

2.26 The multi-agency working group has the following terms of reference:

- 1) Analyse the information and data available in order to establish [a] 'fact base' and to identify characteristics and detect drivers of superannuation guarantee non-compliance. Also have reference to:
 - a) the extent of non-compliance amongst insolvent employers
 - b) the extent to which salary sacrifice is used to meet superannuation guarantee obligations.
- 2) Develop and consider administrative options to improve compliance and foster participation in the superannuation guarantee by employers. Have reference to:
 - a) information about superannuation guarantee payments coming to the ATO
 - b) the use of deterrents, such as prosecutions and audits
 - c) review service offerings to support employers (including understanding the employee/contractor distinction), such as online forms and tools for employers
 - d) the role of superannuation funds to assist employer compliance.
- 3) Develop and consider policy options to address superannuation guarantee non-compliance, including potential legislative change. Have reference to:

26 The Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services, 'Government acting on Super Guarantee non-compliance', *Media release*, 25 January 2017.

27 Australian Taxation Office, answers to questions on notice, 10 February 2017 (received 27 February 2017), p. 2.

- a) potential to improve compliance through collection of more timely and accurate data
- b) the frequency of employers paying superannuation guarantee
- c) the appropriateness of penalties and interest rates for non-compliance.²⁸

2.27 The ATO informed the committee that as the focus of the working group was on clarifying internal views and establishing a 'fact base', as at February 2017 no consultation with external stakeholders in the superannuation industry had been undertaken. The ATO noted however, that it was possible that some targeted consultation may be undertaken by individual agencies in the process of finalising recommendations.²⁹

2.28 The working group was due to report to the Minister by the end of March 2017. An interim report was provided to the Minister on 31 January. At the time of the committee's report being drafted, the interim report had not been released publicly, nor had the final report.

2.29 The committee heard from members of the working group during a public hearing in Canberra. The evidence received during this session will be examined in chapter 4.

Committee view

2.30 The committee is aware that there has been, and continues to be, work conducted on aspects of SG non-compliance and the SG system in general, and notes the findings of the previous reports around the topic. In particular, the committee awaits with interest the findings of the multi-agency working group on SG non-compliance, noting that the working group terms of reference encompass matters similar to those covered in the committee's inquiry. Additionally, the committee looks forward to the release of the 2016 IGT review report into the ATO's employer obligations compliance activities.

Recommendation 1

2.31 In the interests of better informing the debate on the current state of the SG system, the committee recommends the Minister for Revenue and Financial Services publicly release the interim and final reports of the multi-agency working group on SG non-compliance, as well as the 2016 review by the Inspector-General of Taxation as soon as is practicable.

28 Australian Taxation Office, answers to questions on notice, 10 February 2017 (received 27 February 2017), pp. 1–2.

29 Australian Taxation Office, answers to questions on notice, 10 February 2017 (received 27 February 2017), p. 4.