

The Senate

Economics
References Committee

Superbad – Wage theft and non-compliance of
the Superannuation Guarantee

May 2017

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Overview and list of recommendations

The Superannuation Guarantee (SG) system—in conjunction with voluntary superannuation contributions and a means-tested, government-funded age pension—forms an integral part of Australia's retirement income policy.

As such, the committee is deeply concerned by recent analysis by Industry Super Australia that indicates that employers failed to pay an aggregate amount of \$5.6 billion in SG contributions in 2013-14. The committee is keenly aware that this amount represents 2.76 million affected employees, with an average amount of over \$2000 lost per person in a single year.

The negative impacts of non-payment of the SG are pervasive and affect several distinct groups: namely employees, employers and the government. Evidence received by the committee clearly indicates that a failure to adequately detect and address SG non-compliance causes long-term financial detriment to millions of Australian employees, significant competitive disadvantage to compliant employers, and an unnecessary impost to government finances through additional reliance on the age pension. In this regard, the committee is particularly concerned that the individuals most at risk of the negative impacts of SG non-payment often come from the most vulnerable groups in Australian society.

The committee is of the opinion that SG forms a vital component of an employee's remuneration. The committee strongly believes compulsory superannuation should be categorised as deferred wages that rightfully belong to an employee. While the non-payment of SG is immediately reflected in reduced superannuation balances, in the long term it also robs an employee of the benefits of investment earnings and compound interest. This is unacceptable.

The adverse economic impact of SG non-payment on employees is stark. Employees forego their rightful SG entitlements, leading to a loss of retirement income. This in turn lowers their standard of living in retirement and potentially increases their reliance on the age pension.

Additionally, the committee is concerned that employers who comply with their SG obligations must compete against non-compliant employers with an unfair competitive advantage. Without an effective suite of enforcement mechanisms compliant businesses may be incentivised to become non-compliant which would exacerbate the current situation.

A more proactive stance

As a result of evidence received from numerous submitters to this inquiry, the committee has concluded that the current approach of the Australian Taxation Office (ATO) to identifying and addressing SG non-compliance is inadequate. The

committee believes that the ATO's current reactive approach is problematic, and recommends that the ATO shift the balance to a more proactive stance.¹

Given the significant size of the fiscal impact of SG non-payment on the government in terms of lost government revenue and increased reliance on the age pension, as well as the detrimental impacts on employees and compliant businesses, the committee feels that it is necessary and wholly reasonable for the government to consider stronger, more proactive compliance activities in the SG space.

The SG gap

During the course of this inquiry it became apparent to the committee that due to various data gaps, it is difficult to precisely estimate the extent of non-payment of SG in Australia. Although critical of the estimate put forward by Industry Super Australia, the ATO was unable to provide the committee with an alternative figure. The committee is surprised at the ATO's apparent reluctance to engage with the issue of producing an SG gap, particularly as the matter has been raised in numerous reviews dating back to 2010. The committee strongly believes that there is a compelling need for a reliable SG gap figure produced yearly in order to track rates of SG non-payment, analysing which policies are effective, and ultimately minimising the problem.²

Addressing deliberate non-compliance

The committee is also concerned about certain instances of deliberate and repeated non-compliance with SG obligations by unscrupulous employers. The committee is of the opinion that the current SG Charge (SGC) framework, with its reliance on employer self-reporting, should be reviewed in order to ensure that SGC penalties are strong enough to act as a proper deterrents.³

Into the digital age

Given the recent advances in data capture, sharing and storage, the committee considers it is crucial that the SG system move towards a framework, both in terms of design and operational activities, which fully utilises the technological capabilities available in this digital information era. The committee strongly believes that moving SG compliance from the 'paper age' to the 'digital age' will enable a greater focus on proactive methods. This will in turn increase the effectiveness of efforts to detect and remedy SG non-compliance.⁴

Recommendations

The committee has made 32 recommendations intended to address the significant problem of SG non-compliance:

-
- 1 See recommendations 12, 13 and 19, as well as related recommendations 17, 27, 28, 29 and 30 for measures relating to the ATO's interaction with other agencies.
 - 2 See recommendations 1 and 2.
 - 3 See recommendation 16.
 - 4 See recommendations 3, 5, 31 and 32.

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.

Recommendation 2

3.31 The committee recommends that the ATO prioritise its work on calculating and publishing an accurate, reliable estimate of the SG gap. Additionally, the committee recommends that the ATO commit to publishing the SG gap annually in order for progress to be tracked over time.

Recommendation 3

5.26 The committee recommends that the government strongly consider introducing amendments to the SGA Act to remove the \$450 monthly threshold on SG eligibility.

Recommendation 4

5.43 The committee recommends the government introduce amendments to the SGA Act to ensure that an employee's voluntary salary sacrificed superannuation contributions cannot count towards the employer's compulsory SG obligation, nor reduce the OTE base upon which SG is calculated.

Recommendation 5

5.55 The committee recommends that the government strongly consider introducing amendments to the SGA Act to require SG to be paid at least monthly, and preferably in alignment with regular pay cycles.

Recommendation 6

5.71 The committee recommends that the government investigate options to extend the ATO's current private binding advice and administratively binding advice frameworks to make them available to workers as well as businesses.

Recommendation 7

5.85 The committee recommends the government review the definition of Ordinary Time Earnings for the purposes of SG obligation calculations and undertake an examination on the wider implications of any potential changes.

Recommendation 8

5.105 The committee recommends the government consider further initiatives that will assist small business employers in managing their cash flow responsibly in order to provide them the best possible chance of fulfilling their SG obligations.

Recommendation 9

5.119 The committee recommends the government consider amending the SGA Act to extend liabilities of unpaid SG to corporate entities, similar to the expanded accessorial liability provisions for franchisors and holding companies in relation to

unpaid wages, as proposed in the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

Recommendation 10

6.40 The committee recommends that the ATO continue to improve its communication process with individuals to keep them promptly and meaningfully informed of the progress of their employee notification.

Recommendation 11

6.42 The committee recommends that before entering into a payment plan to recover SG from a non-compliant employer, the ATO be required to notify the affected employee and gain their consent to the course of action.

Recommendation 12

6.44 The committee recommends the ATO give consideration to more proactive SG initiatives, such as the options put forward by the Inspector-General of Taxation to incorporate random audits into its SG compliance activities.

Recommendation 13

6.46 The committee recommends that the government review ATO resource levels to ensure that the agency is well-equipped to undertake effective and comprehensive compliance activities to combat SG non-payment.

Recommendation 14

6.59 The committee recommends that the government consider a legislated option for employees, or third parties acting on their behalf, such as unions or superannuation funds, to take private legal action in the relevant courts against their employers for unpaid SG.

Recommendation 15

6.62 The committee recommends that superannuation funds seeking default status in industry awards be required to have a rigorous arrears collection process in place.

Recommendation 16

6.72 The committee recommends that the government review the SGC regime and its management by the ATO to ascertain whether it is adequate, with a view to increasing penalties for deliberate and repeated acts of non-compliance by employers.

Recommendation 17

6.85 The committee recommends that the ATO review all current compliance and recovery activities related to unpaid SG to determine which ones should remain with the ATO, and which ones could be transferred to, or shared with, the Fair Work Ombudsman. As a starting point, the committee recommends that the Fair Work Ombudsman begin to receive and act on SG non-payment complaints where appropriate, rather than simply referring the affected employees to the ATO.

Recommendation 18

6.86 The committee recommends that the government consider increasing the resource levels of the Fair Work Ombudsman to ensure it is properly equipped to carry out any additional SG compliance or recovery activities it may acquire from the ATO.

Recommendation 19

6.97 The committee recommends that the government investigate potential legislative amendments to strengthen the ATO's current ability to recover SGC liabilities through the Director Penalty Notice framework in order to stop company directors undertaking fraudulent phoenix activity and avoiding their SG obligations.

Recommendation 20

6.105 The committee recommends that the government consider implementing a Director Identification Number scheme to prevent individuals engaging in illegal phoenix activity and repeatedly avoiding SG obligations.

Recommendation 21

6.112 The committee recommends that the government consider amending the Corporations Act to ensure that the priorities in section 556 apply during all liquidations, regardless of whether the business being liquidated was operated through a trust structure.

Recommendation 22

6.118 The committee recommends that the government consider amending the SGA Act so that nominal interest on SGC in the case of insolvencies apply up to the date of liquidation, in alignment with other creditors as set out in the Corporations Act.

Recommendation 23

6.119 The committee recommends that the government consider amending the SGA Act to allow insolvency practitioners to pay outstanding SG contributions directly to an employee's superannuation fund.

Recommendation 24

6.144 The committee recommends that the relevant government agencies undertake further research into the fiscal and legislative impacts of an expansion of the current Fair Entitlements Guarantee scheme to cover unpaid SG entitlements.

Recommendation 25

7.11 The committee recommends that the government revise the information that APRA regulated superannuation funds must include in Member Contribution Statements to include a breakdown of each category of superannuation payment an employee has received, as well as the employer it was received from.

Recommendation 26

7.26 The committee recommends that the ATO and ASIC review their data sharing arrangements to ensure that information on insolvency cases is being referred in a timely manner from ASIC to the ATO.

Recommendation 27

7.27 The committee recommends that the ATO and ASIC work together to collect data on abandoned companies to produce a comprehensive picture on the levels of unpaid SG contributions left by such companies.

Recommendation 28

7.29 The committee recommends that the ATO and FWO review their memorandum of understanding to consider whether more frequent information exchanges would improve their SG compliance activities.

Recommendation 29

7.32 The committee recommends that the ATO and ASIC increase their formal cooperation with superannuation funds to coordinate measures around early detection of non-payment of superannuation guarantee.

Recommendation 30

7.33 The committee recommends that privacy provisions which may inhibit information flows between the ATO and APRA regulated superannuation funds be reviewed and that the ATO seek advice from the Office of the Australian Information Commissioner as to the extent to which protection of public revenue exemptions in the Australian Privacy Principles might facilitate improved information sharing.

Recommendation 31

7.54 The committee recommends that the government strongly consider expanding Single Touch Payroll to all businesses, with equal consideration given to how small businesses could be best supported in adopting the initiative. The committee recommends that Single Touch Payroll apply to all employees and contractors on an employer's payroll. The committee also recommends that the government give consideration to whether STP should require both the reporting and payment of tax and superannuation obligations.

Recommendation 32

7.65 The committee recommends that the Fair Work Regulations 2009 be amended to require:

- the amount of earnings that the SG is calculated on;
- any voluntary superannuation contributions due;
- compulsory SG due; and
- all amounts of superannuation (both voluntary and compulsory) paid into an employee's superannuation fund (rather than just the amounts accrued).

Chapter 1

Introduction

Inquiry terms of reference

1.1 On 1 December 2016, the Senate referred an inquiry to the Senate Economics References Committee (the committee) into the impact of non-payment of the Superannuation Guarantee (SG).¹

1.2 The terms of reference for the inquiry were:

(a) the economic impact on:

- (i) workers, their superannuation balances, and retirement incomes,
- (ii) competitive neutrality among employers, and
- (iii) government revenue, including forgone superannuation contributions, earnings taxes, and SG charge penalties, over both the forward estimates and the medium term;

(b) the accuracy and adequacy of:

- (i) information and data collected by the Australian Taxation Office (ATO), the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission on SG non-payment,
- (ii) information and data collected by other agencies, such as the Fair Work Ombudsman, on SG non-payment, and
- (iii) any legislative, privacy, or other reporting barriers preventing the collection of accurate information and data on SG non-payment;

(c) the role and effectiveness of:

- (i) the ATO monitoring, investigations, and recovery of unpaid SG, including technology and data collection to predict and prevent non-payment,
- (ii) resources and coordination between government agencies and other stakeholders to prevent non-payment,
- (iii) legislation and penalties to ensure timely and fair payment of SG,

1 *Journals of the Senate*, No. 23, 1 December 2016, p. 754.

- (iv) superannuation funds in detecting and recovering unpaid SG,
 - (v) employment and contracting arrangements, including remedies to recoup SG in the event of company insolvency and collapse, including last resort employee entitlement schemes, and
 - (vi) measures to improve compliance with the payment of SG;
- (d) the appropriateness of responses by:
- (i) the ATO receiving complaints and ‘tip-offs’ about SG non-payment,
 - (ii) members of Parliament asked to assist and support constituents who have been impacted by SG non-payment, and
 - (iii) accountants, auditors, creditors and financial institutions who become aware of SG non-payment; and
- (e) any other related matters.²

Conduct of the inquiry

1.3 The inquiry was publicised on the committee's website.³ The committee also wrote to key stakeholder groups and organisations to invite submissions.

1.4 The committee received 72 submissions which are listed at Appendix 1.

1.5 The committee held three public hearings:

- 25 January 2017 in Melbourne;
- 3 March 2017 in Canberra; and
- 14 March 2017 in Melbourne.

1.6 The witness lists for these hearings are available at Appendix 2.

Structure of the report

1.7 During the course of the inquiry, the committee identified a wide range of matters related to the non-payment of SG.

2 *Journals of the Senate*, No. 23, 1 December 2016, pp. 754–755.

3 Senate Standing References Committee on Economics, Superannuation Guarantee non-payment, www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/SuperannuationGuarantee (accessed 1 March 2017).

1.8 Chapter 2 provides background information on the operation of the SG system. It notes the previous reviews into the system and briefly canvasses the remit of the government's multi-agency working group on SG non-compliance.

1.9 Chapter 3 examines the extent of SG non-payment in Australia. It also considers the challenges impeding the calculation of an accurate SG gap by the ATO.

1.10 Chapter 4 provides an in-depth examination of the impacts of SG non-payment. It considers the impact of SG non-payment at three levels; that of the individual employee, business, and government.

1.11 Chapter 5 analyses the causes of SG non-payment. Based on the evidence received during the inquiry, the chapter identifies factors that contribute to SG non-payment and recommends solutions to mitigate the impacts of these factors.

1.12 Chapter 6 examines matters relating to efforts to address SG non-compliance. It seeks to evaluate the effectiveness of the ATO's work in the area and considers the role of third parties in identifying and recovering unpaid SG. It also canvasses the division of responsibilities between the ATO and the Fair Work Ombudsman in regard to SG compliance. Finally, the chapter turns its attention to a number of SG matters arising from employer insolvency.

1.13 Chapter 7 considers the accessibility and timeliness of SG data, with a focus on the current information sharing arrangements between government agencies. The chapter also discusses potential remedies for SG non-payment, including the Single Touch Payroll initiative and improved payslip reporting.

Acknowledgment

1.14 The committee thanks those individuals and organisations who contributed to the inquiry by preparing written submissions and giving evidence at public hearings.

Notes on references

1.15 References in this report to the Hansard for the public hearings are to the Proof Hansard. Please note that page numbers may vary between the proof and official transcripts.

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).

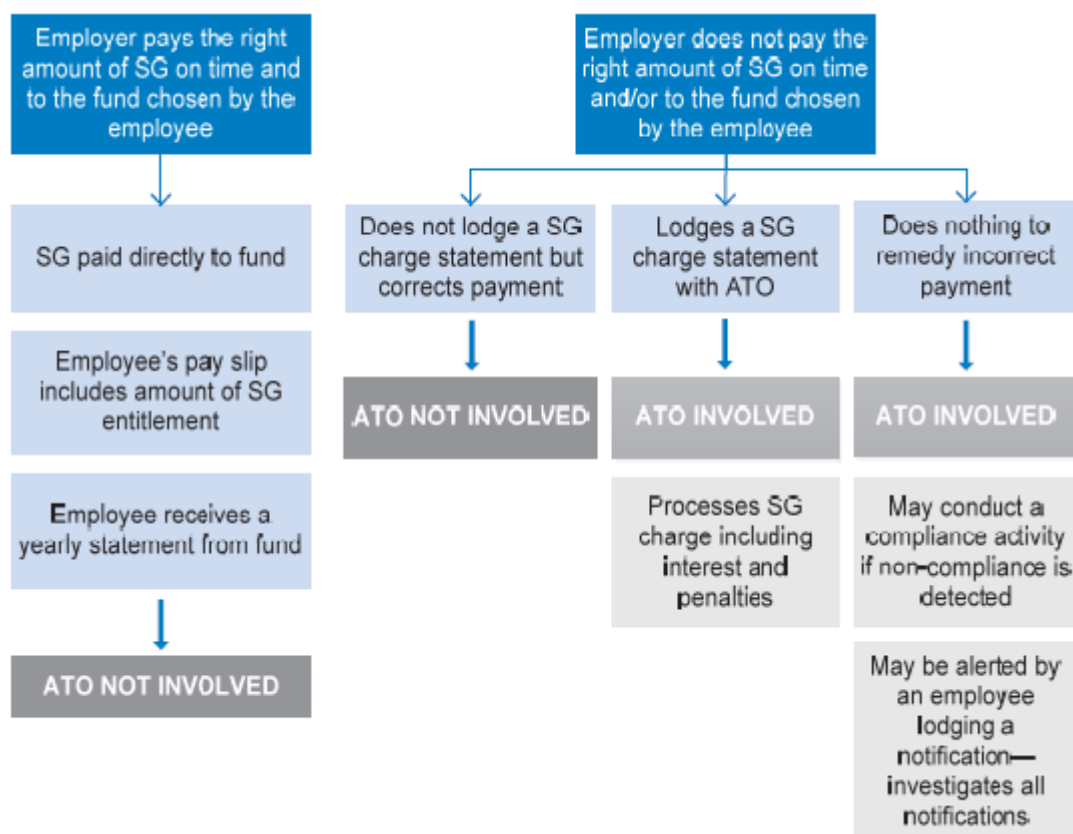
8 Australian Taxation Office, *Submission 6*, p. 5.

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

Table 2.2—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.apf.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.

Chapter 3

Extent of SG non-payment

The extent of SG non-payment

3.1 It became apparent during this inquiry that due to various data gaps, it is difficult to precisely estimate the extent of non-payment of SG in Australia.¹ This issue and its ramifications are discussed in this chapter.

Industry Super Australia's estimate

3.2 According to Industry Super Australia's (ISA) submission, the report 'Overdue: Time for action in unpaid super' released by ISA and Cbus in December 2016, Australian employers failed to pay at least \$3.6 billion in SG contributions in 2013-14.²

3.3 The two components of this combined estimate are:

- underpayment of SG for Pay As You Go (PAYG) employees and sham contractors³, which ISA estimates as at least \$2.8 billion in 2013-14; and
- unpaid superannuation for workers employed in the cash economy, which research by Tria Investment Partners (Tria) for Cbus estimates added a further \$800 million to the total amount of unpaid superannuation.⁴

3.4 The report noted that this estimate equated to 30 per cent of employees (approximately 2.4 million individuals) not being paid part or all of their compulsory superannuation. The report also stated that on average, affected employees missed out on approximately \$1500 (or approximately four months of SG) of superannuation contributions.⁵

3.5 The following table is based on the submission and summarises the report's findings.

1 For the purposes of this report, the term 'non-payment of SG' also refers to the delayed or underpayment of SG.

2 Industry Super Australia, *Submission 7*, p. 3.

3 Sham contracting refers to a situation where an employer attempts to disguise an employment relationship as an independent contracting arrangement, usually for the purpose of avoiding responsibility for employee entitlements.

4 Industry Super Australia, *Submission 7*, p. 3.

5 Industry Super Australia, *Submission 7*, pp. 2–3.

Table 3.1—Estimated impact of SG non-compliance for 2013-14⁶

Estimate of:	ISA underpayment	Tria cash economy	Combined estimate
Dollars lost 2013-14	\$2.8 billion	\$0.8 billion	\$3.6 billion
Number of workers affected	2,150,000	277,000	2,427,000
Average effect on workers affected	\$1,309	\$2,888	\$1,489
Proportion of all SG employees in 2013-14	27 per cent	3 per cent	30 per cent
Average months of contributions lost for those affected	3.3	7.6	3.8

3.6 In a supplementary submission dated March 2017, ISA provided the committee with a revised estimate of the extent of SG non-payment, putting the 2013-14 figure at \$5.6 billion. The supplementary submission noted:

Our December [2016] report projected that 2.4 million Australians are being underpaid by a conservative estimate of at least \$3.6 billion. We have revised our research, removing estimates for the black economy used in December, and using only ATO tax file data for 2013-14. Our revised projections show that 2.76 million people were affected in that financial year by an average amount of \$2,025 per person, or an aggregate amount of \$5.6 billion.⁷

3.7 The supplementary submission went on to provide further detail on the predicted cumulative impact on retirement savings:

Using only official ATO data, ISA estimates the SG gap is \$5.6 billion per year; \$5.45 billion of this is for people aged 20–64 years of age. ISA estimates that 2.69 million [people] aged 20–64 are underpaid. If this continues to occur in the workforce each year from 2013-14 to 2023-24, ISA projects the cumulative impact on retirement savings would be \$102 billion. Table 8 shows this projection, which assumes wage growth consistent with the forward estimates, ABS projected growth, the scheduled rise in the SG rate and 5 per cent returns.

Table 8 – Growth in the Impact on Savings over a Decade

Year ending June	Cumulative gap
2014	\$5.59 billion
2015	\$11.84 billion

6 Industry Super Australia, *Submission 7*, p. 5.

7 Industry Super Australia, *Submission 7.1*, p. 1.

2016	\$18.62 billion
2017	\$25.98 billion
2018	\$33.98 billion
2019	\$42.68 billion
2020	\$52.16 billion
2021	\$62.45 billion
2022	\$74.09 billion
2023	\$87.21 billion
2024	\$101.95 billion

Source: ISA projections based on wage growth consistent with the forward estimates, ABS projected population growth, the scheduled rise in the SG rate and 5 per cent returns.

A shortfall in retirement savings of over \$5 billion per year will have a significant impact on retirement incomes...a single year's underpayment is associated with a lower balance of \$23,860 for 60-64 year olds, but we do not have direct information on historical underpayment. In the absence of longitudinal data, it might be useful to note that a balance difference of \$23,860 would imply \$1,200 less per year in an allocated pension payment and \$388 per year more in age pension (if assessed at the higher income test deeming rate of 3.25 per cent).⁸

3.8 ISA also explained the revised modelling to the committee:

The estimates in our December report combined ISA estimates of underpayment (but not nil payment), in the SG population with estimates produced by Tria Investment Partners (for Cbus) of the black economy where workers were not receiving SG at all. These combined estimates are conservative. Addressing the Terms of Reference of the current inquiry requires the detail of a single unit record source of data.

Accordingly, ISA has revised its estimates to include people not paid any SG even though they are in the SG population (operationally defined as wage and salary earners aged 20 or more, earning about \$5,400 in wages, not having a partnership or trust income and not satisfying the ten per cent income test rule).

In our revised research, removing estimates for the black economy used in December, and using only ATO tax file data for 2013-14, we find there are more people underpaid SG and a significantly higher dollar gap...

ISA has modelled these projections using the ATO 'matched data' 2 per cent sample file of personal tax and MCS [member contribution statement] data sets. The ATO could further refine ISA projections by using the complete 'matched data' file, adjusting OTE [ordinary time earnings] on a more

granular level by industry sector, income, gender and age, adding Division 293 tax data [tax arrangements for high income earners] and removing defined benefit cases from the eligible SG population.⁹

3.9 The committee asked the ANAO whether it had any comments on the ISA methodology. Ms Isabelle Favre, Senior Director at the ANAO noted:

I am not an economist, so I will be very careful. It seems to be a very thorough and cautious methodology. The estimates put forward are systematically the most conservative of the different methodologies that they have used. Given that an estimate is just that – an estimate – and it is meant to help direct a compliance strategy for the ATO, for instance, and we know it is an estimate, there is a risk that the estimate is not correct. But it still seemed to be good enough to be used for directing a compliance strategy.¹⁰

3.10 Mr Andrew Morris, an Executive Director at the ANAO further clarified:

While we would not comment on the particular methodology, it would complement well the top down approach. The ATO has the top-down approach for the SG gap and it would also be useful for that more bottom-up approach to be able to identify the number of employees, say, or employers that are not compliant. If it is also able to target some of the industries and sectors – if it goes that far, that would complement the gap analysis.¹¹

ATO response to ISA estimate

3.11 The ATO responded to the December 2016 estimate of the SG non-payment, asserting that the ISA figure 'substantially overstates' the prevalence of SG underpayments.¹²

3.12 The ATO noted that the modelling used by ISA, while valid, is different to the proposed ATO approach to estimating the SG gap, as the ATO approach is a 'top down approach' which does not seek to estimate the number of employees underpaid.¹³

3.13 The ATO submission explains:

9 Industry Super Australia, *Submission 7.1*, p. 1.

10 Ms Isabelle Favre, Senior Director, Australian National Audit Office, *Proof Committee Hansard*, 3 March 2017, p. 32.

11 Mr Andrew Morris, Executive Director, Australian National Audit Office, *Proof Committee Hansard*, 3 March 2017, p. 33.

12 Australian Taxation Office, *Submission 6*, p. 12.

13 Australian Taxation Office, *Submission 6*, p. 12.

We do not consider the number of people identified with an amount of SG underpayment in the ISA report to be reliable as the report uses 'averages' to reach a specific estimate, rather than an estimate expressed within a 'range'.

The ATO considers that the 'tolerance threshold'; used to determine the 2.15 million people reported with an apparent SG underpayment in the report is too high. The report used a tolerance threshold of 8.5 per cent across the entire population.

A 'tolerance threshold' is an adjustment to the rate of superannuation on the salary or wage figure to account for the fact that salary or wages reported may exceed ordinary time earnings (OTE) (because of aspects such as overtime, allowance, etc.).

We therefore believe the adjustments for OTE used in the report are insufficient to account for the difference seen with employment models and work practices across various broad industries.¹⁴

Lack of alternative SG gap figure from the ATO

3.14 Although criticising the ISA estimated extent of the SG gap, the ATO was unable to provide the committee with an alternative figure.

3.15 The ATO informed the committee that although work is currently being undertaken on the matter, the task is a challenging one and the agency is yet to establish a reliable estimate, noting 'while the methodology is considered to be sound there is in a statistical sense a low level of confidence'.¹⁵

3.16 The committee queried the ATO on its apparent reluctance to engage in and prioritise the issue of establishing an accurate estimate of the SG gap, particularly given that previous reviews, dating back to 2010, included recommendations that this be the case.¹⁶

3.17 Mr James O'Halloran, the ATO Deputy Commissioner responsible for Superannuation, responded by reiterating that the ATO had made a commitment to estimate gaps for all taxes and programs administered by the ATO. He stated:

I am not sure I would characterise it as resistance... There is a public commitment from the Commissioner, particularly to the Tax and Revenue Committee, to undertake and progress a tax gap program... I would perhaps

14 Australian Taxation Office, *Submission 6*, p. 12.

15 Australian Taxation Office, *Submission 6*, p. 11. Note: The identification of a 'tax gap' is an approach which seeks to estimate, through the use of macro analysis, the theoretical incidence of non-payment.

16 See Inspector-General of Taxation, *Review into the ATO's administration of the Superannuation Guarantee*, 2010; Australian National Audit Office, *Promoting Compliance with Superannuation Guarantee Obligations*, Audit Report No. 39, 2014-15.

suggest that the ATO is in fact progressing a full program of gaps, and at this stage we are working through those, and that includes the SG gap.¹⁷

3.18 Mr O'Halloran further noted:

In relation to the SG gap, effectively most of last year, as certainly many stakeholders knew, we have been progressing to develop a credible and reliable methodology to determine the SG gap. We certainly had been working through an appropriate methodology, but at this stage, as is I think on the public record, we do not feel we have a reliable one, that we have a high enough level of confidence. We have been taking particular advice from an ATO panel of experts which has Professor Neil Warren, Chris Richardson and Richard Highfield on it... Certainly we feel that, before we are comfortable that it is a reliable and credible gap, we need to improve some of the methodology. That has been the feedback. I would suggest that we have been progressing very strongly on the methodology, not only across SG but also more broadly, for effectively 12 to 13 months.¹⁸

3.19 When queried by the committee about why the information was not released in 2016, and who made the decision to defer the release, Mr O'Halloran explained:

I consulted with industry itself, through the Superannuation Stewardship Committee, and got some feedback on the methodology. We then took advice from that ATO expert panel. Ultimately, it went to the ATO executive, which includes the Commissioner, around the release of gaps which were identified as having a low level of confidence in a statistical sense if I can use that term. Therefore, we have been tasked to do some more work and bring in more expertise to improve that level to make sure it is reliable and also has an increased level of confidence.¹⁹

3.20 When pressed to provide a more definitive timeline for when work would be complete on the SG gap, the ATO stated in an answer to a question on notice that 'we may be in a position to release the methodology by June 2017'.²⁰

3.21 The committee also canvassed the issue of what the goal of generating the gap analysis was, and queried whether it was for the purposes of enforcement, compliance, risk assessment, or as an aggregate to drive resource prioritisation with the ATO. Mr O'Halloran responded:

17 Mr James O'Halloran, Deputy Commissioner, Superannuation, Australian Taxation Office, *Proof Committee Hansard*, 25 January 2017, p. 12.

18 Mr James O'Halloran, Deputy Commissioner, Superannuation, Australian Taxation Office, *Proof Committee Hansard*, 25 January 2017, p. 12.

19 Mr James O'Halloran, Deputy Commissioner, Superannuation, Australian Taxation Office, *Proof Committee Hansard*, 25 January 2017, p. 12.

20 Australian Taxation Office, answers to questions on notice, 3 March 2017 (received 17 March 2017), p. 2.

I would perhaps put a perspective that our intention in doing any of these gaps is to track them over time, to give us a measure over time of our effectiveness so that should see a reduction in the gap. Certainly from the literature that I had read and from obviously some positional experience, very few gaps actually give you case selection. What it does give you is a number, a trend. It then identifies some industries where they might be some characteristics that then allow you, if you like, where to look to invest and make some of the resources and investments. So it becomes a guiding measure of (1) our effectiveness over time in terms of that and (2) it certainly does, as the methodology matures – and this has happened with the GST gap, whereby it is the second and third iterations – got into the next level of trying to particularise some breakdown within the overall gap trend and often at an industry level, and certainly that would be our expectation over time.²¹

3.22 Evidence received from the Office of the Inspector-General of Taxation indicated clear support for the collection of analysis on the SG gap. As Mr Ali Noroozi, the Inspector-General of Taxation, stated during a public hearing:

...it is good for a government to have some level of expectation in terms of both tax collected and super guarantee. It also makes the revenue [agency] think about and plan ahead in terms of what they are going to collect. If there is a gap indeed between what they had estimated and what ends up being collected then they should have an explanation. By that stage it should be clear to them why there was a difference between what they had estimated and what they have actually collected.²²

3.23 When asked whether the ATO had the capacity to make an estimation of the level of non-compliance in relation to superannuation, Mr Noroozi indicated that the capacity was available:

We have not done it before. They started doing it some time ago with GST, for example. But there is no reason why not, as a formidable tax administration – and they do well compared to revenue agencies of comparable jurisdictions. We are not sure how they are attempting to measure the gap. But one thing that may be a little unpopular is that, usually if you are measuring tax gap, you need to do some level of random audits...

The tax office need to take a random sample and a sizeable sample that can then be extrapolated to say, 'Based on this representative sample we should estimate such and such.' I do not know how the tax office are doing it, but I know that previously they have rejected our recommendations to do any

21 Mr James O'Halloran, Deputy Commissioner, Superannuation, Australian Taxation Office, *Proof Committee Hansard*, 25 January 2017, p. 14.

22 Mr Ali Noroozi, Inspector-General of Taxation, *Proof Committee Hansard*, 3 March 2017, p. 52.

kind of random audits. I am not sure how they are doing it. They are saying they are working on it.²³

Committee view

3.24 The committee is deeply concerned by the ISA's analysis that indicates that employers failed to pay an aggregate amount of \$5.6 billion in SG contributions in 2013-14. The committee is keenly aware that this amount represents 2.76 million affected employees, with an average amount of \$2025 lost per person in a single year.

3.25 The committee is surprised at the ATO's apparent reluctance to engage with the issue of producing an SG gap, particularly as the matter has been raised in numerous reviews dating back to 2010.

3.26 The committee is encouraged that all stakeholders seem to agree that non-compliance with SG obligations is a significant problem. Although there is no consensus on the size of the SG gap, the committee is of the opinion that even a low percentage of non-compliance is a serious issue. This is because the gap represents real money owed to real employees, who are detrimentally impacted upon by any instance of non-payment of SG. As discussed in chapter 4, these non-payments in turn have flow-on impacts to government finances.

3.27 Even if, as the ATO posits, the actual SG gap is somewhat lower than the ISA's estimate, the committee is of the view that a gap of this order of magnitude is unacceptably high. As such, the committee feels that the ATO must take urgent action to address SG non-compliance.

3.28 As a starting point, the committee strongly believes that having a reliable SG gap figure, able to be tracked over time, would be an extremely valuable tool in examining the rate of SG non-payment over time, analysing which policies are effective, and ultimately minimising the problem.

3.29 The committee notes that the ATO indicated it would be in a position to publish its methodology for the SG gap by June 2017. The committee further notes that this date is three months after the working group is due to report to the Minister for Revenue and Financial Services. The committee finds it surprising that the ATO is prepared to criticise the methodology and estimated SG gap of the ISA while not being in a position to produce an estimate of its own. This is particularly the case given the fact that respectable authorities such as the ANAO and the IGT have recommended the ATO produce such a figure. Nevertheless, the committee encourages the ATO to commit to this release date at the very latest.

3.30 Once the ATO has settled on its methodology, the committee expects the ATO to publish a figure for the SG gap annually in order to allow the size of the gap

23 Mr Ali Noroozi, Inspector-General of Taxation, *Proof Committee Hansard*, 3 March 2017, p. 52.

to be consistently tracked over time. The committee considers that this would allow the effectiveness of current ATO SG compliance measures, as well as the impacts of other initiatives such as Single Touch Payroll, to be properly assessed.

Recommendation 2

3.31 The committee recommends that the ATO prioritise its work on calculating and publishing an accurate, reliable estimate of the SG gap. Additionally, the committee recommends that the ATO commit to publishing the SG gap annually in order for progress to be tracked over time.

3.32 Other mechanisms to address the current level of SG non-compliance are addressed in later chapters of this report.

Chapter 4

Impact of SG non-payment

The economic impact of SG non-payment

4.1 The negative impacts of non-payment of the SG are pervasive and affect several distinct groups; employees, employers and the government.¹

Impact on employees

4.2 The adverse economic impact of SG non-payment on employees is stark. Employees miss out on SG entitlements, leading to a loss of retirement income. This in turn will lower their standard of living in retirement and potentially increase their reliance on the age pension.

4.3 The non-payment of SG is immediately reflected in the superannuation balance of an individual, however; in the long term it also robs an employee of the benefits of investment earnings and compound interest.²

4.4 For example, the Association of Super Funds of Australia estimated that for a 25 year old, a one-off loss of \$4000 in superannuation contributions could equate to a loss of over \$14 000 at retirement, in today's dollars.³

4.5 Similarly, Women in Super emphasised that even the late payment of SG has a lasting impact on superannuation balances due the loss of compound interest, an effect that should not be underestimated given the 40 to 50 year time horizon of superannuation.⁴

4.6 Submitters emphasised that the non-payment of SG essentially represents a non-payment of wages, in that SG is deferred wages earned by and therefore rightfully owed to an employee. For example, Mr Liam O'Brien, the Victorian Branch Assistant Secretary of the Australian Workers' Union, argued:

We believe super is deferred wages. It is an industrial right. It has a history embedded around the deferment of wage increases from when the scheme

1 For the purposes of this report, the term 'non-payment of SG' also refers to the delayed or underpayment of SG.

2 Cbus, *Submission 48*, p. 2. See also Council on the Ageing, *Submission 52*, p. 3; Construction, Forestry, Mining and Energy Union, *Submission 54*, p. 6.

3 Association of Super Funds of Australia, *Submission 30*, p. 4.

4 Women in Super, *Submission 45*, p. 3.

was first introduced. We very much see superannuation as an industrial right.⁵

4.7 Similarly, Chartered Accountants Australia and New Zealand emphasised that SG must be characterised as diverted salary and wages, not as an optional, employer provided fringe benefit:

This argument [over whether SG is an employer provided fringe benefit or foregone salary and wages] is not mere philosophical points of difference. A decision [on how to characterise SG] here has to be made because this drives when and how employers should have to make compulsory super contributions. It also impacts which employees will or will not receive the SG.⁶

4.8 CPA Australia also stated that the central tenet of the SG is that it is part of an employee's remuneration, and as such employees had the right to expect their SG to be paid in a timely manner, in the same way as their salary, wages or other elements of their remuneration were treated.⁷

4.9 Recognising SG as deferred salary of wages or as an important part of an employee's remuneration brings into the focus the seriousness of non-compliance and highlights the unjust nature of the problem.

4.10 According to the IGT, 'those most at risk [of SG underpayment] are lower to middle income individuals, the very people who are most reliant upon compulsory superannuation contributions and less able to make voluntary contributions to supplement their retirement savings.'⁸

4.11 In addition to loss of retirement income, the non-payment of SG impacts upon the nature of total and permanent disability payments and income protection insurance payments that are attached to superannuation.

4.12 Mr Kamal Farouque, a principal at Maurice Blackburn Lawyers set out a not uncommon scenario where individuals suffer a serious injury or health event and seek access to a disability or income protection insurance payment, only to find that due to SG non-payment, they are in fact ineligible for assistance under their superannuation fund policy's benefit.⁹ As Mr Farouque observed:

This obviously has a huge impact on those people and their dependents and devolves burden on the taxpayer because if you are not getting income

5 Mr Liam O'Brien, Victorian Branch Assistant Secretary, Australian Workers' Union, *Proof Committee Hansard*, 14 March 2017, p. 8.

6 Chartered Accountants Australia and New Zealand, *Submission 27*, pp. 2–3.

7 CPA Australia, *Submission 32*, p. 1.

8 Inspector-General of Taxation, *Submission 21*, p. 3.

9 Mr Kamal Farouque, Principal, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 14 March 2017, p. 8. See also National Foundation for Australian Women, *Submission 1*, p. 3.

protection insurance you are going to have to support yourself through some means and you are going to have to look to social security payments.¹⁰

4.13 The Textile, Clothing and Footwear Union of Australia (TCFUA) submission also contained information about this kind of scenario. It noted that even when an employer had entered into a payment arrangement with the ATO to pay outstanding SG, unless the ATO transferred the SG to the superannuation funds, employees were still not eligible for disability or income protection insurance payments from their funds.¹¹ The submission provided the following case study:

The employer was in arrears of superannuation contributions for approximately 3 years and had made a payment arrangement with the ATO... The employer eventually provided evidence of payments to the ATO, but the payments at that time still had not been transferred to the employees' super funds. During the period that the payments remained with the ATO, and not with the super funds, the employees did not have access to income protection insurance ordinarily available under the funds. One of the affected workers in their 50's, sustained an injury, but was unable to access benefits under the super funds income protection insurance policy as no super contribution had been made to the fund for the relevant period.¹²

4.14 The National Foundation for Australian Women noted that women are over represented among lower paid, part-time and casual employees, and that they are among the groups of workers most likely to be affected by the non-payment of SG.¹³

4.15 The submission from Women in Super emphasised that on average, Australian women retire with just over half of the superannuation savings of their male counterparts, and that more often than not, their superannuation balances are well below what is deemed necessary to provide a comfortable standard of living in retirement.¹⁴

Impact on business

4.16 Employers who do not pay SG entitlements to their employees may gain a competitive advantage over those employers who are compliant. This is because non-compliant employers are able to operate on lower overheads, in turn increasing the likelihood of higher profit margins.¹⁵

10 Mr Kamal Farouque, Principal, Maurice Blackburn Lawyers, *Proof Committee Hansard*, 14 March 2017, p. 8.

11 Textile, Clothing and Footwear Union of Australia, *Submission 50*, pp. 17, 21.

12 Textile, Clothing and Footwear Union of Australia, *Submission 50*, p. 17.

13 National Foundation for Australian Women, *Submission 1*, p. 2. See also Women in Super, *Submission 45*, p. 2.

14 Women in Super, *Submission 45*, p. 2.

15 Inspector-General of Taxation, *Submission 21*, p. 3.

4.17 Anglicare Australia submitted that the practice of SG non-payment undermined competitive neutrality among employers and may ultimately drive down employment standards across the board.¹⁶

4.18 Similarly, the Australian Chamber of Commerce and Industry (ACCI) acknowledged that wilful non-payment constituted intentional unfair competition for complying businesses.¹⁷ The Construction, Forestry, Mining and Energy Union (CFMEU) also agreed with this position.¹⁸

4.19 The Australian Council of Trade Unions (ACTU) observed that although it did not have any data to analyse the extent of the impact, there would be differences in competitive position of employers who pay the SG entitlement and those who do not.¹⁹

4.20 ISA also recognised that employers not paying SG have a distinct competitive advantage over those that do, and that proper enforcement of the SG obligation would act to 'level the playing field' for business. ISA also commented that as the SG rate increases, so do the incentives for employers to avoid, minimise or exploit their SG obligations.²⁰ The submission from the IGT also noted that an 'uneven playing field' may lead to a domino effect in regard to propagating non-compliance.²¹

Impact on government

4.21 The non-payment of SG has significant impacts on government expenditure, not least because individuals who enter retirement with lower levels of superannuation will necessarily be more reliant on the age pension. As the ACTU set out in its submission:

The simple reality is that if older Australians have less in their superannuation balance at retirement, they will have both a greater entitlement to the Age Pension than had their balance been at a higher level. Further older Australians will draw down from that balance faster and/or their balances will be eroded in shorter time frames meaning more Australian will be reliant on [a] full pension that if the system had been operating at its most efficient and effective level.²²

4.22 In addition to the greater reliance on the age pension, the IGT observed two other negative impacts on government finances:

16 Anglicare Australia, *Submission 2*, p. 2.

17 Australian Chamber of Commerce and Industry, *Submission 49*, p. 4.

18 Construction, Forestry, Mining and Energy Union, *Submission 54*, p. 6.

19 Australian Council of Trade Unions, *Submission 51*, p. 12.

20 Industry Super Australia, *Submission 7.1*, p. 8.

21 Inspector-General of Taxation, *Submission 21*, p. 3.

22 Australian Council of Trade Unions, *Submission 51*, p. 12.

Government revenue in the form of tax may be lower due to superannuation funds' earnings being based on a lesser amount of SG payments having been made. There are also ATO costs in investigating and recovering unpaid SG. More importantly, in the long term, the Government will have to fund the retirement of those who do not have adequate retirement savings. Effectively, future generations will have to bear such costs.²³

4.23 Evidence from ISA indicated that SG underpayment for 2013-14 was estimated at \$5.6 billion. This implied a contributions tax loss of \$838 million in a single year, as well as a cumulative contributions tax loss over the forward estimates of approximately \$4 billion. In addition, ISA projected that by 2023-24 the annual contributions tax lost on unpaid SG will reach \$1.5 billion.²⁴

4.24 Furthermore, ISA asserted that based on current rates of SG non-payment, future impacts could entail a \$300 million loss in private retirement income drawdown and \$97 million more in age pension payments.²⁵

4.25 Cbus also noted the immediate and negative effect on the collection of government revenue through lost taxation and the subsequent strain on the federal budget.²⁶

Committee view

4.26 The committee notes that the Superannuation Guarantee forms a vital component of an employee's remuneration. The committee believes that compulsory superannuation can be categorised as deferred wages that rightfully belong to an employee.

4.27 The committee is aware that a failure to adequately detect and address SG non-compliance causes severe detriment to employees, to compliant employers, and to the government through additional reliance on the age pension.

4.28 As noted in chapter 3, ISA data indicated that employers failed to pay an aggregate amount of \$5.6 billion in SG contributions in 2013-14. This amount represents 2.76 million affected employees who each lost on average \$2025 from their superannuation balances in a single year. The committee is concerned that the individuals most at risk of the negative impacts of SG non-payment often come from the most vulnerable groups in Australian society.

4.29 Additionally, the committee is concerned that employers who comply with their SG obligations must compete against non-compliant employers with an unfair

23 Inspector-General of Taxation, *Submission 21*, p. 3.

24 Industry Super Australia, *Submission 7.1*, p. 8.

25 Industry Super Australia, *Submission 7.1*, p. 7.

26 Cbus, *Submission 48*, p. 2.

competitive advantage. Without an effective suite of enforcement mechanisms, compliant businesses may be incentivised to become non-compliant which would exacerbate the current situation.

4.30 Given the significant size of the fiscal impact of SG non-payment on the government in terms of lost government revenue and increased reliance on the age pension, the committee considers it reasonable for the government to consider stronger compliance activities to minimise the impact on its budgetary position. The committee believes it is in the best interests of the government to commit to further initiatives that effectively minimise the problem of SG non-payment and its negative impacts on Australian employees and compliant businesses. Examples of these initiatives can be found in chapters 5, 6 and 7.

Chapter 5

The causes of SG non-payment

5.1 Submitters to the inquiry put forward numerous causes behind non-compliance with SG obligations.

5.2 For example, according to a submission by Cbus, SG non-compliance typically has four main sources:

- employer non-compliance (either deliberately or inadvertently);
- use of the cash economy;
- sham contracting; and
- employer insolvency.¹

5.3 The ACTU took a similar approach to considering reasons for SG non-payment and identified four types of employment arrangements in which non-payment is likely to occur:

- 'normal' employment arrangements in which an employer simply does not comply with their SG obligations;
- 'independent' contracting arrangements in which there may be uncertainty about whether genuine contracting is occurring, leading to doubts as to whether a liability for SG exists and if it does, who should pay it;
- cash in hand arrangements; and
- 'new' forms of employment (such as the 'gig economy' or 'in kind' work) which may raise doubts as to whether the SG liability arises, and who should be responsible for it.²

5.4 The ATO collated a range of reasons provided by employers as to why they had not complied with SG obligations. For example, cash flow difficulties were raised in around 70 per cent of cases, with poor record keeping raised in approximately 20 per cent of cases.³ The ATO also stated that other reasons provided by employers for non-compliance included a lack of understanding of the SG legislation (leading to a misunderstanding of obligations); a deliberate strategy to delay or avoid SG obligations as long as possible; or simply choosing not to comply.⁴

1 Cbus, *Submission 48*, p. 9.

2 Australian Council of Trade Unions, *Submission 51*, p. 6.

3 Australian Taxation Office, *Submission 6*, p. 13.

4 Australian Taxation Office, *Submission 6*, p. 13.

5.5 Taking into account all the evidence received by the committee, several factors driving systemic non-compliance with SG obligations were identified. These factors can be broadly categorised as follows:

- compliance challenges stemming from system design and complexity;
- compliance challenges specific to small businesses; and
- industry characteristics leading to a pre-disposition to SG non-payment.

5.6 The problem of employer insolvency was also raised by numerous submitters as a contributing factor to SG non-payment, and this will be discussed in chapter 6.

5.7 This chapter will now turn to examine the salient issues contained within these three categories.

System design and complexity

5.8 The committee received evidence indicating that some aspects of the design and complexity of the SG system increased the likelihood of SG non-payment. A number of submitters argued that the SGA Act was not simple to follow and that the obligations imposed on employers under it were complex.⁵

5.9 Similarly, in its 2015 performance audit of the ATO's activities in promoting compliance with SG obligations, the ANAO observed that some features of the operation of the SG scheme presented practical challenges for employers, employees, and the ATO as regulator. The ANAO stated those challenges could in some cases underpin employer non-compliance with SG obligations.⁶

5.10 However, despite the apparent system complexity, it should be noted that the ATO acknowledged that case officers reported a very high level of employer awareness regarding SG requirements, and that it was rare for an employer to claim they knew nothing about their SG obligations.⁷

5.11 Elements of system design which could lead to SG non-payment include:

- the \$450 per month threshold limit;
- current salary sacrifice arrangements; and
- quarterly payment requirements.

5.12 Administrative challenges arising from the complexity of the system which led to SG non-payment include:

5 For example, see Housing Industry Association, *Submission 28*, p. 2; Council of Small Business Australia, *Submission 33*, pp. 1–3.

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

7 Australian Taxation Office, *Submission 6*, p. 13.

-
- the misclassification of employees; and
 - the difficulty in calculating SG amounts based on the definition of OTE.

5.13 This section will examine each of these five elements in turn.

\$450 per month threshold limit

5.14 To be eligible for SG contributions from an employer, an employee must be aged 18 or over and earning over \$450 a month in OTE. Numerous submitters pointed out that this \$450 monthly threshold missed out a potentially significant number of employees and was too easily able to be exploited by unscrupulous employers.⁸

5.15 ISA asserted that some workplaces use targeted strategies based around this threshold to avoid SG obligations. For example, an employer may deliberately roster staff in ways to keep them under the \$450 threshold, or develop an enterprise agreement restricting the classification of OTE hours, thereby ensuring additional hours worked are overtime and fall outside the SG base.⁹

5.16 The National Foundation for Australian Women (NFAW) was also of the opinion that the \$450 monthly threshold was an anomaly that was being misused, leading to a particular subset of employees not accumulating any superannuation benefits. The NFAW submission stated:

We have been informed that some employers who maintain large casualised workforces may be exploiting this provision in their rostering arrangements. For example women have talked of being employed by several different employers in the same industry, with each employer limiting the hours so that the worker remains under the monthly threshold. We believe that this also affects other groups of workers, including students.¹⁰

5.17 Similarly, Women in Super informed the committee that even without the misuse of minimum monthly earnings figure, the \$450 monthly threshold was likely to disproportionately affect females. This is because women make up the majority of part-time and casual workers, and often work multiple jobs in female dominated, low paid industries (such as nursing, retail and hospitality). The submission also noted that men in similar circumstances would also be adversely affected.¹¹

8 See ISA, *Submission 7.1*; Anglicare Australia, *Submission 22*; National Foundation for Australian Women, *Submission 1*; Council on the Ageing, *Submission 52*; Council of Small Businesses Australia, *Submission 33*; Australian Institute of Superannuation Trustees, *Submission 37*; Women in Super, *Submission 45*; Construction, Forestry, Mining and Energy Union, *Submission 54*.

9 ISA, *Submission 7.1*, p. vi.

10 National Foundation for Australian Women, *Submission 1*, p. 2.

11 Women in Super, *Submission 45*, p. 3.

5.18 Anglicare Australia submitted that the threshold alone was detrimental to workers on low incomes, or multiple low sources of income, as it effectively prevented them from building their superannuation balances.¹²

5.19 The Council of Small Business Australia (COSBOA) proposed that the \$450 monthly threshold should be removed, citing the resulting removal of threshold anomalies in the award system as justification.¹³

5.20 Additionally, the Australian Institute of Superannuation Trustees (AIST) asserted that the \$450 monthly threshold should be abolished as it provided an incentive for businesses to retain casual employees on low work rostering in order to avoid SG obligations.¹⁴

5.21 The AIST submission provided three reasons as to why the removal of the threshold is necessary to improve fairness and compliance with the SG system:

- the cost to government would be minimal;
- individuals on lower incomes would have a better retirement outcome; and
- Australia's superannuation coverage, although quite high, is comparatively lower than other systems with mandatory superannuation.¹⁵

5.22 The AIST further argued:

We note that whilst wages have grown, so too has the increasing casualisation of the Australian workforce. As the percentage of Australians holding more than one job increases, so too does the likelihood that at least one job will pay under the threshold. As this, in turn, affects the retirement savings of Australians, we believe that [the] time is right to debate the role that this threshold plays in limiting the retirement comfort of Australians.¹⁶

Committee view

5.23 The committee is of the opinion that the \$450 monthly threshold is out-dated. The committee is aware that while initially the threshold may have minimised the administrative burden for employers of deducting small contribution amounts for lower paid or itinerant workers, technological advances over subsequent years and the capabilities available in the current digital age have simplified this aspect of the SG administrative process, rendering this justification irrelevant.

12 Anglicare Australia, *Submission 22*, p. 3.

13 Council of Small Business Australia, *Submission 33*, p. 6.

14 Australian Institute of Superannuation Trustees, *Submission 37*, pp. 22–23.

15 Australian Institute of Superannuation Trustees, *Submission 37*, p. 21.

16 Australian Institute of Superannuation Trustees, *Submission 37*, p. 23.

5.24 The committee is aware that stakeholder concerns around the adverse impact of the \$450 monthly threshold have been raised in the past. In particular the committee notes that a 1995 report¹⁷ of the Senate Select Committee on Superannuation, as well as a 2001 report¹⁸ by the then Senate Select Committee on Superannuation and Financial Services canvassed the issue and examined the adverse impacts of the threshold on those employed in 'itinerant vocations and professions'.¹⁹ Both reports recommended that the appropriateness of the threshold be examined with a view to change.

5.25 Furthermore, the committee understands that the threshold adversely impacts particular categories of employees, such as women and employees who work in multiple, low paid jobs. The committee is mindful that the increasing casualisation of the Australian workforce will only further contribute to the adverse impacts of the threshold on affected workers.

Recommendation 3

5.26 The committee recommends that the government strongly consider introducing amendments to the SGA Act to remove the \$450 monthly threshold on SG eligibility.

Current salary sacrifice arrangements

5.27 A 2006 ATO ruling (SGD 2006/2) on the SGA Act states that it is allowable for an employee's voluntary salary sacrifice contributions to firstly, reduce the employee's OTE base on which SG is calculated; and secondly, be counted towards their employer's compulsory SG obligation.²⁰ Numerous submitters raised concerns with this arrangement and emphasised it could be exploited by unscrupulous employers to the detriment of employees.

5.28 The AIST set out the ways in which this arrangement adversely impacts employees as follows:

- salary sacrifice arrangements reduce the earnings base upon which SG is calculated, resulting in smaller amounts of SG payable by employers; and

17 Senate Select Committee on Superannuation, *Super Guarantee—Its Track Record*, February 1995.

18 Senate Select Committee on Superannuation and Financial Services, *Enforcement of the Superannuation Guarantee Charge*, April 2001.

19 Senate Select Committee on Superannuation and Financial Services, *Enforcement of the Superannuation Guarantee Charge*, April 2001, p. 99.

20 Australian Taxation Office, *Superannuation Guarantee Determination SGD 2006/2*, 28 June 2006, www3.austlii.edu.au/au/other/rulings/ato/ATOSGD/2006/sgd2006-02/sgd2006-02.html (accessed 21 March 2017).

- salary sacrifice amounts are able to count towards SG amounts, enabling 'double counting' by unscrupulous employers.²¹

5.29 In its submission, the AIST drew attention to that fact that the ATO appears to highlight these effects as a benefit for employers as set out in an excerpt from the ATO website:

For you [employer making salary sacrifice contributions on behalf of employees], salary-sacrificed super contributions count towards your super guarantee payment obligations, which are calculated on your employee's reduced salary. However, the agreement [between the employer and employee setting out the salary sacrifice arrangements] may specify that you continue to pay super at the pre-sacrifice level.²²

5.30 Owing to the effects of the loophole, ISA argued that 'it is incomprehensible that any legislator intended to create this anomaly, and equally astonishing that it has not been addressed in more than a decade.'²³

5.31 Chartered Accountants Australia and New Zealand emphasised that due to SG being deferred wages, it is particularly important that employers do not take advantage of the salary sacrifice loophole:

As compulsory employer super is foregone salary and wages we think employers should not be permitted to reduce their compulsory super contributions because an employee has elected to contribute via salary sacrifice unless this has been clearly established under employment conditions.²⁴

5.32 Similarly, the ACTU characterised the ability for employers to offset SG against voluntary salary sacrifice arrangements as an anomaly with an unfair and detrimental impact on employees if misused by unscrupulous employers.²⁵

5.33 Cbus also identified that even though the majority of employers understood and supported the efforts of their employees to build their retirement funds by providing genuine salary sacrifice arrangements over and above their SG obligations, the salary sacrifice loophole had the potential to be exploited and therefore should be closed. Cbus mentioned that many employees may not even be aware that their employer was legally able to offset SG obligations against voluntary contributions.²⁶

21 Australian Institute of Superannuation Trustees, *Submission 37*, p. 24.

22 Australian Institute of Superannuation Trustees, *Submission 37*, p. 24.

23 Industry Super Australia, *Submission 7.1*, p. v.

24 Chartered Accountants Australia and New Zealand, *Submission 27*, p. 4.

25 Australian Council of Trade Unions, *Submission 52*, p. 9.

26 Cbus, *Submission 52*, pp. 14–17.

5.34 Industry Super Australia also provided an estimate of the number of employees affected by the arrangement:

Under Superannuation Guarantee Determination 2 of 2006, salary sacrifice contributions made by the employee are thus considered employer contributions for the purposes of the SG (and for the purposes of both employer and employee income deductions). ISA estimates that salary sacrifice contributions by 429,200 employees were used to meet the employer SG obligations in 2013-14. This involves \$3.6 billion in salary sacrifice contributions – a huge distortion in competitive neutrality.

ISA analysis of the 2 per cent matched sample file indicates that employers are reducing the compulsory contributions of 36 per cent of people who are salary-sacrificing, and the vast majority of people affected by this earn below full-time average earnings. Sixty-one per cent of those affected have incomes under \$ 80,000 a year – and the average impact of this across those who are salary-sacrificing and whose employers are reducing their contributions is, on average, \$3,892 per person.²⁷

5.35 During a public hearing the committee queried whether the multi-agency working group on SG had discussed the issue of salary sacrifice deductions with reference to the 2006 ATO ruling. Mr O'Halloran, ATO Deputy Commissioner for Superannuation, responded that the matter had been discussed.²⁸

5.36 Mr David Denney, Branch Manager in the Department of Employment (also a member agency of the working group), provided further clarification and indicated that from the department's perspective, it was an issue that was being looked at in more detail. He also noted that there was room for greater clarity, particularly as the matter intersected with the Fair Work Act and that there appeared to be some confusion around what employers could and could not do in the area.²⁹

5.37 The Department of Employment provided detailed information in response to a question on notice requesting clarification on situations where it is legal for an employer to reduce their SG obligations:

Section 323 of the *Fair Work Act 2009* (FW Act) outlines when an employer can deduct money from payments to an employee for the performance of work (including superannuation). Subsection 324(1) of the FW Act permits a deduction only if it is:

- (a) authorised in writing by the employee and principally for the employee's benefit;
- (b) authorised by the employee in accordance with an enterprise agreement;

27 Industry Super Australia, *Submission 7.1*, p. 8.

28 Mr James O'Halloran, Deputy Commissioner, Superannuation, Australian Taxation Office, *Proof Committee Hansard*, 3 March 2017, p. 20.

29 Mr David Denney, Branch Manager, Department of Employment, *Proof Committee Hansard*, 3 March 2017, pp. 20–21.

(c) authorised under a modern award or an order of the Fair Work Commission; or

(d) authorised by or under a law of the Commonwealth, a State or a Territory, or an order of a court.

Deductions authorised under both paragraphs (a) and (b) require a separate, express agreement by the employee for each deduction.

Further, a term of an award, enterprise agreement or employment contract will be of no effect if it permits a deduction that is for the benefit of the employer *and* is unreasonable in the circumstances.

Therefore, without an employee's express agreement, an employer cannot use an employee's voluntary superannuation contribution to satisfy any part of their compulsory superannuation guarantee obligation unless the deduction is authorised under (c) or (d). An employer who does use an employee's voluntary contribution in this way without the express agreement of the employee may be in contravention of the FW Act. This is because the deduction would appear to be directly for the benefit of the employer as it reduces their compulsory superannuation guarantee obligation.

However, theoretically there may be individual circumstances where an employee expressly agrees to their voluntary contribution being used to satisfy the employer's compulsory superannuation guarantee obligation as it is principally for the benefit of the employee.³⁰

5.38 The ATO informed the committee that it did not have any data to indicate if, or to what extent, employers were using their employees' salary sacrifice amounts to meet their SG obligations, or to show, if indeed this practice was occurring, what amount of salary sacrifice contributions were being used.³¹ As the ATO stated:

Employers are required to report contributions made under a salary sacrifice agreement as '*Reportable employer super contributions*'. Specific salary sacrifice amounts cannot be distinguished from other items reported under this category, such as additional amounts paid to an employee's superannuation fund as an annual bonus or employee negotiated increases in employer superannuation contributions.³²

30 Department of Employment, answers to questions on notice, 3 March 2017 (received 15 March 2017), p. 1.

31 Australian Taxation Office, answers to questions on notice, 3 March 2017 (received 17 March 2017), p. 1.

32 Australian Taxation Office, answers to questions on notice, 3 March 2017 (received 17 March 2017), p. 1.

5.39 The ATO did note, however, that a broad analysis of the complaints and compliance cases it dealt with did not identify the inappropriate use of the salary sacrifice loophole as an issue brought to its attention.³³

5.40 In addition, Ms Jenny Wilkinson, Division Head from the Department of the Treasury, observed:

We get a few complaints to Treasury about this practice occurring. We are aware that it occurs in places, but we do not get a lot of complaints brought to us. We really do not have a sense of how widespread it is...

But the other thing is, for any individuals who are concerned about their employer using their salary sacrifice contributions to make up their SG, with the changes in arrangements for personal deductions that the government introduced in the last set of superannuation changes, you do need to salary sacrifice in order to get the benefits of making personal deductions to your super. You can now do that as a voluntary personal contribution and still received a deduction through your tax return.³⁴

5.41 ISA put forward a recommendation to 'close the loophole' that allows salary sacrifice contributions made by an employee to be considered employer contributions for the purpose of the SG by amending the SGA Act as follows:

- clarify whether Reportable Employer Super Contributions (RESC) are considered salary or wages for the purposes of the act (section 11);
- clarify that a RESC contribution is not considered a contribution for the purposes of subsection (2) and therefore cannot be used by an employer to reduce the SG charge percentage and SG shortfall (section 23); and
- clarify that a RESC is a component of OTE as defined in subsection (2) (section 23).³⁵

Committee view

5.42 The committee understands the concerns raised by submitters about the possibility of the current salary sacrifice arrangements being misused by some employers in order to reduce or avoid their SG obligations. The committee believes that the SG must be a guaranteed minimum contribution to employees' retirement savings. When employees voluntarily contribute extra funds to their own superannuation savings they should be assured that these amounts are genuinely additional to the SG and not simply reducing their employers SG obligation. Without

33 Australian Taxation Office, answers to questions on notice, 3 March 2017 (received 17 March 2017), p. 1.

34 Ms Jenny Wilkinson, Division Head, Department of the Treasury, *Proof Committee Hansard*, 3 March 2017, p. 22.

35 Industry Super Australia, *Submission 7.1*, p. 8.

this assurance, employees may be disinclined to make adequate provision to their retirement through voluntary contributions.

Recommendation 4

5.43 The committee recommends the government introduce amendments to the SGA Act to ensure that an employee's voluntary salary sacrificed superannuation contributions cannot count towards the employer's compulsory SG obligation, nor reduce the OTE base upon which SG is calculated.

Quarterly payment requirements

5.44 Numerous submitters informed the committee that the current quarterly payment regime of the SG system was a contributing factor to the non-payment of SG. These submitters recommended that SG payments be made more frequently, in alignment with an employee's normal pay cycle.

5.45 As outlined in chapter 2, employers are generally required to make SG contributions to the complying superannuation fund of the employee's choice four times per annum.³⁶

5.46 ISA argued that the risk of SG non-payment is compounded by the quarterly payment system. As such, ISA recommended that the SGA Act be amended to require that SG contributions be paid on at least a monthly payment cycle, and preferably in alignment with wage and salary payments, before 1 July 2018.³⁷

5.47 CPA Australia observed that the current quarterly payment requirements (with payment due within 28 days of the end of a quarter) made it difficult for the ATO to effectively monitor payment. CPA Australia also stated that the payment requirements made it difficult for employees to identify and reconcile whether the appropriate amount of SG had been paid into their nominated fund when the quarterly payments do not align with their regular salary payments.³⁸

5.48 Similarly, the Institute of Public Accountants noted that research from its membership indicated that employees had difficulty monitoring their employer's SG compliance, in part because of the lack of transparency around when SG was actually paid into their superannuation funds.³⁹

36 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). Note: There are some exceptions to this requirement in that some awards may require SG to be paid monthly.

37 Industry Super Australia, *Submission 7.1*, p. 16.

38 CPA Australia, *Submission 32*, p. 2.

39 Institute of Public Accountants, *Submission 31*, pp. 2–3.

5.49 Cbus also asserted that the quarterly payment requirements created a significant risk of non-compliance and impeded the prompt detection of non-compliance when it did occur. Cbus informed the committee that in order to address this and facilitate the early detection of arrears, the Cbus Trust Deed provides that participating employers make superannuation payments on behalf of their employees monthly, by the first day of the following month. As such, employers, upon joining Cbus, enter a contract accepting these payment terms. Cbus concluded that 'superannuation should be treated the same as wages and paid congruently' and recommended real time payment and reporting of SG be implemented.⁴⁰

5.50 The Council on the Ageing (COTA) emphasised that the administration of wages and entitlements now takes place in an environment far more technologically advanced than that in which SG was introduced in 1992. As such, the quarterly payment dates, which may have been appropriate in the early 1990s when most payments would have been processed manually, were now outdated.⁴¹ As the COTA submission outlined:

The electronic transfer of payments and much more digitally sophisticated accounting and reporting systems open the potential for well-designed, secure, timely and efficient forms of SG payment that better serve the interests of both the employer and the employee. There is no longer an administrative argument for withholding the SG payment from an employee for several months.⁴²

5.51 COTA recommended the payment of SG in real-time, and noted that paying SG alongside or close to wage payments would leave no room for confusion about whose money it was, potentially encouraging better compliance.⁴³

5.52 United Voice pointed out that under the Fair Work Act, wages must be paid at least monthly. It went on to argue that aligning superannuation contributions with pay cycles would reduce the gap between payments, make it harder for employers to fall behind on payments, and make it easier to detect non-compliance.⁴⁴

Committee view

5.53 The committee recognises that the current quarterly SG payment requirements outlined in the SGA Act create a significant risk of non-compliance and also hinder the prompt detection of SG non-payment.

40 Cbus, *Submission 48*, pp. 2–3, 7.

41 Council on the Ageing, *Submission 52*, p. 5.

42 Council on the Ageing, *Submission 52*, p. 5.

43 Council on the Ageing, *Submission 52*, p. 5.

44 United Voice, *Submission 66*, p. 25.

5.54 The committee believes that the current technological solutions available to businesses regarding payroll and other related activities mean that a more frequent schedule of SG payments would not place an undue administrative burden on businesses.

Recommendation 5

5.55 The committee recommends that the government strongly consider introducing amendments to the SGA Act to require SG to be paid at least monthly, and preferably in alignment with regular pay cycles.

Misclassification of workers

5.56 The misclassification of workers in employment or contracting arrangements was an issue identified by several submitters as a factor contributing to SG non-payment.

5.57 Generally speaking, if a worker is classified as an employee, their employer has the liability to pay SG. However, if a worker is classified as a contractor, this is not the case. However, it can be complicated for an employer to correctly classify their workers for SG purposes, particularly as the definition of an employee in common law differs from the expanded definition provided in the SGA Act.⁴⁵

5.58 As the IGT pointed out:

There are inherent difficulties associated with the employee/contractor distinction which stems from its common law definition of 'employee' with no determinative factor. There are a number of factors which have to be considered relative to each other, making a determination very much reliant on the facts of each case.⁴⁶

5.59 The misclassification of a worker as a contractor, rather than an employee, can therefore lead to SG entitlements not being paid.

5.60 The Housing Industry Association (HIA) reiterated this point arguing that one of the core challenges for businesses in the residential construction industry was determining which workers were eligible for the SG, as distinguishing between employees and independent contractors for the purposes of superannuation was a complex and difficult task.⁴⁷

5.61 HIA elaborated on the issue:

...the extended definition of 'employee' in section 12(1) of the SGA Act deems certain individuals to be employees for superannuation guarantee purposes, even though they would otherwise be outside the scope of the

45 Australian Council of Trade Unions, *Submission 51*, p. 6.

46 Inspector-General of Taxation, *Submission 21*, p. 11.

47 Housing Industry Association, *Submission 28*, p. 3.

SGA Act. In particular, section 12 (3) of the SGA Act deems a person that 'works under a contract that is wholly or principally for the labour of the person' to be an employee for superannuation law purposes.

The ATO has issued Superannuation Guarantee Ruling 2005/1 (SGR 2005/1), which sets out the Tax Office's view on when a contractor falls within the expanded definition of an employee. Drawing on the common law the ruling sets out three principal tests when a contractor will be considered an employee. These are if the contractor:

- is remunerated wholly or principally for their labour and skills
- performs the work themselves
- is not paid to achieve a result.⁴⁸

5.62 HIA concluded that while the SGR 2005/1 ruling provides a degree of guidance, as does the ATO's decision tool, there remains 'considerable uncertainty about who is an employee and who is a contractor for superannuation purposes.'⁴⁹

5.63 However, it should be noted that in addition to instances of accidental misclassification of workers due to system complexity, it is not unknown for unscrupulous employers to deliberately misclassify employees as contractors in order to avoid paying entitlements such as SG. This practice is known as 'sham contracting'.⁵⁰

5.64 The CFMEU submitted that sham contracting arrangements were rife in the construction industry, and that there were substantial cases of non-payment and underpayment of SG as a result of this practice.⁵¹

5.65 Furthermore, as pointed out by the AIST, the prevalence of sham contracting arrangements was singled out as a significant systematic risk in the IGT's 2010 report, given that it potentially affects those individuals most reliant upon SG as a source of retirement income.⁵²

5.66 The IGT informed the committee that businesses and workers could benefit from further assistance to determine the status of workers at an early point in the employment relationship. On this front, the IGT suggested that the existing ATO online tool, the Employee/Contractor Division (ECD) tool, which currently assists businesses to determine whether they have an SG liability, could be expanded to facilitate use by workers as well. The IGT observed that 'such expansion, along with

48 Housing Industry Association, *Submission 28*, p. 3.

49 Housing Industry Association, *Submission 28*, p. 3.

50 See also National Foundation for Australian Women, *Submission 1*, p. 3.

51 Construction, Forestry, Mining and Energy Union, *Submission 54*, p. 4.

52 Australian Institute of Superannuation Trustees, *Submission 37*, p. 5.

early promotion and integration with other ATO tools will better inform all parties of potential superannuation obligations and entitlements.⁵³

5.67 Another initiative put forward by the IGT which would provide a higher degree of certainty for workers on their status as either employees or contractors is a Voluntary Certification System (VCS). The ATO's current private binding advice and administratively binding advice framework is only available to businesses. As the IGT elaborated:

The VCS would, in effect, be an extension of the existing ruling and advice framework but would be based on information provided independently by each party. Similar systems exist in the United States ((US) and Canada where either the worker or business may request a binding determination from the Internal Revenue Service or the Canada Revenue Agency respectively.⁵⁴

5.68 The IGT further detailed:

The VCS would be expected to overcome the inability of workers to obtain relevant binding advice on their status and for both parties to independently submit their facts for consideration. Similar to the expanded ECD tool all parties could be encouraged to use it as soon as possible so that, from the outset, employers are clear when they have to pay the SG amounts and employees are aware of their entitlements.⁵⁵

Committee view

5.69 Given the complexity of classifying workers correctly for SG purposes, and the impact of a misclassification on the SG entitlements of an individual, the committee believes there is a need for enhanced mechanisms that provide greater certainty to workers and their employers on SG entitlements and obligations.

5.70 Guided by the potential solutions suggested by the IGT, the committee is of the opinion that the ATO should look to provide an administratively binding advice framework available not only to businesses, but also to workers.

Recommendation 6

5.71 The committee recommends that the government investigate options to extend the ATO's current private binding advice and administratively binding advice frameworks to make them available to workers as well as businesses.

53 Inspector-General of Taxation, *Submission 21*, p. 11.

54 Inspector-General of Taxation, *Submission 21*, pp. 11–12.

55 Inspector-General of Taxation, *Submission 21*, p. 12.

Difficulty in determining SG amounts

5.72 The difficulty employers faced in determining the correct amount of SG to pay employees was cited by numerous submitters as a factor behind SG non-payment.⁵⁶

5.73 SG is currently calculated upon the amount of Ordinary Time Earnings (OTE). For the purposes of this SG calculation, OTE are defined as the salary or wages paid to employees for their ordinary hours of work. As the ANAO explained in its 2015 performance audit report:

OTE can include over-award payments, allowances, bonuses, commissions, and paid leave. Overtime payments are excluded unless an employer is unable to separately identify overtime amounts. Lump sum payments to an employee on termination in lieu of unused leave entitlements, such as sick leave, recreation and long service leave, are also excluded from the definition of OTE for SG contribution purposes.⁵⁷

5.74 The AIST submitted that the calculation of the SG for all stakeholders would be greatly simplified by basing the calculation on gross remuneration, rather than OTE. This is because under the current system, it is often unclear whether a payment counts as OTE. As the submission stated:

OTE unfortunately only captures some of the many payments that can be paid to employees as part of their work. OTE does not incorporate overtime, whether or not this is regularly worked, nor does it incorporate paid parental leave.

It is not always clear whether a payment forms part of OTE. In Superannuation Guarantee Ruling SGR 2009/2, the Commissioner of Taxation considered 24 different types of employer payments (with some of these further broken down into sub-types) and only concluded in 14 cases that these formed part of OTE.⁵⁸

5.75 The AIST went on to detail:

OTE is presently inconsistent with different income definitions used for thresholds for SG-related taxation and offsets such as the Low Income Superannuation Tax Offset (LISTO) and Division 293 tax which are based on a gross remuneration equivalent, being taxable income adjusted to include reportable fringe benefits, superannuation contributions and investment losses.⁵⁹

56 See Housing Industry Association, *Submission 28*; Australian Institute of Superannuation Trustees, *Submission 37*; Council of Small Business Australia, *Submission 33*.

57 Australian National Audit Office, *Promoting Compliance with Superannuation Guarantee Obligations*, Audit Report No. 39, 2014-15, p. 34 (footnote 49).

58 Australian Institute of Superannuation Trustees, *Submission 37*, p. 7.

59 Australian Institute of Superannuation Trustees, *Submission 37*, p. 7.

5.76 HIA noted that from its observations, employers often experienced confusion about what constituted OTE, particularly in regard to overtime. HIA mentioned other anomalies which caused confusion; for example, if an employer fails to make the correct SG contributions on time and is subject to the SG charge for the shortfall, the shortfall is not based on OTE, but on the broader definition of salary or wages, which might include overtime. HIA also identified that different rules for terminating employees also created confusion.⁶⁰

5.77 The Construction, Forestry, Mining and Energy Union (CFMEU) pointed out that many of its disputes around SG arose due to a conflict over what constitutes OTE. The CFMEU also argued that for hourly employees in industries such as manufacturing, construction and transport, OTE bears little relationship with the actual earnings.⁶¹

5.78 COTA argued that basing SG off gross remuneration would work to simplify SG calculation for employers and employees, and 'properly reflect the intent that SG is a deferred consistent percentage of employee remuneration'.⁶²

5.79 The committee received evidence from the Finance Sector Union of Australia (FSU) and the Commonwealth Bank of Australia (CBA) outlining a situation where the complexity of determining the correct amount of SG resulted in a significant number of CBA part-time employees being underpaid their SG entitlements.

5.80 In 2009, the ATO issued an update to Superannuation Guarantee Ruling SGR 2009/2 which deals with the definition of OTE and superannuation payable to employees. The CBA subsequently obtained advice that set out that under that ruling, SG was not payable on additional hours or overtime worked by part-time workers.⁶³ As a result, part-time CBA employees were not paid SG on any additional hours they worked that were paid at single time hourly rates.⁶⁴

5.81 The FSU raised concerns with the CBA about this practice over several years, as part-time CBA employees indicated that working additional ordinary hours (above those initially specified in their contracted hours) was a relative frequent occurrence. However, the initial response from the CBA was that the payment for those hours did not constitute OTE as envisaged by the SG legislation.

5.82 The CBA informed the committee that it had reviewed its position in light of a number of case studies brought to its attention by the FSU in early 2017, and that it would now be paying SG on additional single time hours worked by part-time CBA

60 Housing Industry Association, *Submission 28*, pp. 5–6.

61 Construction, Forestry, Mining and Energy Union, *Submission 54*, pp. 14–15.

62 Council for the Ageing, *Submission 52*, pp. 8–9.

63 Commonwealth Bank of Australia, *Submission 55*, p. 1.

64 Finance Sector Union of Australia, *Submission 34*, p. 3.

employees. CBA also outlined that it had commenced an internal review of the additional work hours and pay records of all current and former part-time employees for the past eight years in order to identify and rectify instances of unpaid superannuation.⁶⁵

Committee view

5.83 The committee acknowledges the frustrations of stakeholders in the SG system with the current complexity in calculating SG amounts. The committee is aware that this complexity can cause difficulties for employers and may be a contributing factor to SG non-payment.

5.84 The committee is also mindful that any change to the base on which SG is calculated could have wider implications on the tax and superannuation frameworks, and that any move to change the way in which SG is calculated would need to be carefully considered.

Recommendation 7

5.85 The committee recommends the government review the definition of Ordinary Time Earnings for the purposes of SG obligation calculations and undertake an examination on the wider implications of any potential changes.

5.86 The committee considers that such a review be undertaken with a view to avoid any future situations similar to those experienced by part-time employees of the CBA.

Compliance challenges for small businesses

5.87 The committee received evidence that small businesses face particular compliance challenges that can lead to higher rates of SG non-payment.

5.88 According to the Office of the Australian Small Business and Family Enterprise Ombudsman (ASBFEO), small businesses are collectively Australia's biggest employers, providing 44 per cent of total employment. However, small businesses generally have limited administrative resources to navigate the complexities involved with the administration of employee superannuation entitlements.⁶⁶

5.89 ATO analysis of the characteristics of SG non-compliance concluded that it appears to be more prevalent among micro and small businesses. The ATO considered that this may form part of a broader picture of non-compliance, with such employers

65 Commonwealth Bank of Australia, *Submission 55*, p. 1.

66 Office of the Australian Small Business and Family Enterprise Ombudsman, *Submission 29*, p. 1.

also failing to withhold employee's income tax, paying wages in cash, or incorrectly treating employees as contractors.⁶⁷

5.90 The ATO submission stated:

Some 97 per cent of reports of unpaid super made to the ATO were against small business employers and this same group accounted for around 98 per cent of the liability raised by the ATO.⁶⁸

5.91 JobWatch agreed with the ATO's assessment that small business employers are particularly prone to non-compliance with SG obligations. JobWatch also informed the committee that most of the complaints they received in regard to SG non-payment originate from small business employees and low wage workers with largely insecure working arrangements.⁶⁹

5.92 Cash flow pressures were identified by numerous submitters as a challenge to small businesses that drove or created a pre-disposition to SG non-payment.

5.93 For example, the Australian Chamber of Commerce and Industry stated that small business cash flow was a major contributor to missed payments, and that cash flow was an endemic problem for many small and micro businesses.⁷⁰

5.94 The Australian Restructuring Insolvency and Turnaround Association noted:

Self-reportable amounts payable to the ATO can become an easy source of 'funding' when a business enters some form of financial distress. By failing to report, the obligation or debt can become hidden and there is a perception that the outstanding amount will remain unidentified until such time as business improves and the amount can be paid. It is often the case that business does not improve and amounts continue to accrue and remain unpaid, and often unreported.⁷¹

5.95 As the Office for the ASBFEO submitted:

For small business, cash flow is king and non-payment of the Superannuation Guarantee must be seen in context as symptomatic of perennial resource limitations and cash flow difficulties experienced by small business.⁷²

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

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

69 JobWatch, *Submission 26*, p. 4.

70 See Australian Chamber of Commerce and Industry, *Submission 49*, pp. 5–6.

71 Australian Restructuring Insolvency and Turnaround Association, *Submission 23*, p. 1.

72 Office of the Australian Small Business and Family Enterprise Ombudsman, *Submission 29*, p. 3.

5.96 Similarly, the IGT submission noted:

...the ATO has observed that in 70 per cent of cases where it investigated non-payment of SG entitlements, the reason for non-compliance was 'cash flow issues'. Indeed, non-payment of SG entitlements is an indication of financial difficulties that a business may be experiencing and may expose its creditors to financial risk of which they may be unaware.⁷³

5.97 Dr Tess Hardy, a lecturer in employment law, and regulatory compliance and enforcement at the University of Melbourne argued:

I think that, where the great bulk of unpaid superannuation is due to cash flow problems, that is a red flag for the economic drivers of non-compliance. It is not as a result of a lack of education or ignorance. And that means that more education, more tweets, more Facebook posts—all of this social media—are, in my view, wasted energy to some extent because they are not going to address some of the fundamental drivers, which are cash flow economic problems faced by small businesses.⁷⁴

5.98 CPA Australia submitted that poor business-to-business payment culture had a detrimental impact on the cash position of small businesses, which could in turn drive the non-payment of SG.⁷⁵

5.99 CPA Australia also drew the committee's attention to the issues paper for the Payment Times and Practices inquiry that was being conducted by the ASBFEO.⁷⁶

5.100 The issues paper stated that evidence from Australia indicated large businesses were using their bargaining power to extend their payment times to suppliers while reducing or keeping payment terms for their customers shorter, allowing them to 'unlock' their working capital and improve their cash conversion cycle at the expense of suppliers. The paper recognised:

Late payments and extended payment times have significant impact on the SME [small and medium enterprises] subject to these conditions. These businesses usually have small, if any, cash reserves and are dependent on a fast cash flow cycle to maintain solvency... SMEs also are often forced to pass on the delay in payment to their suppliers as well as delay payments for other legal obligations (i.e. superannuation) and to government entities.⁷⁷

73 Inspector-General of Taxation, *Submission 21*, p. 3.

74 Dr Tess Hardy, private capacity, *Proof Committee Hansard*, 14 March 2017, p. 6.

75 CPA Australia, *Submission 32*, p. 1.

76 CPA Australia, *Submission 32*, p. 1.

77 Australian Small Business and Family Enterprise Ombudsman, *Issues Paper – Payment Times and Practices – February 2017*, http://asbfeo.gov.au/sites/default/files/ASBFEO_Issues_Paper.pdf (accessed 21 March 2017).

5.101 The ASBFEO's *Payment Times and Practices* report was publicly released in April 2017. The report observed that late payments had a significant impact on the cash flow of the businesses owed the outstanding debt, thereby forcing them to find other ways to finance the short fall in their working capital. The report made a number of recommendations, including that industry codes be developed to regulate business-to-business transactions to include best payment practices, including set payment times. The report also recommended that the government should encourage the adoption of technology solutions to assist businesses to streamline administrative tasks and facilitate prompt payment practices.⁷⁸

5.102 The Office of the ASBFEO also detailed in its submission that interim results of a survey of over 500 small businesses indicated that almost 50 per cent experienced late payments on approximately half of the bills owed to them, with one in four businesses experiencing an average payment delay of between 31 and 60 days past their payment terms. In addition, one in five respondents stated that late payments forced them to delay paying staff salaries, benefits and superannuation contributions.⁷⁹

Committee view

5.103 Although recognising that some small businesses face unique challenges (such as cash flow problems) that may impede their ability to comply with SG obligations, the committee is strongly of the view that employees' SG entitlements should not be used as a cash flow tool, particularly without their knowledge or consent.

5.104 The committee is aware that the ATO is implementing the Cash Flow Management Program, a new initiative for small businesses which focuses on helping employers better understand and manage their cash flow. The committee understands the program has been designed by the ATO and Price Waterhouse Cooper Indigenous Consulting, in consultation with tax practitioners, accountants, bookkeepers and small businesses.⁸⁰

Recommendation 8

5.105 The committee recommends the government consider further initiatives that will assist small business employers in managing their cash flow responsibly in order to provide them the best possible chance of fulfilling their SG obligations.

78 Office of the Australian Small Business and Family Enterprise Ombudsman, *Payment Times and Practices Inquiry – Final Report*, April 2017, pp. 4–6, www.asbfeo.gov.au/sites/default/files/ASBFEO_Payment_Times_and_Practices%20Inquiry_Report.pdf (accessed 21 April 2017).

79 Office of the Australian Small Business and Family Enterprise Ombudsman, *Submission 29*, pp. 2–3.

80 Australian Taxation Office, *Submission 6*, p. 19.

Industry and workforce characteristics

5.106 Evidence received by the committee indicated that instances of non-payment of SG occurred more frequently in certain industries, owing to workforce characteristics inherent to them. These characteristics included low wages and insecure work patterns. These at-risk sectors included the construction, transport, hospitality, accommodation and cleaning industries.⁸¹

5.107 The ATO acknowledged that there are particular industries where SG non-compliance was high:

From an industry analysis perspective, the top four industries from which reports are received by the ATO are from Accommodation and Food Services, Construction, Manufacturing and Retail Trade. These four industries represent approximately 50 per cent of the audits and reviews undertaken.⁸²

5.108 The Textile, Clothing and Footwear Union of Australia also identified the textile, clothing and footwear (TCFUA) industry as being at high risk for systemic SG non-payment. The TCFUA submission noted:

The reasons for this are many and varied, but the TCF sector is generally characterised as being highly award dependent, low paid and subject to widespread non-compliance of minimum safety net wages and conditions. These factors would appear to predispose certain sectors to high rates of non-compliance with award superannuation and/or SG obligations.⁸³

5.109 The TCFUA further observed:

In the TCFUA's experience, such chronic non-payment and underpayment by employers is conscious and deliberate, rather than a result of ignorance of obligations. Put bluntly, the payment of superannuation is commonly not considered a financial priority for many TCF businesses, but rather still viewed as something discretionary or not necessary to the act of employing staff. The decision to delay (or not pay at all) employee superannuation is seen as a legitimate cash flow solution or an interest free loan in the form of employee entitlements.⁸⁴

5.110 The CFMEU emphasised that the building and construction industry faced an ongoing crisis in relation to the systemic non-payment and underpayment of worker entitlements, and that non-compliance with SG obligations was widespread. Its

81 See Industry Super Australia and Cbus, *Overdue: Time for action on unpaid super*, November 2016, pp. 7-8; as well as Australian National Audit Office, *Promoting Compliance with Superannuation Guarantee Obligations*, Audit Report No. 39, 2014-15, pp. 14-15.

82 Australian Taxation Office, *Submission 6*, p. 4.

83 Textile, Clothing and Footwear Union of Australia, *Submission 50*, p. 4.

84 Textile, Clothing and Footwear Union of Australia, *Submission 50*, p. 5.

submission noted that for the period 1 January 2011 to 31 December 2016, the New South Wales branch of the CFMEU Construction Division recouped over \$13 million for members for the non-payment or underpayment of SG.⁸⁵

5.111 Anglicare Australia noted that the groups most likely to be affected by unpaid SG contributions are women, young people, and people on low incomes. These groups are also the same individuals likely to be engaged in insecure work.⁸⁶ Employees from culturally and linguistically diverse backgrounds are also more likely to be vulnerable to SG non-payment due to their overrepresentation in insecure or casual jobs.⁸⁷

5.112 Dr Hardy commented on industry characteristics which are systemic drivers behind SG non-compliance:

There are a range of drivers [of SG non-payment] in my view. It can arise in industries which have been identified by the ATO and the Fair Work Ombudsman. Those industries which are highly competitive and have high labour costs generally result in a highly casualised workforce characterised by large numbers of young workers or migrant workers. The way in which labour costs may affect the profit or sustainability of small businesses within those industries tends to perpetuate noncompliance. So that is one driver – the industry.⁸⁸

5.113 Dr Hardy also explained the ways in which the fragmenting of organisations could lead to non-compliance with the SG and other workplace obligations:

The other, which I have explored in my work under the Fair Work Act, is the way that the fragmentation of organisations can also lead to noncompliance... I am referring to franchising as an obvious example; the other is of course complex corporate groups – supply chains, labour hire. They are all examples of the way in which the splintering of organisations can drive noncompliance because the smaller businesses at the end of the supply chain or the franchisees within a broad franchise network have limited control over the way in which they manage their business – the price paid for the services or goods that they supply. The one thing they can control is labour costs, and that tends to drive a race to the bottom. They engage in unlawful behaviour because they perceive that they cannot survive as a business in any other way.⁸⁹

5.114 Anglicare Australia argued that unprecedented growth in insecure work had led to workplace conditions for employees which left them more vulnerable to the effects of SG non-payment:

85 Construction, Forestry, Mining and Energy Union, *Submission 54*, pp. 5–6.

86 Anglicare, *Submission 22*, pp. 1–2.

87 Textile, Clothing and Footwear Union of Australia, *Submission 50*, pp. 2–3.

88 Dr Tess Hardy, private capacity, *Proof Committee Hansard*, 14 March 2017, p. 6.

89 Dr Tess Hardy, private capacity, *Proof Committee Hansard*, 14 March 2017, p. 6.

An increasing number of people are stuck in precarious employment situations, characterised by unpredictable or fluctuating income, irregular hours, uncertainty over the length of employment arrangement, a lack of basic rights and entitlements, and a lack of power to negotiate wages and conditions.⁹⁰

5.115 Anglicare Australia also noted that those most affected by unpaid SG are the same groups as those most likely to be affected by insecure work, and emphasised the need to address the problem now:

This is a direct link that cannot be ignored, both because of its disproportionate effect on people who will have the least income in retirement, and because it clearly points to an issues that is going to affect more people into the future as these economic changes progress. We need to address this now to avoid a much greater problem as the next generations enter retirement.⁹¹

Committee view

5.116 The committee is concerned that the increasing casualisation of the Australian workforce could lead to a rise in SG non-payment. As such, the committee is supportive of proposals (such as the removal of the \$450 per month threshold mentioned earlier in this chapter) that eliminate an incentive for the unnecessary casualisation of the work force.

5.117 The committee is also of the view that it is crucial for the government to consider legislative changes that work to combat the compliance challenges that arise from an insecure, casualised workforce characterised by a large number of fragmented organisations and supply chains.

5.118 As such, the committee urges the government to consider the merits of amending the SGA Act to extend liabilities of unpaid SG to corporate entities, similar to the expanded accessorial liability provisions for franchisors and holding companies in relation to unpaid wages, as proposed in the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

Recommendation 9

5.119 The committee recommends the government consider amending the SGA Act to extend liabilities of unpaid SG to corporate entities, similar to the expanded accessorial liability provisions for franchisors and holding companies in relation to unpaid wages, as proposed in the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017.

90 Anglicare Australia, *Submission 22*, p. 1.

91 Anglicare Australia, *Submission 22*, p. 1.

Chapter 6

Addressing SG non-compliance

The ATO's effectiveness in identifying and addressing SG non-compliance

6.1 The ATO informed the committee that in 2015-16, ATO compliance action resulted in:

- \$670.4 million SG charge raised (including penalties and interest);
- \$341.3 million SG charged collected;
- 2997 default assessments raised; and
- 877 Director Penalty Notices issued for SG debt of \$130 million.¹

6.2 The ATO conducts audits and reviews to ascertain SG non-compliance. Approximately 70 per cent of the cases the ATO looks into arise from employee notifications, with the remaining 30 per cent of cases stemming from ATO initiated strategies.²

6.3 The ATO's compliance program is comprised of three review or audit types:

- Employee Notification (EN) cases;
- ATO initiated cases – SG Proactive; and
- ATO initiated cases – Employer Obligations.³

6.4 As the ATO stated in its submission:

The majority of our review and audit work is directly addressing employee notifications. We also undertake ATO initiated reviews and audits arising from case selections from high risk employers or from high risk industries. We also examine SG payments when reviews and audits are undertaken examining income tax employer obligations risks.⁴

6.5 The ATO's submission notes that over the past three years, the ATO has increased its efforts to select cases from a broader array of sources other than EN. The submission also notes that the ATO takes a risk differentiated approach to compliance activities which considers factors such as the industry and market segment of the employer, as well as prior compliance history.⁵

1 Australian Taxation Office, *Submission 6*, p. 23.

2 Australian Taxation Office, *Submission 6*, p. 23.

3 Australian Taxation Office, *Submission 6*, p. 24.

4 Australian Taxation Office, *Submission 6*, p. 24.

5 Australian Taxation Office, *Submission 6*, pp. 24–25.

6.6 The ATO also highlighted the component of the compliance program that examines employers that are suspected not to have met their SG obligation. Analysis of ATO held data enables the identification of employers who are considered a high risk of not having met their SG obligations:

By comparing salary and wage data from individuals income tax returns with SG payments as reported by funds in member contributions statements, a general assessment can be made as to whether an employee may have received the SG they were entitled to. This information is then aggregated to an employer level. This assessment is by no means definitive, but can highlight employers who have a high probability of underpaying SG. This strategy focuses our audit resources upon those employers.

Reviews and audits undertaken under this strategy have consistently produced stronger results in terms of adjustments raised per audit than is achieved by our Employer Notification driven work.⁶

6.7 The ATO's approach to SG compliance activities can be generally characterised as reactive, rather than proactive.⁷

6.8 The committee received evidence indicating that the ATO's heavy reliance on EN to trigger compliance activities is problematic, as it places the onus on affected employees to take action. This in turn presents challenges to the timeliness of notifications and the likelihood of SG being recovered.

6.9 As the IGT outlined to the committee, even if affected employees are aware of SG non-payment, they may not take prompt action:

The reason is that they are usually amongst the most vulnerable in our society and may be too afraid of potential repercussions such as loss of employment. This is evidenced by the fact that approximately 70 per cent of employees only notify the ATO of non-payment of their SG after the relevant employment has ended. The result is that, generally, there is a significant time lag between the non-payment of SG and when the ATO is made aware of it, by which time the offending employer may no longer be a going concern and it may not be possible to recover any such amounts.⁸

6.10 The TCFUA submitted that the approach taken by the ATO is at odds with the systematic non-compliance with SG and award superannuation obligations evident in high-risk industries:

The system is premised on a range of questionable assumptions including:

- that it is appropriate, on a policy level, to impose the greatest onus on employees for ensuring that superannuation contributions are paid by

6 Australian Taxation Office, *Submission 6*, p. 28.

7 See for example Mr Ali Noroozi, Inspector-General of Taxation, *Proof Committee Hansard*, 3 March 2017, p. 54.

8 Inspector-General of Taxation, *Submission 21*, p. 8.

employers (i.e. that employees should essentially bear the primary risk in relation to non-payment of superannuation);

- that all employees have a good understanding of what superannuation is, including an employer's obligations [in regard] to payments and choice of funds;
- that all employees have the resources and capacity (including proficient English language and written skills) to effectively monitor their superannuation payments, and secondly, make a complaint to the ATO in their own name;
- that employees will pursue non-payment of superannuation (despite the risk of threats to ongoing job and income security);
- that non-compliance is confined to individual employees, rather than being an entrenched systemic problem at a particular workplace.⁹

6.11 Dixon Advisory also provided evidence that highlighted the problematic aspects of a compliance regime too reliant on employee notifications. The submission argued that placing the onus on employees to initiate the recovery action with the ATO could be too daunting an experience for some individuals, particularly in a small-medium business scenario where the fear of recrimination may be high. The submission also stated that during periods of poor business conditions where there was a strong perceived risk of foreclosure or job loss, employees may consciously make the decision not to lodge an EN, figuring that they would be better off foregoing SG if it assisted their employer to remain solvent and protected their own job.¹⁰

6.12 Dixon Advisory noted that this logic was detrimental to employees, as it was difficult for an individual employee to assess the complex risks to their financial situation when it was highly likely they did not possess enough information to gauge the true operating position of their employer.¹¹

6.13 As an attachment to her submission, Dr Tess Hardy provided the committee with a 2014 article from the UNSW Law Journal, authored by herself and Professor Helen Anderson, which centred on issues around the detection and recovery of unremitted superannuation.¹²

6.14 The article examined 'the limitations inherent in the individual complaint/risk based approach nexus' and identified the flaws in the assumption underpinning the current SG compliance regime. In particular, the article outlined the ways in which the reality of the situation differs from the assumption that employees are in a position to detect unpaid SG and report it to the ATO. These included that:

9 Textile, Clothing and Footwear Union of Australia, *Submission 50*, pp. 12–13.

10 Dixon Advisory, *Submission 25*, p. 3.

11 Dixon Advisory, *Submission 25*, p. 3.

12 Dr Tess Hardy, *Submission 24 (Attachment 1)*, p. 162.

- employees may be ignorant of their SG entitlements, the source of the entitlement, or how to check that correct payments are being made;
- employees may fear that questioning their employer will result in their dismissal;
- employees may be more concerned about the underpayment of wages and other entitlements;
- employees may be unaware that underpaid wages almost automatically means underpaid SG; and
- to an employee missing out on employment entitlements, the ATO may not seem the logical place to lodge a complaint over unpaid SG.¹³

6.15 The article summarised the outcome of this situation:

Combined, these issues make it relevant to inquire whether the current approach is adequate in protecting employees and whether any of the detection and enforcement functions, which are increasingly placed on employees, can and should be shared with key government agencies.¹⁴

6.16 In a similar vein, the IGT submission observed:

It is clear that the ATO heavily relies on employee complaints to uncover non-compliance with SG. However, as stated earlier such complaints are typically not made promptly and result in unpaid SG often not being recoverable. Accordingly, it is crucial that the ATO considers other proactive approaches in addressing SG risks at the earliest possible stage.¹⁵

6.17 The IGT noted that one option to bolster the proactive compliance activities of the ATO would be to conduct more SG specific audits based on risks identified by the ATO's risk assessment mechanism. As an alternative, the IGT also suggested that random audits could be conducted (as outlined in the 2010 IGT report), although it noted that the ATO had previously rejected such an option.¹⁶

6.18 The IGT provided detail on the random audit option:

Whilst carrying out random audits may expose some compliant employers to unnecessary compliance costs, these costs and inconveniences may be minimised by the manner in which the ATO conducts these audits... Furthermore, in light of the earlier discussion on the economic impact of unpaid SG, such costs and inconveniences should be weighed against the

13 Dr Tess Hardy, *Submission 24 (Attachment 1)*, p. 168.

14 Dr Tess Hardy, *Submission 24 (Attachment 1)*, p. 168.

15 Inspector-General of Taxation, *Submission 21*, p. 9.

16 Inspector-General of Taxation, *Submission 21*, p. 10.

potential disadvantage that the very same compliant employers face if their competitors do not pay SG and remain undetected.¹⁷

6.19 On the topic of the costs to employers for random audits, the IGT noted that one option that could be considered by the ATO is a level of remuneration or compensation for employers if they were found to be compliant.¹⁸

6.20 The IGT also asserted that random audits may lead to better targeting of non-compliant employers in the long term:

Certain common characteristics of non-compliant employers may be exposed and they could be used to improve the ATO's current risk assessment tools. As the ATO's current risk assessment processes largely rely on reported data, these audits may be the only way that the most non-compliant employers can be detected. Furthermore, conducting random audits would allow the SG gap to be more accurately measured.¹⁹

ATO handling of employee notifications and resource levels

6.21 The committee received evidence noting concerns with how the ATO responded to employee notifications.

6.22 For example, the TCFUA voiced concerns over the ability for an employer to enter into a payment plan with the ATO for unpaid SG, without the knowledge or consent of the affected employee.²⁰

6.23 The TCFUA stated:

Typically in TCFUA's experience, the particular employer commences making payments under the ATO payment plan, but eventually falls into significant arrears again, and simply enters into another payment plan. The pattern is often repeated over years, such that the employee's superannuation is never up to date. Addressing such compliance 'churning' is time and resource intensive and rarely leads to final or full resolution.²¹

6.24 The TCFUA recommended that it be compulsory for the ATO to notify the affected employee and gain consent before entering into a SG payment plan with a non-compliant employer.²²

17 Inspector-General of Taxation, *Submission 21*, p. 10.

18 Inspector-General of Taxation, *Submission 21*, p. 10; see also Mr Ali Noroozi, Inspector-General of Taxation, *Proof Committee Hansard*, 3 March 2017, p. 52.

19 Inspector-General of Taxation, *Submission 21*, p. 10. For similar comments, see Mr Ali Noroozi, Inspector-General of Taxation, *Proof Committee Hansard*, 3 March 2017, p. 54.

20 Ms Vivienne Wiles, National Industrial Officer, Textile, Clothing and Footwear Union of Australia, *Proof Committee Hansard*, 14 March 2017, p. 45.

21 Textile, Clothing and Footwear Union of Australia, *Submission 50*, p. 6.

22 Textile, Clothing and Footwear Union of Australia, *Submission 50*, p. 6.

6.25 The ATO informed the committee that it contacts the individual who lodged the EN by letter or email at each stage of the investigation to provide a progress update or outcome.²³

6.26 Another concern raised was the amount of time it took for the ATO to resolve SG cases, and the lack of information provided to employees about how investigations into their unpaid SG monies were proceeding.

6.27 Cbus observed that many of its members felt as if the ATO was not an effective player in resolving issues regarding SG arrears. In addition, its submission noted:

Cbus' experience of the ATO SG compliance area has sometimes been frustrated by poor communication, extensive time taken in recovery and a lack of confidence in the willingness of the ATO to pursue arrears given their policy and resourcing restrictions.²⁴

6.28 Similarly, the TCFUA informed the committee that many of their members were frustrated with the slow timeframes of ATO investigations of ENs. Ms Vivienne Wiles, the National Industrial Officer for the TCFUA elaborated on these concerns:

It [the ATO] is too slow in a number of respects. It is too slow to transfer the money to the super fund when it is received. Its communication with employees is also very poor. It is really common for employees to not even know that the ATO have even recovered any money. The reporting from the ATO back to the employee often takes many, many months and sometimes years.²⁵

6.29 Ms Wiles continued by providing a specific example of significant ATO delays:

We had one case where a number of employees, members of ours, made complaints to the ATO and they literally heard nothing for three years, and then they received a letter telling them that the company was insolvent and had gone into liquidation and the ATO could do nothing further for them. It was a really significant period... They are really left in the dark, which is ironic because it is their money ultimately.²⁶

6.30 As mentioned in chapter 2, according to the ATO, it aims to commence 99 per cent of ENs within 28 days of receipt, and where they proceed to audit, complete 50 per cent of compliance cases within four months (this benchmark is currently under review) and 90 per cent of compliance cases within 12 months. The ATO submission

23 Australian Taxation Office, *Submission 6*, p. 10.

24 Cbus, *Submission 48*, p. 5.

25 Ms Vivienne Wiles, National Industrial Officer, Textile, Clothing and Footwear Union of Australia, *Proof Committee Hansard*, 14 March 2017, p. 46.

26 Ms Vivienne Wiles, National Industrial Officer, Textile, Clothing and Footwear Union of Australia, *Proof Committee Hansard*, 14 March 2017, p. 46.

pointed out that since 2013, the benchmarks for all three service standards has been met.²⁷

Table 6.1—Employee Notification Service Standards²⁸

EN Service Standard	Standard	Benchmark	2012–13	2013–14	2014–15	2015–16
Commenced within 28 days of EN receipt	28 days	99%	99.10%	99.40%	99.50%	99%
Closed within 4 months	4 months	50%	50.82%	70.70%	73.50%	76%
Closed within 12 months	12 months	90%	99.70%	99.80%	99.90%	100%

6.31 Although recognising the work done by the ATO to improve its complaint response outcomes, JobWatch informed the committee that callers to its helpline largely perceived the ATO's follow-up action as inadequate, and were consistently frustrated with a perceived lack of ATO activity in investigating complaints.²⁹

6.32 JobWatch also emphasised that individuals who had lodged ENs often reported feeling unhappy with their interactions with the ATO:

Anecdotally, many of our callers have complained about feeling as if they had not been listened to thoroughly by the relevant authorities, perceiving responses by the ATO as largely scripted and robotic.³⁰

6.33 While recognising that providing individual updates is a time consuming, resource intensive process, JobWatch recommended that, as much as possible, the ATO take steps to personally explain the process of debt enforcement to complainants:

The time taken to properly explain the complexities and difficulties based on a personalised assessment of a complainant's situation will go some way to ensure that, at the very least, the complainant feels listened to.³¹

6.34 In regard to ATO resource levels, the Community and Public Sector Union (CPSU) submitted that its members had observed that the ability of the ATO to effectively undertake compliance activities (both in terms of the identification and

27 Australian Taxation Office, *Submission 6*, p. 37.

28 Australian Taxation Office, *Submission 6*, p. 37.

29 JobWatch, *Submission 26*, p. 6.

30 JobWatch, *Submission 26*, p. 7.

31 JobWatch, *Submission 26*, pp. 7–8.

recovery of unpaid SG) was limited due to the decline of ongoing staffing levels in recent years.³²

6.35 The CPSU submission further sets out the limitations of the ATO's complaints process:

Feedback from CPSU members is that due to prioritisation of resources within the ATO, if an employee notifies that there has been a non-payment of SG, an audit of all the SG payments by that employer is not completed until a pattern of non-payment has been established. This forces the burden of proof onto the employees of the business to establish a pattern of behaviour, rather than a problem being identified by the compliance area within the ATO.³³

6.36 On the matter of resource levels, the ATO informed the committee that the majority of resources for SG activities sit within the Superannuation Business Line, with support services provided by client accounts services, law design and practice, and customer service and solutions. The ATO stated that the fulltime equivalent (FTE) number and proportion of staff working on SG within the Superannuation Business Line remained at a similar level in 2016-17 as it had in 2015-16. The Superannuation Business Line currently has approximately 350 FTE employed in active compliance, and of the work undertaken by the active compliance staff, 170 FTE are involved in SG.³⁴

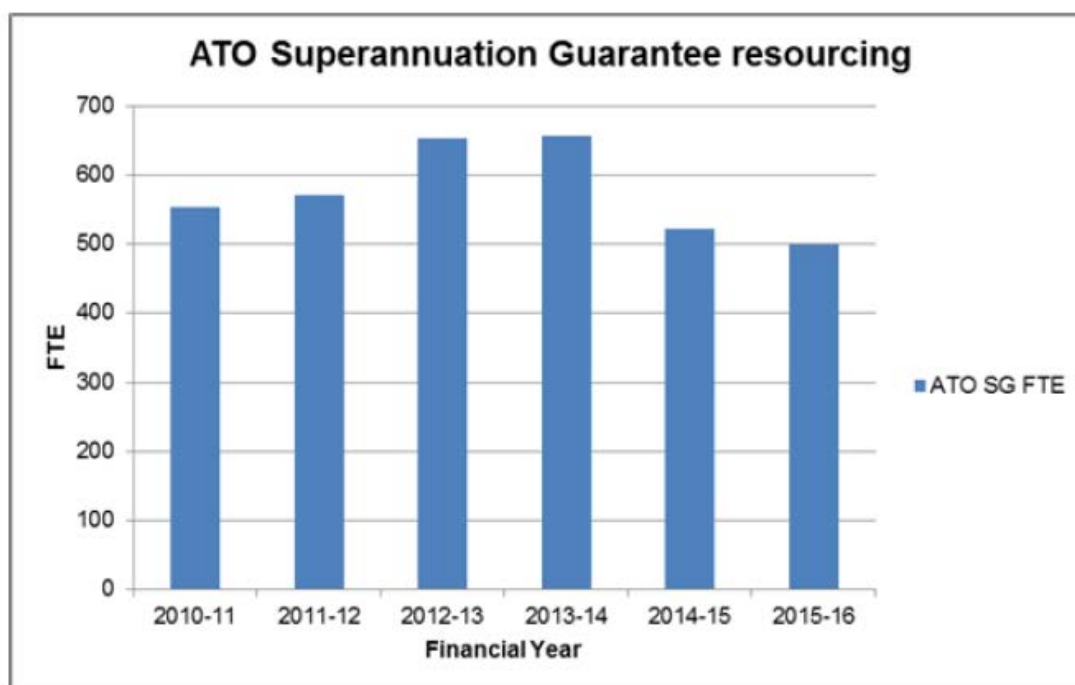
32 Community and Public Sector Union, *Submission 20*, pp. 1–2.

33 Community and Public Sector Union, *Submission 20*, p. 1.

34 Australian Taxation Office, *Submission 6*, p. 36.

6.37 A graph of ATO SG resourcing indicated, however, that the FTE levels for SG resourcing had dropped from a peak of well over 600 FTE in 2012-13 and 2013-14, to approximately 500 FTE in 2015-16.³⁵

Table 6.2—ATO Superannuation Guarantee resourcing, 2010-11 to 2015-16³⁶



6.38 The Association of Superannuation Funds of Australia (ASFA) recommended that the ATO be provided with additional funding to conduct an increased number of SG specific audits of high-risk businesses.³⁷

Committee view

6.39 The committee understands the concerns raised by submitters about the challenges and limitations inherent in the ATO's current SG compliance approach. In particular, the committee recognises that delays in the investigations of employee notifications, as well as a lack of information on the progress of an investigation, can cause significant frustration to individuals awaiting an outcome on their unpaid SG complaint.

Recommendation 10

6.40 The committee recommends that the ATO continue to improve its communication process with individuals to keep them promptly and meaningfully informed of the progress of their employee notification.

35 Australian Taxation Office, *Submission 6*, p. 36.

36 Australian Taxation Office, *Submission 6*, p. 36.

37 Association of Superannuation Funds of Australia, *Submission 30*, pp. 4–5.

6.41 Additionally, the committee is very concerned by evidence indicating that the ATO is able to enter into payment plans with non-compliant employers without informing the employee in question, whose money is being recovered.

Recommendation 11

6.42 The committee recommends that before entering into a payment plan to recover SG from a non-compliant employer, the ATO be required to notify the affected employee and gain their consent to the course of action.

6.43 The committee has serious reservations about the ATO's reactive approach to SG compliance. The committee sees benefits in the ATO rebalancing its current approach to SG compliance by increasing its focus on more proactive methods. The committee urges the ATO to continue to move away from the current reliance on employee notifications to trigger compliance activities.

Recommendation 12

6.44 The committee recommends the ATO give consideration to more proactive SG initiatives, such as the options put forward by the Inspector-General of Taxation to incorporate random audits into its SG compliance activities.

6.45 The committee is aware that taking a more proactive approach, or providing more detailed updates to complainants will necessarily require further ATO resources. The committee notes that ATO SG resourcing levels in terms of FTE numbers appear to have been reduced by a significant amount since 2012-13.

Recommendation 13

6.46 The committee recommends that the government review ATO resource levels to ensure that the agency is well-equipped to undertake effective and comprehensive compliance activities to combat SG non-payment.

The role of third parties in detecting and recovering unpaid SG

6.47 Some superannuation funds choose to take an active role in enforcing the payment of their members' SG.³⁸ For example, as mentioned in chapter 2, Industry Fund Services (IFS) provides a range of services to not-for-profit superannuation funds. IFS stated that its unpaid superannuation division, which specialises in the recovery of SG (including arrears collection, enforcement and participation in insolvency proceedings), acts on behalf of nine superannuation funds.³⁹

6.48 IFS noted that a fund may appoint IFS as their agent at any point in the SG collection process and outlined:

38 Inspector-General of Taxation, *Submission 21*, p. 11.

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

Some client funds utilise all of IFS's services while others undertake arrears collection in-house (or at their outsourced administrator) and rely on IFS for legal enforcement and/or insolvency proceedings only. IFS has five funds representing more than 5.1 million accounts that utilise the full suite of unpaid superannuation services.⁴⁰

6.49 ISA informed the committee that in the absence of an award or another kind of industrial agreement requiring the payment of a specific superannuation amount, the SGA Act may be the only legal instrument imposing a specific legal obligation on an employer to pay contributions. As such, the enforcement of the SGA Act relies upon the potential imposition of an SG charge by the ATO. In these instances, an affected employee or superannuation fund seeking to act on their behalf are unable to take any action themselves and must instead rely on the ATO.⁴¹

6.50 ISA noted that in an attempt to bridge this coverage gap, some superannuation funds have developed deeds of agreement with contributing employers in nominated workplace default fund agreements that explicitly provide superannuation funds with the legal standing to act on behalf of their members. Such agreements provide a record of a formal relationship confirming that an employer has nominated a default fund and set out the employer obligations to superannuation fund members.⁴²

6.51 ISA explained the difficulties that arise without these default fund agreements:

When no formal relationship exists between a fund and an employer, funds have no standing to act on behalf of a member to recover arrears or enforce debt. Employees who are exercising 'choice of fund' are not usually covered by these agreements.

Noting the duty of superannuation fund trustees to recover debts (but the lack of standing that some funds may have due to an absence of an industrial award, enterprise agreement or an explicit default fund agreement), allowing employees – or funds acting on their behalf to apply to the ATO to give standing to recover arrears and pursue a debt would allow funds to fulfil this duty.⁴³

6.52 ISA recommended that in order to remedy gaps in the standing of employees, or those acting on their behalf, to recover unpaid SG from an employer, consideration should be given to amending the SGA Act to allow an individual or agent (such as a superannuation fund or a service provider to the fund) to recover SG shortfalls on application to the ATO. ISA asserted that this could be achieved in a number of ways,

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

41 Industry Super Australia, *Submission 7.1*, p. 16.

42 Industry Super Australia, *Submission 7.1*, p. 20.

43 Industry Super Australia, *Submission 7.1*, p. 20.

including by permitting the ATO to delegate an agent (e.g. the superannuation fund or a service provider to them) to recover unpaid SG on application.⁴⁴

6.53 When asked by the committee whether there was a place for superannuation funds to recover unpaid SG, Mr Mark Korda, a partner at KordaMentha observed:

Obviously, they are incentivised to do that. They want to look after their members first, but also the more you have the funds under management the more you can defray your costs – the expense ratio.⁴⁵

6.54 The TCFUA informed the committee that unions are unable to make complaints to the ATO on behalf of individual employees or groups of employees, and noted that it is a complicated process for employee representatives to obtain information on behalf of the individuals they represent. The TCFUA also indicated that while third parties can provide information to the ATO regarding circumstances of SG non-payment, the ATO does not consider these tip-offs to be formal complaints (i.e. employee notifications). The TCFUA submitted that this represented a significant barrier to unions effectively assisting workers in relation to SG non-payment and recommended that union representatives are acknowledged as legitimate representatives of affected workers.⁴⁶

6.55 JobWatch told the committee that many of its callers are frustrated to learn that as employees they lacked the standing to sue their employer for unpaid SG if their entitlements come from the SG legislation and not from a common law contract, modern award, or registered agreement. As a result, employees cannot take private legal action and must instead rely on the ATO to enforce the SG legislation on their behalf.⁴⁷

6.56 JobWatch recommended that there be a legislated option for employees to take private legal action against their employers for unpaid SG, and noted that this could be done by amending the National Employment Standards contained in the Fair Work Act to include an entitlement to SG. JobWatch stated that this would allow employees to issue proceedings to recover unpaid SG, including by way of the small claims procedure outlined in the Fair Work Act.⁴⁸

6.57 The IGT noted that when examining whether the law should be changed to provide employees better direct access to avenues of redress, consideration should be given to whether such a legislative change would be an effective solution when often employees may not have the resources or funds to pursue the matter themselves.⁴⁹

44 Industry Super Australia, *Submission 7.1*, pp. vi, 19; see also Australian Super, *Submission 9*.

45 Mr Mark Korda, Partner, KordaMentha, *Proof Committee Hansard*, 14 March 2017, p. 24.

46 Textile, Clothing and Footwear Union of Australia, *Submission 50*, pp. 13–14.

47 JobWatch, *Submission 26*, p. 9.

48 JobWatch, *Submission 26*, p. 10.

49 Inspector-General of Taxation, *Submission 21*, p. 8.

Committee view

6.58 The committee is of the view that third parties could play an important role in detecting and recovering unpaid SG. The committee believes that the current arrangement, whereby an individual cannot take private legal action against their employer if their SG entitlements stem purely from the SGA Act, is inadequate.

Recommendation 14

6.59 The committee recommends that the government consider a legislated option for employees, or third parties acting on their behalf, such as unions or superannuation funds, to take private legal action in the relevant courts against their employers for unpaid SG.

Default fund criteria

6.60 Related to issues surrounding the role of third parties in recovering unpaid SG, the committee received evidence from Cbus recommending that superannuation funds seeking default status in industry awards be required to have a rigorous arrears collection process in place. Cbus noted that the current default fund criteria in the Fair Work Act does not include the issue of SG compliance, and stressed that only funds with stringent processes in place for dealing with unpaid SG should be considered when assessing funds for default fund status.⁵⁰

Committee view

6.61 The committee considers it pertinent that any superannuation fund seeking default status in an industry award be required to have a proper arrears collection process in place. This would ensure that a fund member who encounters unpaid SG is able to access appropriate assistance in recovering the money.

Recommendation 15

6.62 The committee recommends that superannuation funds seeking default status in industry awards be required to have a rigorous arrears collection process in place.

Effectiveness of the SG Charge

6.63 As outlined in chapter 2, 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 ATO..⁵¹

6.64 An employer subject to the SGC must lodge an SGC Statement with the ATO, calculate the amount payable, and pay the charge by the due date for the relevant

50 Cbus, *Submission 48*, pp. 3, 10–11.

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

quarter. The ATO then forwards the shortfall and nominal interest component to the employee's superannuation fund.⁵²

6.65 Evidence received by the committee indicated that the ATO is reliant upon employers self-reporting to trigger awareness of non-compliance cases. As the ATO submission stated:

The lodgement of an SGC Statement informs the ATO that an employee has not met their SG obligations. It allows the ATO to follow-up and ensure compliance and payment.

If an employer does not lodge an SGC statement, the ATO has powers to raise the SG Charge assessment and the employer can be liable for a penalty of up to 200 per cent of the charge amount.⁵³

6.66 It would appear that under this arrangement the ATO only becomes aware that an employer has not lodged a SGC Statement when an employee lodges an EN, or if the non-compliance is picked up during ATO initiated compliance activities (e.g. through SG proactive audits or the analysis of data to identify SG high risk employers).⁵⁴

6.67 Given that only 30 per cent of the cases of SG non-compliance the ATO looks into are ATO initiated, it could be reasonably concluded that an employer who does not lodge an SGC Statement does not face a high risk of being detected by the ATO.

6.68 One of the three components of the SGC is a nominal interest amount (currently set at 10 per cent from the beginning of the period). This component is designed to compensate an employee for lost investment returns on the unpaid SG amount. However, ISA asserted that as non-compliant employers obtained a cash flow benefit from not paying SG on time (for example interest savings on business loans, credit cards or overdrafts), those interest rate benefits may in effect offset the nominal 10 per cent interest charge. This in turn reduces the impact of the SGC penalty on an employer.⁵⁵

6.69 ISA also argued that the SGC penalty regime overall does not provide a strong enough disincentive to non-compliant employers:

On balance, the existing penalty regime for employers who are failing to meet their SG obligations is not effective. The risk of detection, by either proactive audit or employee complaint, is very low. The SGC penalty

52 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).

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

54 See Australian Taxation Office, *Submission 6*, pp. 28–29, 31.

55 Industry Super Australia, *Submission 7.1*, p. 16.

regime appears to have been designed merely to provide a modest disincentive for making late payments. It is not a deterrent to employers wilfully ignoring the SG liability.⁵⁶

Committee view

6.70 The committee is concerned that the SGC regime relies heavily on non-compliant employers self-reporting. While the committee acknowledges that many employers seek to do the right thing and do lodge SGC statements, there are also some unscrupulous employers who attempt to circumvent the system.

6.71 The committee is mindful of the view put forward by the IGT that when assessing the effectiveness of the SGC, there is a need to strike a balance between the deterrent aspects of the charge, as well as appropriate consideration of the employer's circumstances.⁵⁷ However, the committee is of the opinion that the current SGC does not amount to a strong enough deterrent for employers who purposefully seek to evade their SG obligations. The committee considers there is a need for stronger penalties for deliberate and repeated non-compliance as such behaviour severely disadvantages individual workers, damages the competitiveness of compliant employers, and ultimately undermines the system as a whole.

Recommendation 16

6.72 The committee recommends that the government review the SGC regime and its management by the ATO to ascertain whether it is adequate, with a view to increasing penalties for deliberate and repeated acts of non-compliance by employers.

ATO and FWO compliance responsibilities

6.73 The committee received evidence regarding the division of responsibilities for superannuation entitlements between the ATO and the Fair Work Ombudsman (FWO) and the impact of this division on SG compliance efforts.

6.74 The Department of Employment outlined the role of the FWO in relation to superannuation entitlements as follows:

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.

The FWO responds to complaints of underpayment made by employees by gathering payment information from both the employee and the employer.

56 Industry Super Australia, *Submission 7.1*, p. 17.

57 Inspector-General of Taxation, *Submission 21*, p. 12.

FWO does not have statutory access to payment information from employers or superannuation funds in the same way as the ATO. Therefore [the] FWO is not able to proactively monitor SG and in the majority of circumstance, will forward on complaints regarding SG contribution to the ATO for action...

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.⁵⁸

6.75 Mr Michael Campbell, the Deputy Fair Work Ombudsman (Operations), clarified that:

Our power to enforce a superannuation payment would only arise through a modern award and it would depend on how that clause is drafted to determine what our enforcement possibilities would be. If it is specific and it requires a percentage payment then we can enforce that as part of our regular work.⁵⁹

6.76 Dr Tess Hardy provided the committee with an example illustrating that the FWO does have the ability to pursue superannuation entitlements in some situations:

Certainly, although the Fair Work Ombudsman has a practice of dealing with underpayments of minimum wages and referring the superannuation shortfall issues to the ATO, there are a number of cases where it has pursued superannuation entitlements as part of a broader proceeding in relation to underpayment of wages. It is certainly within their ambit to pursue superannuation entitlements where, of course, they arise within their jurisdiction, which is under a modern award, under an enterprise agreement or as a safety net contractual entitlement. They have done so.⁶⁰

6.77 Dr Hardy went on to give a specific example of such a situation:

There was a recent case in the Federal Court of the Fair Work Ombudsman and Grouped Property services, which involved the underpayment of wages, various other entitlements and superannuation contributions. There were 48 award-covered employees and three award-free employees. For the 48 award-covered employees the Fair Work Ombudsman was able to seek compensation for lost superannuation and lost interest. The three award-free employees would have to rely on the ATO to take action on their behalf. That is kind of an illustration of the way in which the award coverage has

58 Department of Employment, *Submission 24*, p. 7.

59 Mr Michael Campbell, Deputy Fair Work Ombudsman, Operations, Fair Work Ombudsman, *Proof Committee Hansard*, 3 March 2017, p. 36.

60 Dr Tess Hardy, private capacity, *Proof Committee Hansard*, 14 March 2017, p. 3.

implications for the Fair Work Ombudsman's jurisdiction and recovery of those underpayments through the courts.⁶¹

6.78 The FWO informed the committee that of the formal requests for assistance finalised by the FWO in 2015-16, approximately 5 per cent (1242 requests) involved a reference to superannuation.⁶²

6.79 Mr Andrew Fogarty, Executive Director of Policy, Media and Communications at the FWO clarified that:

...we really structure ourselves at the moment so that, at the front end, if someone comes to our contact centre, for instance, or calls us, we are, right at the beginning, referring them to the ATO if their question is about superannuation or taxation.⁶³

6.80 When the committee sought further information on when the FWO does act to enforce SG, Mr Campbell outlined that although the jurisdiction of the FWO was enlivened when an award provided for a specific percentage SG payment and it was an award entitlement, in practice, the FWO method of operation was to refer SG to the ATO. As Mr Campbell noted 'they [ATO] have a broader coverage and greater powers to conduct this work and, ultimately, it is more effective than our seeking to do it.'⁶⁴

6.81 Mr Campbell went on to provide the committee with further detail around the approach of the FWO to superannuation non-payment:

In simple terms, the work we focus on is that which is clearly within our jurisdiction. The ATO has a broader jurisdiction than ours. It reaches more employees and employers and it has a better toolkit and set of powers to seek out and recover unpaid superannuation. So we refer it to them and we think that is an appropriate approach. It is not that we do not prioritise or think that it is important, but the mechanism that we have in place works. That is how we treat that work.⁶⁵

6.82 When questioning other witnesses on what might be behind the apparent reluctance of the FWO to engage in the superannuation compliance issues, the committee received the following evidence:

61 Dr Tess Hardy, private capacity, *Proof Committee Hansard*, 14 March 2017, pp. 3–4.

62 Fair Work Ombudsman, answers to questions on notice, 3 March 2017 (received 15 March 2017), p. 2.

63 Mr Andrew Fogarty, Executive Director of Policy, Media and Communications, Fair Work Ombudsman, *Proof Committee Hansard*, 3 March 2017, p. 36.

64 Mr Michael Campbell, Deputy Fair Work Ombudsman, Operations, Fair Work Ombudsman, *Proof Committee Hansard*, 3 March 2017, p. 37.

65 Mr Michael Campbell, Deputy Fair Work Ombudsman, Operations, Fair Work Ombudsman, *Proof Committee Hansard*, 3 March 2017, p. 39.

Chair: In your view, what explains the Fair Work Ombudsman's reluctance to engage in this area? Are there some administrative difficulties for them which make it easier for them to refer to the ATO or is it simply that the ATO is recognised within government as being the relevant enforcement agency? Is there something other than just an informal division of responsibilities?

Dr Hardy: I certainly think there is the perception that the ATO is the principal regulator in this space. The other obvious issue would be one of resources. The more time they spend on enforcing superannuation entitlements, the less resources they have for addressing other issues that they might perceive as more squarely within their jurisdiction or not within someone else's jurisdiction.⁶⁶

6.83 The memorandum of understanding between the ATO and the FWO as it relates to information sharing between the two agencies is covered in chapter 7.

Committee view

6.84 The committee is of the view that the FWO should be more active in the SG compliance space. Rather than simply referring SG matters to the ATO, the committee believes that the FWO should actively assist employees in resolving unpaid SG matters where appropriate under their jurisdiction.

Recommendation 17

6.85 The committee recommends that the ATO review all current compliance and recovery activities related to unpaid SG to determine which ones should remain with the ATO, and which ones could be transferred to, or shared with, the Fair Work Ombudsman. As a starting point, the committee recommends that the Fair Work Ombudsman begin to receive and act on SG non-payment complaints where appropriate, rather than simply referring the affected employees to the ATO.

Recommendation 18

6.86 The committee recommends that the government consider increasing the resource levels of the Fair Work Ombudsman to ensure it is properly equipped to carry out any additional SG compliance or recovery activities it may acquire from the ATO.

Unpaid SG in the event of insolvency

6.87 Employer insolvency poses a serious challenge to the payment of SG. In addition to the loss of wages, annual leave and other redundancy entitlements, the loss of unpaid SG is of great concern to affected employees, particularly in a situation where SG entitlements have not been remitted for a significant period of time, if at all.

66 Dr Tess Hardy, private capacity, *Proof Committee Hansard*, 14 March 2017, p. 4.

6.88 As Professor Helen Anderson and Dr Tess Hardy noted in an academic article in the UNSW Law Journal submitted by Dr Hardy part of her submission:

Corporate insolvency exacerbates the recovery of unpaid employment entitlements, including any unremitted superannuation contributions, because the main target of enforcement action – the company– is likely to have insufficient assets to meet the claim.⁶⁷

6.89 JobWatch stated that many of its callers reported being dissatisfied with their inability to recover unpaid SG when their employer had gone into liquidation or been declared bankrupt. JobWatch also stated that in some situations, although an employee had lodged an EN with the ATO before their employer's bankruptcy or liquidation, by the time the ATO conducted an investigation the insolvency process had already begun. JobWatch noted 'the lengthy and secretive investigation process for recovery through the ATO is inadequate in these situations as rapid resolution is essential to prevent employee entitlements from being subjugated by other creditors'.⁶⁸

6.90 According to the ATO's submission, 36 per cent of EN cases were raised against employers displaying an insolvency indicator on ATO systems, which made debt collection unlikely. This in turn meant that the ATO was generally unable to collect any SG payment for affected employees.⁶⁹ In addition, the ATO observed that due to the time lag in reporting the non-payment of SG contributions, insolvency was a significant issue in the recovery of SGC debt, with \$113.2 million irrecoverable at law in 2015-16.⁷⁰

Effectiveness of Director Penalty Notices

6.91 The ATO informed the committee that administrative improvements to the recovery of unpaid SG could potentially be achieved by improving the systems that support the issuing of Director Penalty Notices (DPNs). Since 2012, the Director Penalty regime (enacted through Division 269 of Schedule 1 of the *Taxation Administration Act 1953*) has been applicable to company SGC liabilities. As a result, the ATO Commissioner is able to recover SGC liabilities by pursuing a parallel liability imposed on the company directors in the form of a penalty.⁷¹

6.92 For example, the ATO would issue a notice requiring a director to pay any unpaid SG, and if the director did not comply with the notice by the due date, the director becomes personally liable for the penalty amount until it is paid in full.⁷²

67 Dr Tess Hardy, *Submission 24 (Attachment 1)*, p. 162.

68 JobWatch, *Submission 26*, p. 10.

69 Australian Taxation Office, *Submission 6*, p. 28.

70 Australian Taxation Office, *Submission 6*, p. 33.

71 Australian Taxation Office, *Submission 6*, p. 34.

72 Cbus, *Submission 48*, p. 14.

6.93 However, the effectiveness of this framework is limited in situations involving an insolvent company. For example, if the ATO sends a DPN to the director of an insolvent company, the director is able to escape personal liability by simply liquidating the defaulting company within 21 days of receiving the notice. This means that any unpaid SG amounts are not recoverable.⁷³

6.94 The ATO elaborated on this point:

...the liquidation or voluntary administration of the company automatically extinguishes any director penalty which was not already the subject of a Director Penalty Notice (s 269-25 of the TAA [*Taxation Administration Act 1953*]) issued more than 21 days prior to the commencement of the insolvency administration or where the associated SGC liability was not reported for more than three months at the time that the administration commenced. Given that the reporting date for SGC is two months following the end of the quarter, it is often the case that the eventual liquidation of the company extinguishes the director penalties related to the past eight months of the company's unpaid superannuation obligations.⁷⁴

6.95 Similarly, in an article in the University of New South Wales Law Journal by Dr Tess Hardy and Professor Helen Anderson, the two academics outlined their concerns with the adequacy of the DPN system:

Companies wishing to avoid these (and possible other) liabilities can simply liquidate or enter voluntary administration before three months has elapsed without reporting or paying their SGC liabilities. In such circumstances, the directors will face no personal consequences, even if the ATO later identifies the lack of superannuation payment. The business may then be reborn through a 'phoenix' company and the behaviour continues.⁷⁵

Committee view

6.96 The committee is concerned by the apparent deficiency of the current DPN framework as it relates to unpaid SG by companies that become insolvent. The committee is of the view that this unintentional loophole must be urgently addressed in order to stop unscrupulous employers from engaging in fraudulent phoenix activity and avoiding their superannuation obligations.

Recommendation 19

6.97 The committee recommends that the government investigate potential legislative amendments to strengthen the ATO's current ability to recover SGC liabilities through the Director Penalty Notice framework in order to stop company directors undertaking fraudulent phoenix activity and avoiding their SG obligations.

73 Professor Helen Anderson, *Submission 5*, p. 3.

74 Australian Taxation Office, *Submission 6*, p. 34.

75 Dr Tess Hardy, *Submission 24 (Attachment 1)*, p. 178.

Impact of illegal phoenix activities

6.98 Phoenix activity is generally based upon the failure or abandonment of one company, only to have a second company 'rise from the ashes' of the first, with the same controllers and business. Such activity is illegal when, in a breach of directors' duties, the intention of the company's controllers is to shed debts while continuing what is essentially the same business through the new entity. The non-payment of taxes and employee entitlements, including SG, is often the core objective of illegal phoenix activity.⁷⁶

6.99 A February 2017 report by Professor Anderson and colleagues at the Melbourne Law School entitled 'Phoenix Activity: Recommendations on Detection, Disruption and Enforcement' recommended the use of director identification numbers (DIN) for all company directors to allow ASIC and other regulators to monitor and track repeat offenders engaging in illegal phoenix activity.⁷⁷

6.100 It is currently possible to register an Australian company by simply providing ASIC with the name, address and date of birth of each proposed officeholder. ASIC does not ask for the prior corporate history of the proposed directors, nor does it independently verify the information provided to it. This is problematic as repeat offenders in illegal phoenix activity can attempt to conceal their previous multiple directorships under the guise of a 'dummy director' (for example, by providing the name of a relative or fictitious character, deliberately misspelling their name, or listing an incorrect date of birth).⁷⁸

6.101 To combat this behaviour, Professor Anderson's report proposed the following details for a DIN scheme:

The limitations of the existing company registration requirements could be overcome through the relatively simple and cheap process of requiring directors to establish their own identity via 100 points of identity proof, which would accord with the well-accepted and uncontroversial practice for opening bank accounts and obtaining passports. Directors would then be allocated a unique DIN, which would enable tracking of company directors

76 Professor Helen Anderson, *Submission 5*, p. 1.

77 Professor Helen Anderson, Professor Ian Ramsay, Professor Michelle Welsh and Mr Jasper Hedges, *Phoenix Activity: Recommendations on Detection, Disruption and Enforcement*, February 2017, http://law.unimelb.edu.au/_data/assets/pdf_file/0020/2274131/Phoenix-Activity-Recommendations-on-Detection-Disruption-and-Enforcement.pdf (accessed 24 April 2017).

78 Professor Helen Anderson, Professor Ian Ramsay, Professor Michelle Welsh and Mr Jasper Hedges, *Phoenix Activity: Recommendations on Detection, Disruption and Enforcement*, February 2017, p. 2.

who have been involved in multiple corporate failures and who may be likely to engage in armful phoenix activity.⁷⁹

6.102 In her inquiry submission Professor Anderson also suggested that a DIN scheme could assist credit reporting agencies in acting as market-based regulators. If given information about unremitted SG and those directors responsible for it (identified through the DIN), credit reporting agencies could in effect make it more difficult for unscrupulous directors to obtain finance for their future companies.⁸⁰

6.103 The Australian Restructuring Insolvency and Turnaround Association (ARITA) informed the committee that it supported a DIN scheme as set out in the research by Professor Anderson, noting that it is a policy they have strongly advocated for to reduce instances of illegal phoenix activity.⁸¹

Committee view

6.104 The committee considers that a DIN initiative has merit as it would go some way to preventing directors engaging in illegal phoenix activity and repeatedly avoiding SG obligations with impunity. The committee also considers that the potential for a DIN initiative to assist credit reporting agencies in identifying individuals who engage in illegal phoenix activity is worth further investigation.

Recommendation 20

6.105 The committee recommends that the government consider implementing a Director Identification Number scheme to prevent individuals engaging in illegal phoenix activity and repeatedly avoiding SG obligations.

Impact of trusts on unpaid SG during liquidation

6.106 The committee received evidence indicating that the method in which an employee is employed (i.e. via a company structure or via a trust) can impact the priority of employee entitlements during the liquidation of a company. This in turn impacts on the ability for employees to recover unpaid SG amounts.

6.107 ARITA informed the committee that in the event of the liquidation of a company, employee entitlements (such as unpaid SG) are given priority over ordinary

79 Professor Helen Anderson, Professor Ian Ramsay, Professor Michelle Welsh and Mr Jasper Hedges, *Phoenix Activity: Recommendations on Detection, Disruption and Enforcement*, February 2017, p. 2.

80 Professor Helen Anderson, *Submission 5*, p. 3.

81 Mr John Winter, Chief Executive Officer, Australian Restructuring Insolvency and Turnaround Association, *Proof Committee Hansard*, 13 March 2017, p. 28.

trade creditors. ARITA observed, however, that recent court decisions⁸² have determined that if the business is traded and employed through a trust, all creditors rank equally when it comes to the distribution of available funds.⁸³ Specifically, if a business is operated through a trust structure, it is outside the operation of section 556 (relating to priority payments) of the *Corporations Act 2001* (Corporations Act).⁸⁴

6.108 ARITA provided the committee with the following example to explain the impact on the recovery of unpaid SG amounts of employees of an insolvent company:

...if a butcher trades using a company structure, employee entitlements owing to the apprentice would be paid in priority to the debts owing to the butcher's meat supplier. If the same business was instead traded through a trust structure, the apprentice and the meat supplier would rank equally. Where there are insufficient funds available to pay all outstanding amounts, this reduces the amount of outstanding entitlements that the employee would receive, including any superannuation...⁸⁵

6.109 In a submission in his private capacity, Mr Geoff Green, a chartered accountant and former registered liquidator, argued that as the use of discretionary trusts is widespread in commercial practice, many thousands of employees could be impacted. Mr Green stated that if the level of protection afforded to employee superannuation and other priorities is dependent on the type of structure used by the employer, then in practical terms it was firstly inequitable (because there is no business or commercial justification for such a difference); and secondly impractical (because employees cannot be expected to identify the type of structure by which they are employed, or to understand the consequences of the structure).⁸⁶

6.110 Mr Green suggested that a solution to this problem would be to amend the Corporations Act so that section 556 priorities apply in all liquidations. Mr Green noted that this would implement the recommendation set out in paragraph 265 of the Australian Law Reform Commission's 1988 Harmer report.⁸⁷ Mr Green also observed that as an alternative to amending section 556 of the Corporations Act, a new provision that operates to create priority for employee entitlements and SG debts ahead of trust creditors (in the same way that section 561 currently gives priority to employee entitlements and SG debts ahead of circulating security interests) could be created. In addition, Mr Green noted that any changes should be drafted to allow for

82 ARITA referred to recent decisions in the New South Wales Supreme Court (in the matter of Independent Contractor Services (Aust) Pty Limited ACN 119 186 971 (in liquidation) (No 2) [2016] NSWSC 106); and the Federal Court (in Woodgate, in the matter of Bell Hire Services Pty Ltd (in liquidation) [2016] FCA 1583).

83 Australian Restructuring Insolvency and Turnaround Association, *Submission 23*, p. 3.

84 Mr Geoff Green, *Submission 4*, p. 1

85 Australian Restructuring Insolvency and Turnaround Association, *Submission 23*, p. 3.

86 Mr Geoff Green, *Submission 4*, p. 1.

87 Mr Geoff Green, *Submission 4*, p. 2.

the possibility that corporate entities might be the trustee of more than one trust, or might also employ staff in their own right.⁸⁸

Committee view

6.111 The committee considers it inequitable that individuals employed in businesses operating through a trust structure with unpaid SG are not considered to have priority over ordinary creditors in the event of employer insolvency.

Recommendation 21

6.112 The committee recommends that the government consider amending the Corporations Act to ensure that the priorities in section 556 apply during all liquidations, regardless of whether the business being liquidated was operated through a trust structure.

Other issues relating to payment and calculation of SG during liquidation

6.113 The committee received evidence on other issues relating to the payment and calculation of SG during liquidation processes.

6.114 For example, ARITA highlighted the inconsistency in the calculation of the nominal interest component of the SGC between the SGA Act and the Corporations Act. ARITA stated that under the Corporations Act, creditors are entitled to include interest up to the date of liquidation in their claim, if the terms of their debt provide for interest to accrue. However, when the ATO calculates the nominal interest of the SGC on unpaid super, the nominal interest is calculated up to the date of lodgement of the SGC statement. This date of lodgement is generally after the date of liquidation.⁸⁹

6.115 ARITA argued that this inconsistency could potentially disadvantage other creditors in the liquidation due to the priority status of the SGC amount:

In our view, this is inappropriate, as creditors in the liquidation should enjoy the same rights and privileges unless specifically differentiated by the Corporations Act... In our view, all interest should be treated equally and the right to interest should be calculated as at the date of liquidation.⁹⁰

6.116 ARITA also informed the committee that feedback from its members showed there were often lengthy delays between when an SGC payment is made to the ATO as part of an insolvency process, and when those funds are remitted to an employee's superannuation fund. To solve this, ARITA suggested that power be given to insolvency practitioners to pay dividends for unpaid SG directly to an employee's superannuation fund (where details of the fund are known). Any payments could then

88 Mr Geoff Green, *Submission 4*, p. 2.

89 Australian Restructuring Insolvency and Turnaround Association, *Submission 23*, pp. 3–4.

90 Australian Restructuring Insolvency and Turnaround Association, *Submission 23*, p. 4.

be reported to the ATO, and the associated administration component of the SGC be paid directly to the ATO.⁹¹

Committee view

6.117 The committee is of the view that both these issues warrant further investigation in order to ascertain whether any changes could be made to allow employees to promptly receive their SG entitlements in the event that their employer becomes insolvent.

Recommendation 22

6.118 The committee recommends that the government consider amending the SGA Act so that nominal interest on SGC in the case of insolvencies apply up to the date of liquidation, in alignment with other creditors as set out in the Corporations Act.

Recommendation 23

6.119 The committee recommends that the government consider amending the SGA Act to allow insolvency practitioners to pay outstanding SG contributions directly to an employee's superannuation fund.

Fair Entitlements Guarantee scheme

6.120 The Fair Entitlements Guarantee (FEG) is a publicly funded safety net scheme of last resort designed to protect accrued basic employment entitlements administered by the Department of Employment under the *Fair Entitlements Guarantee Act 2012* (FEG Act). FEG commenced as a legislated scheme in December 2012, replacing the previous administrative version of the scheme, the General Employee Entitlements and Redundancy Scheme (GEERS).

6.121 FEG allows employees who have lost their jobs due to the liquidation or insolvency of their employer and who are unable to recover particular entitlements, to apply to receive financial assistance, with all payments subject to a capped weekly amount.⁹²

6.122 Unpaid SG is specifically excluded from FEG. The five basic employment entitlements covered under the scheme are as follows:

- unpaid wages (capped to 13 weeks)
- unpaid annual leave
- unpaid long service leave
- payment in lieu of notice (capped to five weeks)

91 Australian Restructuring Insolvency and Turnaround Association, *Submission 23*, pp. 2–3.

92 Department of Employment, *Submission 24*, pp. 2–3.

- redundancy pay (capped to four weeks per full year of service)⁹³

6.123 The Department of Employment provided the committee with some background on the policy design of FEG:

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*.⁹⁴

6.124 The Department of Employment also elaborated on why SG was not covered under FEG:

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.⁹⁵

6.125 The Department of Employment also stated that the FEG scheme presents a 'moral hazard' as it potentially shifts the cost of employer accountability for employee entitlements obligations to tax payers. The department noted that as FEG has become more generous over time, the moral hazard risk that insolvent employers rely on the scheme to meet employees entitlements has increased.⁹⁶

6.126 Numerous submitters recommended that FEG be expanded to cover unpaid SG. For example, Cbus, the ACTU and United Voice all recommended that consideration be given to expanding FEG to include SG entitlements.⁹⁷

6.127 ISA argued that even though an expansion of FEG to include SG would create costs to government, these costs may be offset over time through a decrease in the number of affected employees reliant on the age pension years later. ISA also stated

93 Department of Employment, *Submission 24*, p. 4.

94 Department of Employment, *Submission 24*, p. 3.

95 Department of Employment, *Submission 24*, p. 6.

96 Department of Employment, *Submission 24*, pp. 5, 8.

97 See Cbus, *Submission 48*; Australian Council of Trade Unions, *Submission 51*; United Voice, *Submission 66*.

that including SG in FEG would create an incentive for government to administer an effective SG compliance regime.⁹⁸

6.128 JobWatch informed the committee that although superannuation and wage entitlements have equal standing in insolvency legislation when it comes to prioritising payments, if an employee is unable to access superannuation due to employer insolvency, there is no other option for remuneration available to them.⁹⁹

6.129 The Association of Super Funds Australia (ASFA) recommended that unpaid SG entitlements be included in the unpaid employment entitlements covered by FEG. ASFA stated that there was merit in reviewing the treatment of unpaid SG entitlements in insolvency cases as, according to ASIC data, a substantial number of insolvency cases involved unpaid SG entitlements.¹⁰⁰

6.130 The Association of Financial Advisors (AFA) pointed out that unpaid SG liability can be a cause of employers entering insolvency arrangements in the first place, meaning employees could potentially miss out on substantial sums of retirement funds rightfully owed to them. AFA suggested that the FEG scheme be reviewed to consider the protection of SG entitlements in liquidation.¹⁰¹

6.131 The committee also received evidence from the IGT indicating that the inquiry was not the first time that the expansion of the last resort employee entitlement scheme has been canvassed. In the 2010 IGT Super Guarantee Charge review, the IGT recommended an expansion to both GEERS and the Director Penalty Notice (DPN) regime to cover unpaid SGC liabilities.¹⁰²

6.132 The recommendation read as follows:

Recommendation 11

To better protect employees' SG entitlements and improve both deterrence against SG non-compliance and provide greater transparency of the cost of SG non-compliance on future age pension outlays, the Government consider:

- Expanding the director penalty regime to apply to unpaid SGC liabilities of the company; and

98 Industry Super Australia, *Submission 7.1*, p. 21.

99 JobWatch, *Submission 26*, p. 11.

100 Association of Australian Super Funds, *Submission 30*, p. 5.

101 Association of Financial Advisors, *Submission 58*, p. 3.

102 Inspector-General of Taxation, *Submission 21*, p. 13.

- Expanding GEERS to cover unpaid SGC liabilities where a company has been placed into liquidation and the ATO has not been able to recover against the directors personally.¹⁰³

6.133 Although the suggestion to expand GEERS was not actioned, the DPN regime was expanded to include unpaid SGC liabilities in June 2012. As a result of this, if a company fails while owing SG to employees, directors of the company may become liable for any unpaid superannuation entitlements. The policy intent behind the expansion was to establish a deterrent against non-compliance and improve the ATO's ability to recover unpaid SG even after a company had been declared insolvent.¹⁰⁴

6.134 However, according to the IGT submission, this expansion was supposed to be complemented by an expansion of the last resort employee entitlement scheme:

The IGT explained in his 2010 SGC Review that the expansion of both DPNs and GEERS to cover unpaid SGC complementary. Where a company has not met their SG obligations, the ATO should have the ability to recover unpaid SGC amounts from the directors of companies personally. Only when the ATO has not been able to recover unpaid SGC liabilities from the company and the directors should GEERS, now FEG, cover unpaid SG.¹⁰⁵

6.135 The Department of Employment (the department) argued that FEG not be expanded, asserting that notwithstanding the availability of FEG as a last resort safety net, the government had clearly stated that it is the responsibility of an employer to meet its employee entitlement obligations. The department also stated that 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.¹⁰⁶

6.136 The department asserted that including unpaid SG contributions in FEG would:

- significantly increase the cost of the scheme;
- exacerbate the existing moral hazard inherent in the scheme; and
- create unnecessary policy and administrative complexity.¹⁰⁷

6.137 In particular the department argued that expanding FEG to include unpaid SG would result in an increase of around 47 per cent in the number of claims to the

103 Inspector-General of Taxation, *Review into the ATO's administration of the Superannuation Guarantee*, 2010, p. 93.

104 Inspector-General of Taxation, *Submission 21*, p. 13.

105 Inspector-General of Taxation, *Submission 21*, p. 13.

106 Department of Employment, *Submission 24*, p. 8.

107 Department of Employment, *Submission 24*, pp. 8–10.

scheme. This would in turn result in additional administered expense for the government, which the department estimated to be \$801 million over the forward estimates. The department also claimed that changes to business systems would be needed to administer assessment and payment of the superannuation component of claims, at a cost of an extra \$39 million to departmental expenses over the forward estimates.¹⁰⁸

6.138 The following table was provided by the department to illustrate the additional expenditure:

Table 6.3—Summary of additional expenditure flowing from an expansion of FEG¹⁰⁹

Item	2017-18	2018-19	2019-20	2020-21	Total
Administered expense (million)	\$180.6	\$193.2	\$206.6	\$220.9	\$801.2
Departmental expense (million)	\$5.41	\$8.49	\$8.47	\$8.52	\$39.34

6.139 The department also flagged that expanding FEG would require legislative amendment to the FEG Act, as well as possibly the SGA 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 Charge arrangements, possibly resulting in a higher level of non-compliance.¹¹⁰

6.140 Rather than expanding FEG, the department recommended that the committee consider measures to strengthen the powers available to the ATO to manage SG compliance. The department stated that expanding FEG to include SG would not likely achieve the desired result of improving compliance in employers meeting their ongoing SG obligations.¹¹¹

108 Department of Employment, *Submission 24*, p. 9.

109 Department of Employment, *Submission 24*, p. 9.

110 Department of Employment, *Submission 24*, p. 10.

111 Department of Employment, *Submission 24*, p. 10.

Committee view

6.141 The committee is mindful of the concerns put forward by the Department of Employment in regard to the additional expenditure that would be required to expand the FEG scheme to cover unpaid SG entitlements. The committee is aware that any change to FEG would need to be carefully considered and undertaken only when there is scope in the federal budget to adequately fund it.

6.142 However, as mentioned earlier in this report, the committee is strongly of the view that SG forms an integral part of an employee's remuneration and is akin to deferred wages. As such, the committee does not agree with the Department of Employment's argument that the different policy genesis of superannuation, as well as the fact that SG is not paid directly to employees as it falls due, nor payable directly to employees on redundancy, are valid reasons for excluding SG from the FEG scheme. The fact the SG contributions are deferred wages does not diminish their importance. The FEG scheme has always covered unpaid wages, and therefore it is logical that SG, as deferred wages, should also be covered.

6.143 Additionally, the committee notes that although including SG in the FEG scheme would increase current costs to government, the likelihood is that government expenditure would instead be decreased in later years due to a reduced reliance on the age pension from those affected employees. The committee is also of the view that if the ATO undertakes more proactive work to prevent SG non-payment as recommended, this will partially offset the increased costs to the FEG scheme should SG be included.

Recommendation 24

6.144 The committee recommends that the relevant government agencies undertake further research into the fiscal and legislative impacts of an expansion of the current Fair Entitlements Guarantee scheme to cover unpaid SG entitlements.

Chapter 7

Accessibility and timeliness of SG data

Accessibility and timeliness of SG data

7.1 The current design of the SG system is essentially based on the employment relationship between an employee and their employer, and subsequently between their employer and the employee's superannuation fund. The ATO is then informed annually in October of the event of SG payment by the employee's superannuation fund via a Member Contribution Statement.¹

7.2 The ATO pointed out the problems this causes for its SG compliance work:

This design creates significant time lags which impact on the ATO's ability to monitor and detect non-payment early due to the quality and nature of annual reporting of contributions by superannuation funds.²

7.3 The SGA Act does not require employers to report payments made to an employee's superannuation fund to the ATO. Although the ATO receives annual PAYG (pay as you go) payment summaries from employers, these do not include SG payment data and only report gross payments, which do not allow for OTE to be identified.³

7.4 The Member Contribution Statement (MCS) the ATO receives each October from APRA regulated superannuation funds focuses on member (i.e. employee) reporting, not employer reporting. It reports the total super contributions received by the fund for their member, and does not consistently identify the employer who contributed the SG.⁴

7.5 The time lag and data constraints of this current arrangement means it can be difficult for the ATO to identify employers who are not keeping up with their SG obligations:

The ATO does not currently have visibility or a timely way to monitor the reporting or payment of SG by an employer. Super funds report member contributions to the ATO on an annual basis and as a result ATO has no visibility of payment information for up to 15 months after the start of a year. This means non-compliant employers can be difficult for the ATO to identify in a timely manner.⁵

1 Australian Taxation Office, *Submission 6*, pp. 8–9.

2 Australian Taxation Office, *Submission 6*, pp. 8–9.

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

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

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

7.6 The ATO provided an overview of the challenges it faces in regard to data. These were summarised as follows:

- There are currently limitations in the data (e.g. Member Contribution Statements) provided by third parties (i.e. superannuation funds) to the ATO.
- Employers who make superannuation contributions to employees cannot be consistently identified. This limitation reduces the ATO's ability to identify employers who have not complied with SG legislation.
- The tax file numbers of employees' reported in Member Contribution Statements from superannuation funds are in some instances not correct. This data limitation means that the ATO is unable to identify the right employees during risk assessments of employers.⁶

7.7 The inability of the ATO to obtain more timely data from superannuation funds has been highlighted in previous reviews on the ATO's administration of the SG system. For example, both the 2010 IGT report and the 2015 ANAO report raised the matter in their respective recommendations.⁷

7.8 The IGT summarised the situation in the following manner:

The effectiveness of the ATO's ability to detect unpaid SG is very much dependent on the timelines and reliability of the data that it is able to obtain or is otherwise available to it.⁸

Committee view

7.9 The committee is of the view that the annual MCS lodged with the ATO by APRA regulated superannuation funds should contain more detailed information than is currently required. The committee considers it necessary that an MCS delineate each category of superannuation payment received (for example SG, additional contributions as required through an industrial agreement, and any voluntary contributions from an employee), and in the case of multiple employers, clearly set out which contribution is from which employer.

7.10 The committee considers that this level of detail is essential to allow the ATO to gain a more comprehensive picture of SG payment and better carry out its compliance activities in the SG space.

Recommendation 25

7.11 The committee recommends that the government revise the information that APRA regulated superannuation funds must include in Member

6 Australian Taxation Office, *Submission 6*, p. 35.

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

8 Inspector-General of Taxation, *Submission 21*, p. 9.

Contribution Statements to include a breakdown of each category of superannuation payment an employee has received, as well as the employer it was received from.

Information sharing between government agencies

7.12 Although the ATO is the core agency tasked with dealing with non-payment of SG, other government agencies also hold information about the operations and viability of stakeholders in the SG system. These agencies include ASIC, APRA and the FWO.

7.13 The committee received evidence confirming there is already a level of information sharing between government agencies. For example, under a memorandum of understanding between the ATO and the FWO, the ATO receives twice yearly reports from the FWO containing details of employers who appear to have not paid SG contributions.⁹

7.14 When asked by the committee whether there would be some benefit in more regular reporting between the two agencies, the ATO clarified that the twice yearly exchange was a 'self-imposed restriction' and it was possible for information sharing to happen on an ad hoc basis.¹⁰ Ms Debbie Rawlings, the ATO's Assistant Commissioner of Superannuation, explained that:

We do exchange on some larger or noteworthy cases; they happen outside that cycle. It is possibly to exchange more regularly. At the moment it is six-monthly.¹¹

7.15 The committee questioned the ATO and APRA over the kind of information sharing relationship between the two agencies. Mr Sacha Vidler, the Senior Manager of the Specialist Superannuation, Industry Tech Services, Policy and Advice Division at APRA, summarised the relationship as such:

APRA collects a lot of data from funds. It is collected fundamentally at a fund level. In terms of estimating SG requirements for individuals or by employer, which is what we need to look at [for] this compliance question, it is not that useful. The ATO and APRA have a memorandum of understanding for sharing information relevant to our work, but that is on a

9 Australian Taxation Office, *Submission 6*, p. 10, see also Department of Employment, *Submission 24*, p. 7.

10 Mr James O'Halloran, Deputy Commissioner, Superannuation, Australian Taxation Office, *Proof Committee Hansard*, 3 March 2017, p. 26.

11 Ms Debbie Rawlings, Assistant Commissioner, Superannuation, Australian Taxation Office, *Proof Committee Hansard*, 3 March 2017, p. 26.

case-by-case basis. Incidence of sharing is evaluated at quite a high level before approval.¹²

7.16 Mr James O'Halloran of the ATO noted:

We have a close relationship in a whole range of ways. I would proffer that, probably from the ATO's point of view, a lot of the framework and information that APRA gets is probably not active enough for case-type work. Certainly, our main complementary work is particularly with the regulatory obligations...¹³

7.17 Mr Vidler further detailed:

...I would just add that, to the extent that there is a data gap that influences SG non-compliance, it is not generated by a failure to share. The data is not collected...¹⁴

7.18 When asked whether there was any other data that APRA could provide to the ATO that may assist in SG compliance activities, Mr Vidler further clarified:

We provided the data that we had on contributions, SG and otherwise, as part of our consideration as a working group. But they are aggregate. They are certainly not split at the employer level, which is what you need to evaluate this problem. So it gives you a sense of the scale of industry but it does not go to this question of compliance.¹⁵

7.19 ISA summarised the current state of information sharing between government agencies and emphasised the disconnect present in the arrangements:

The ATO can access information at the level of the individual and relevant employer for each contribution, for all such employees and employers, but as they have noted in testimony and submissions, they are currently unable to readily identify an employee's OTE base. Superannuation funds cannot identify the OTE base for a payment, APRA only receives aggregated reports, and ASIC and the FWO are more likely to act on complaints rather than responding to a universal information system.¹⁶

12 Mr Sacha Vidler, Senior Manager, Specialist Superannuation, Industry Tech Services, Policy and Advice Division, Australian Prudential Regulation Authority, *Proof Committee Hansard*, 3 March 2017, p. 24.

13 Mr James O'Halloran, Deputy Commissioner, Superannuation, Australian Taxation Office, *Proof Committee Hansard*, 3 March 2017, p. 25.

14 Mr Sacha Vidler, Senior Manager, Specialist Superannuation, Industry Tech Services, Policy and Advice Division, Australian Prudential Regulation Authority, *Proof Committee Hansard*, 3 March 2017, p. 25.

15 Mr Sacha Vidler, Senior Manager, Specialist Superannuation, Industry Tech Services, Policy and Advice Division, Australian Prudential Regulation Authority, *Proof Committee Hansard*, 3 March 2017, p. 25.

16 Industry Super Australia, *Submission 7.1*, p. 10.

7.20 Professor Helen Anderson noted that there did not appear to be a strong exchange of information between ASIC and the ATO in regard to insolvent businesses:

It is interesting that in the third party reports to the ATO there is a huge amount from the Fair Work Ombudsman and nothing from ASIC. At the end of every insolvency, the external administrator sends a report about a given company to ASIC estimating how much was not paid in wages and super and all sorts of bits of information. ASIC does not appear to pass any of that on to the ATO, and I find that quite startling. There are roughly 8,000 liquidations per year, and that information they have gathered could be passed on. That may be a structural issue within the ASIC Act, perhaps. There are privacy concerns there about disclosing that information, because it does not lead to a specific prosecution, perhaps. But it seems to me that is a valuable amount of information that ASIC gathers as part of its own operations, that could be useful here.¹⁷

7.21 Professor Anderson made reference to a table included in the ATO submission setting out the sources of third party SG referrals:

Table 7.1—Source of third party SG referrals¹⁸

Year	Fair Work Ombudsman	Super Funds	Community referrals	Internal ATO referrals	Other	Total
2015-16	2405	73	651	70	57	3256
2014-15	2103	33	431	50	50	2667

7.22 Professor Anderson observed that given roughly 40 per cent of insolvencies involve unpaid superannuation and there are approximately 8000 liquidations per year, it could be reasonably expected that there would be potentially thousands of referrals from ASIC to the ATO. Assuming these referrals would be categorised under 'other', the ATO table appears to indicate that this information exchange is not occurring.¹⁹

7.23 On a related matter, Professor Anderson also drew the committee's attention to the fact that while approximately 8000 companies enter liquidation each year, and their employees are able to access FEG, five times as many companies each year are abandoned and then eventually deregistered by ASIC for failure to pay annual fees and submit returns. Employees of abandoned companies receive no entitlements from the company and are not eligible for assistance from FEG. Professor Anderson

17 Professor Helen Anderson, private capacity, *Proof Committee Hansard*, 14 March 2017, p. 53.

18 Australian Taxation Office, *Submission 6*, p. 10.

19 Professor Helen Anderson, private capacity, *Proof Committee Hansard*, 14 March 2017, p. 53.

emphasised that it is impossible to account for the amounts of lost superannuation of employees of abandoned companies.²⁰

Committee view

7.24 The committee is of the opinion that better coordination between government agencies is a necessary condition to improve the detection of SG non-payment. The current capabilities around the collection, sharing and storage of digital information should act as an incentive for government agencies to re-evaluate their current data coordination arrangements and consider what improvements could be made.

7.25 The committee is particularly concerned that valuable information held by ASIC on insolvency cases is not being properly referred to the ATO. In addition, the matter of unpaid SG left by abandoned companies is an issue that the committee feels ought to be better tracked.

Recommendation 26

7.26 The committee recommends that the ATO and ASIC review their data sharing arrangements to ensure that information on insolvency cases is being referred in a timely manner from ASIC to the ATO.

Recommendation 27

7.27 The committee recommends that the ATO and ASIC work together to collect data on abandoned companies to produce a comprehensive picture on the levels of unpaid SG contributions left by such companies.

7.28 The committee is also of the opinion that it may be beneficial for the ATO and FWO to formally agree to exchange information more frequently than the six monthly cycle set out in their current memorandum of understanding.

Recommendation 28

7.29 The committee recommends that the ATO and FWO review their memorandum of understanding to consider whether more frequent information exchanges would improve their SG compliance activities.

7.30 The committee notes that during the 44th Parliament it inquired into insolvency in the Australian construction industry. The 2015 report made two recommendations related to the sharing of data around SG non-payment:

Recommendation 5

3.72 The committee recommends that the ATO and ASIC increase their formal cooperation with superannuation funds to coordinate measures around early detection of non-payment of superannuation guarantee.

Recommendation 6

20 Professor Helen Anderson, *Submission 5*, p. 2.

3.73 The committee recommends that privacy provisions which may inhibit information flows between the ATO and APRA regulated superannuation funds be reviewed and that the ATO seek advice from the Office of the Australian Information Commissioner as to the extent to which protection of public revenue exemptions in the Australian Privacy Principles might facilitate improved information sharing.²¹

7.31 The committee stands by these 2015 recommendations and encourages the government to consider them, noting that as yet there has not been a formal government response to the report.

Recommendation 29

7.32 The committee recommends that the ATO and ASIC increase their formal cooperation with superannuation funds to coordinate measures around early detection of non-payment of superannuation guarantee.

Recommendation 30

7.33 The committee recommends that privacy provisions which may inhibit information flows between the ATO and APRA regulated superannuation funds be reviewed and that the ATO seek advice from the Office of the Australian Information Commissioner as to the extent to which protection of public revenue exemptions in the Australian Privacy Principles might facilitate improved information sharing.

Potential remedies to address SG non-payment

Single Touch Payroll

7.34 The committee received evidence indicating that the Single Touch Payroll (STP) initiative would contribute to positive outcomes in terms of addressing SG non-payment. However, the committee also heard concerns that STP would only be a partial solution owing to the proposed coverage of the roll-out.

7.35 The STP initiative was announced by the then Minister for Small Business, the Hon Bruce Billson MP, and the then Assistant Treasurer, the Hon Josh Frydenberg MP on 28 December 2014. STP requires the use of compatible business management software to report tax and superannuation information in the required format for digital transmission to the ATO.²²

7.36 STP aims to simplify taxation and superannuation interactions for employers by aligning the reporting of PAYG withholding and SG payments with a

21 Senate Economics References Committee, *Insolvency in the Australian construction industry*, December 2015, p. 48.

22 Australian Taxation Office, *Regulation Impact Statement: Single Touch Payroll*, October 2015, <http://ris.pmc.gov.au/2016/02/10/single-touch-payroll>, p. 1 (accessed 27 March 2017).

business's normal process of paying their employees. STP will become operational from 1 July 2017 and become mandatory for all employers with more than 20 employees from 1 July 2018.²³ Employers with 19 employees or less will also be able to use STP from 1 July 2017, but it will not be compulsory.²⁴

7.37 The Regulatory Impact Statement outlined the expected benefits flowing from STP in regard to SG obligations:

Single Touch Payroll will assist the ATO to take earlier action to protect honest businesses that do the right things and to support those who may begin to struggle with meeting their obligations. In particular, those business who do not fully comply with their PAYG withholding and superannuation obligations enjoy a significant competitive advantage over those that do fully comply, and Single Touch Payroll will allow us to identify and support those who are struggling to comply much earlier.²⁵

7.38 The ATO informed the committee that its visibility of SG data would be greatly improved with the introduction of the STP initiative:

Under the current design, Single Touch Payroll will provide opportunities to identify the non-payment of SG by providing real time visibility of SG liabilities and payments and will enable the ATO to continuously monitor SG shortfalls at the employer and employee level.²⁶

7.39 The ATO further stated that this improved data visibility would allow it to predict and monitor SG payment patterns for changes or any 'missed' payments, meaning it would be able to implement more proactive and preventative measures. The preventative measures given as examples in the submission included:

- where the ATO can see that an employer pays SG near the due date, SMS reminders could be sent;
- where a predicted payment is missed, the ATO could contact the employer before the SG due date; and
- where an employer has an SG shortfall and has yet to lodge an SG statement, the ATO can instigate action and in some cases issue a default assessment.²⁷

7.40 Although acknowledging that the STP initiative would improve the availability of real time data, ISA raised concerns that the currently proposed STP

23 Australian Taxation Office, *Submission 6*, pp. 8, 41.

24 Australian Taxation Office, *Single Touch Payroll*, www.ato.gov.au/general/new-legislation/in-detail/other-topics/single-touch-payroll/ (accessed 5 April 2017).

25 Australian Taxation Office, *Regulation Impact Statement: Single Touch Payroll*, October 2015, <http://ris.pmc.gov.au/2016/02/10/single-touch-payroll>, p. 2 (accessed 27 March 2017).

26 Australian Taxation Office, *Submission 6*, p. 41.

27 Australian Taxation Office, *Submission 6*, pp. 41–42.

coverage would not capture the data of 45 per cent of Australian employees who are employed by a small business employer (19 employees or less). ISA was particularly concerned as this category of employees is identified by the ATO as a cohort with a high incidence of unpaid SG.²⁸

7.41 The AIST expressed support for the STP initiative, as did Chartered Accountants Australia and New Zealand. Both organisations recommended that the initiative be expanded to cover all business employers, regardless of size, citing that it would improve the ATO's ability to monitor SG non-compliance.²⁹

7.42 The TCFUA also recommended that use of STP be compulsory for all employers, particularly given the high level of non-compliance with SG obligations in smaller workplaces.³⁰ COTA also supported the extension of STP to all employers in due course.³¹

7.43 Similarly, Cbus stated that while it was encouraged by the development of the STP platform, its own experience indicated that the bulk of SG non-compliance occurred in small businesses, which would not be covered by STP under the current rollout. Cbus noted that nevertheless, STP offered a valuable opportunity for government to engage with the community about the rights and obligations surrounding superannuation.³²

7.44 Unions Tasmania informed the committee that with around 13 806 businesses in Tasmania employing between one and 19 employees (approximately 37 per cent of all Tasmanian businesses), STP as currently mandated would not assist in protecting the approximately 100,000 employees of these small businesses against SG non-payment. Unions Tasmania recommended that the operation of STP be extended to all businesses to ensure employees of small businesses are not left behind.³³

7.45 The IGT also observed that the current anticipated coverage of STP would have limited success in combatting the non-payment of SG, because it is not mandatory for small or micro businesses, and it is within this category of employer that SG non-payment is highest.³⁴ As such, the IGT suggested:

Accordingly, it would be beneficial to remove or reduce the barriers to the adoption of STP by small or micro businesses even before they are required to do so. For example, the ATO could consider a no or low cost solution for

28 Industry Super Australia, *Submission 7.1*, pp. 10–11.

29 Australian Institute of Superannuation Trustees, *Submission 37*, p. 8; Chartered Accountants Australia and New Zealand, *Submission 27*, p. 5.

30 Textile, Clothing and Footwear Union of Australia, *Submission 50*, p. 11.

31 Council on the Ageing, *Submission 52*, p. 7.

32 Cbus, *Submission 48*, p. 6.

33 Unions Tasmania, *Submission 44*, p. 4.

34 Inspector-General of Taxation, *Submission 21*, p. 7.

these categories of employers or, in the case of those in remote areas, an alternative to direct digital access could be explored.³⁵

7.46 The ATO submission stated that a pilot program will be undertaken in 2017 to examine the benefits for small businesses from STP and noted that a decision by government on any STP expansion to small business employers is expected after the pilot is completed.³⁶

7.47 The IGT also cautioned that while STP data would provide the ATO with greater access to information about the payment of SG, it would not confirm amounts received by superannuation funds. As such, the ATO would still need to await payment information (from the Member Contribution Statement) before it could fully verify compliance. The time gap before such reconciliation could be conducted would increase the risk of non-recovery of unpaid SG.³⁷

7.48 In their report on phoenix activities, Professor Helen Anderson and her colleagues at the Melbourne Law School observed that STP was initially proposed as a mechanism for employers to pay their employees and related PAYG (W) remittance and superannuation contributions. However, in response to concerns from the business community, the STP proposal was later amended to only cover the reporting of tax and superannuation obligations.³⁸ The report noted:

This alteration [to the scope of STP] was in response to concerns from business about the 'cash flow' implications of having to pay the taxes at an earlier time than is presently the case. In other words, while wages are generally paid fortnightly, PAYG (W) and superannuation are usually only remitted monthly or quarterly depending on the size of the business and the terms of the super fund trust deed. The objection raised shows the extent to which businesses rely on employee-related sums – 'their money' until it is legally payable – to finance their businesses, and also shows the hesitation of the government to interfere with this practice.³⁹

7.49 Professor Anderson and colleagues observed that STP as a reporting only mechanism undermined its effectiveness (particularly in regard to so-called 'lockdown'

35 Inspector-General of Taxation, *Submission 21*, p. 7.

36 Australian Taxation Office, *Submission 6*, p. 41.

37 Inspector-General of Taxation, *Submission 21*, p. 7.

38 Professor Helen Anderson, Professor Ian Ramsay, Professor Michelle Welsh and Mr Jasper Hedges, *Phoenix Activity: Recommendations on Detection, Disruption and Enforcement*, February 2017, p. 77.

39 Professor Helen Anderson, Professor Ian Ramsay, Professor Michelle Welsh and Mr Jasper Hedges, *Phoenix Activity: Recommendations on Detection, Disruption and Enforcement*, February 2017, p. 77.

DPNs) and recommended that STP instead require both the reporting and payment of tax and superannuation obligation.⁴⁰

7.50 Similarly, ARITA recommended that steps be taken to directly link tax and SG obligations for both reporting and payment to the employee's regular payroll cycle. ARITA noted 'reporting alone under Single Touch Payroll will not resolve problems with non-payment of SG and other taxes'.⁴¹

Committee view

7.51 The committee appreciates that the implementation of the STP initiative has the potential to greatly assist in the identification and rectification of SG non-payment within businesses of more than 20 employees, particularly in its ability to provide the ATO with greater visibility of SG data.

7.52 However, the committee holds concerns that the current coverage of STP misses out small business employers of 20 employees or less, and that this gap in coverage will disadvantage small business employees, who are widely regarded as particularly vulnerable to SG non-payment.

7.53 The committee is aware that a pilot program will be undertaken in 2017 to identify the benefits of STP for small businesses and is interested to see the outcomes of this program.

Recommendation 31

7.54 The committee recommends that the government strongly consider expanding Single Touch Payroll to all businesses, with equal consideration given to how small businesses could be best supported in adopting the initiative. The committee recommends that Single Touch Payroll apply to all employees and contractors on an employer's payroll. The committee also recommends that the government give consideration to whether STP should require both the reporting and payment of tax and superannuation obligations.

Improved payslip reporting

7.55 The committee received evidence suggesting that improved payslip reporting would promote compliance with SG obligations. In particular, submitters recommended that employee pay slips include the actual amount of SG paid to an employee's superannuation fund, rather than merely accrued.

40 Professor Helen Anderson, Professor Ian Ramsay, Professor Michelle Welsh and Mr Jasper Hedges, *Phoenix Activity: Recommendations on Detection, Disruption and Enforcement*, February 2017, p. 78. For more detail on 'lockdown' DPNs see pp. 77–78.

41 Australian Restructuring Insolvency and Turnaround Association, *Submission 32*, p. 2.

7.56 Under the Fair Work Act and the *Fair Work Act Regulations 2009* (Fair Work Regulations), employers are required to issue payslips to employees and keep employment records. The prescribed details for these documents includes information relating to the employment status of the employee, the rate of remuneration, the number of overtime hours worked, and the superannuation contributions that the employer is liable to make (or has made).⁴²

7.57 Regulation 3.46 of the Fair Work Regulations states:

If the employer is required to make superannuation contributions for the benefit of the employee, the pay slip must also include:

(a) the amount of each contribution that the employer made during the period to which the pay slip relates, and the name, or the name and number, of any fund to which the contribution was made; or

(b) the amounts of contributions that the employer is liable to make in relation to the period to which the pay slip relates, and the name, or the name and number, of any fund to which the contributions will be made.⁴³

7.58 As a result of this regulation, there is a disconnect between the amount of SG an employee sees listed on their payslip each pay cycle, and the amount actually paid into their superannuation fund during that same time period.

7.59 Dr Tess Hardy outlined the impact of this disconnect:

While an employer is obliged to indicate on payslips the amount of superannuation contributions accrued, it does not mean that this amount is actually paid to the superannuation fund. In order to identify any shortfall, an employee must compare the amounts stated on their payslips with the statements issued by their superannuation fund. Given these statements are often published on an annual basis, an employee may not be in a position to detect any underpayment until almost 12 months after the payment was due.⁴⁴

7.60 Both ISA and Australian Super also observed that the four month delay between an SG amount being accrued and noted on a payslip, and that amount being paid into a fund, makes it difficult for an employee to check whether they have been paid correctly. As such, ISA recommended that the Fair Work Act and its associated regulations be amended to require payslips to state the SG amount paid to an employee's superannuation fund, rather than just the amount due. Australian Super also supported this policy suggestion.⁴⁵

42 Dr Tess Hardy, *Submission 42*, p. 2.

43 Fair Work Regulations 2009, Regulation 3.46, www.legislation.gov.au/Details/F2017C00246 (accessed 3 April 2017).

44 Dr Tess Hardy, *Submission 42*, p. 3.

45 Industry Super Australia, *Submission 7.1*, p. 14; Australian Super, *Submission 9*, p. 2.

7.61 The AIST stated that it supported improved payslip disclosure that included details of the amounts of SG accrued, as well as the planned and actual payment dates of SG contributions.⁴⁶

7.62 Similarly, the TCFUA proposed that all employers be required to include the following information on each payslip in order to improve the ability of an employee to check their SG has been properly paid:

- the amount of the superannuation contribution required to be made (including any additional amounts above the SG percentage required under an industrial instrument or contract);
- the amount of compulsory superannuation actually paid and the date of the payment;
- the amount of any voluntary superannuation authorised to be deducted from the employee's wages; and
- the amount of voluntary superannuation and the date of the payment.⁴⁷

7.63 However, the Department of Employment informed the committee that due to the design of the current SG system in regard to payment timings, any changes to payslip reporting would be of limited effect:

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 material difference if superannuation payments were aligned with when payslips were issued. There would be compliance costs as employers would generally need to update payroll software.⁴⁸

Committee view

7.64 The committee is strongly of the view that improved payslip reporting of SG will increase the capacity of employees to keep track of their SG and raise the alarm early in the case of non-payment. The continued improvements in electronic record management, as well as data transfer options, should be utilised to their full potential in this regard.

Recommendation 32

7.65 The committee recommends that the Fair Work Regulations 2009 be amended to require:

- **the amount of earnings that the SG is calculated on;**

46 Australian Institute of Superannuation Trustees, *Submission 37*, pp. 12–13.

47 Textile, Footwear and Clothing Union of Australia, *Submission 50*, p. 12.

48 Department of Employment, *Submission 24*, p. 7.

- **any voluntary superannuation contributions due;**
- **compulsory SG due; and**
- **all amounts of superannuation (both voluntary and compulsory) paid into an employee's superannuation fund (rather than just the amounts accrued).**

7.66 The committee understands the concerns raised by the Department of Employment that at any amendments to payslip reporting would only make a material difference if SG payments were aligned with pay cycles, and that there would be compliance costs to update payroll software. However, the committee believes that given the SG is part of an employee's remuneration, it is entirely justified that they are provided with this level of information. Without such information, employees are far less likely to be able to determine whether or not they are being paid the correct SG amounts.

7.67 As such, the committee suggests that Recommendation 32 be taken in conjunction with the Recommendation 5 in chapter 5 suggesting SG payment be aligned with pay cycles.

Senator Chris Ketter
Chair

Deputy Chair's Dissenting Report

1.1 The superannuation system that exists today is vastly different to the system that existed in 1992 when the superannuation guarantee (SG) was legislated. However, the legislation governing the administration of the SG remains largely unchanged.

1.2 In 2015-16 employer contributions to superannuation totalled \$89.6 billion. This total has progressively grown from about \$62 billion in 2006-07.¹

1.3 The total size of funds under management in the superannuation system has grown from around \$150 billion in March 1992² to over \$2 trillion dollars in 2017.

1.4 The growth in the size and significance of the superannuation system to both individuals and the Australian economy more broadly has been primarily as a result of successive government decisions to compel Australians to forgo a substantial proportion of their pay today in order to save for their retirement.

1.5 The Turnbull Government believes it is imperative that the legislation governing the system is modernised, with well-governed standards of oversight and accountability as its foundation.

1.6 Given the importance of superannuation savings on the lives of Australians living in retirement, the Turnbull Government takes employer non-compliance with their SG obligations very seriously.

1.7 In December 2016, the Government established an interdepartmental working group to investigate community concerns and develop practical recommendations reporting to the Minister for Revenue and Financial Services to deal with SG non-compliance. The Government is considering this report.

1.8 Senator Hume wishes to highlight evidence provided to the committee by the ATO in its submission that the research referred to extensively during the inquiry by the superannuation industry lobby group, Industry Super Australia (ISA), was likely to substantially overstate the prevalence of SG underpayment:

We do not consider the number of people identified with an amount of SG underpayment in the ISA report to be reliable...

and:

...the adjustments for OTE used in the report are insufficient to account for the differences seen with employment models and work practices across various broad industries. This means the report substantially overstates the prevalence of SG underpayments.³

1 APRA, Annual Superannuation Bulletin, Table 4a: Financial performance by fund type (as at 1 February 2017).

2 Parliamentary Library, *Chronology of superannuation and retirement income in Australia*, June 2010, <https://tinyurl.com/lnme2ol>.

3 Australian Taxation Office, *Submission 6*, p. 12.

1.9 Senator Hume notes the breadth of issues raised during the course of this inquiry and the Committee's recommendations. However, some recommendations made by the Committee are, in the view of Senator Hume, beyond the scope of the Terms of Reference.

1.10 Recommendations 3, 5, 7, 8, 9, 11, 14, 15 and 18 are considered by Senator Hume to be beyond the scope of the terms of reference of this inquiry.

1.11 Senator Hume recognises that the issue raised in the Chair's report under recommendation 3 is an important one and believes that the Turnbull Government should examine it in the near future.

Senator Jane Hume

Deputy Chair

Appendix 1

Submissions and additional information

Submission Number	Submitter
1	National Foundation for Australian Women
2	Ms Amanda Koopman
3	Mr F. John Morgan
4	Mr Geoff Green
5	Professor Helen Anderson
6	Australian Taxation Office
7	Industry Super Australia
8	Mr Ian Gillard
9	AustralianSuper
10	Mr Malcolm Shepherd
11	Confidential
12	Mr Eric Brouwers
13	Mr Gary Garbett
14	Name Withheld
15	Name Withheld
16	Confidential
17	Confidential
18	Confidential
19	Confidential
20	Community and Public Sector Union
21	Inspector-General of Taxation
22	Anglicare Australia
23	Australian Restructuring Insolvency and Turnaround Association
24	Department of Employment
25	Dixon Advisory
26	JobWatch Inc
27	Chartered Accountants Australia and New Zealand
28	Housing Industry Association
29	Australian Small Business and Family Enterprise Ombudsman
30	Association of Superannuation Funds of Australia
31	Institute of Public Accountants

32	CPA Australia
33	Council of Small Business Australia
34	Finance Sector Union of Australia
35	Mr Martin Lock
36	Precision Taxation Accounting & Management
37	Australian Institute of Superannuation Trustees
38	Mr Paul Beaglehole
39	Mr Andrew Mason
40	Miss Kelly Eke
41	Mrs Cheryl Robl
42	Dr Tess Hardy
43	Financial Services Council
44	Unions Tasmania
45	Women In Super
46	The Tax Institute
47	Ms Karen Streckfuss
48	Cbus
49	Australian Chamber of Commerce and Industry
50	Textile, Clothing and Footwear Union of Australia
51	Australian Council of Trade Unions
52	Council on the Ageing
53	Industry Fund Services
54	Construction, Forestry, Mining and Energy Union
55	Commonwealth Bank of Australia
56	Confidential
57	Confidential
58	Association of Financial Advisers
59	Mr Michael Ley
60	Ms Nicole Miller
61	Mr Nick Popovich
62	Mr Laurie McPhee
63	Name Withheld
64	Name Withheld
65	Name Withheld
66	United Voice
67	Mine Wealth and Wellbeing
68	Maritime Union of Australia

69	ADP
70	Australian Institute of Credit Management
71	Australian Credit Forum
72	Ms Sharon Claydon MP

Additional information

- 1 Additional information titled 'Australian Taxation Office - Superannuation Guarantee Determination SGD2006/2'; received from Industry Super Australia on 2 February 2017.
- 2 Letter of correction to information provided by the Australian Taxation Office at a public hearing in Canberra, 3 March 2017.

Answers to questions taken on notice

- 1 Answers from the Australian Taxation Office in response to written questions on notice; received 23 January 2017.
- 2 Answers from the Australian Taxation Office in response to questions taken on notice at a public hearing in Melbourne, 25 January 2017; received 13 February 2017.
- 3 Answer from the Australian Taxation Office in response to written questions on notice; received 27 February 2017.
- 4 Answers from the Department of Employment in response to questions taken on notice at a public hearing in Canberra, 3 March 2017; received 15 March 2017.
- 5 Answers from the Fair Work Ombudsman in response to questions taken on notice at a public hearing in Canberra, 3 March 2017; received 15 March 2017.
- 6 Answers from the Australian Taxation Office in response to questions taken on notice at a public hearing in Canberra, 3 March 2017; received 17 March 2017.
- 7 Answer from Industry Fund Services in response to a question taken on notice, asked by Senator Hume at a public hearing in Melbourne, 14 March 2017; received 17 March 2017.
- 8 Answers from Commonwealth Bank of Australia in response to questions taken on notice, asked by the Chair at a public hearing in Melbourne, 14 March 2017; received 22 March 2017.

- 9 Answers from Industry Super Australia in response to questions taken on notice at a public hearing in Melbourne, 25 January 2017; received 31 March 2017.
- 10 Answers from the Council of Small Business Australia in response to questions taken on notice at a public hearing in Canberra, 3 March 2017; received 23 April 2017.

Tabled documents

- 1 Document titled 'Distribution of employment contributions compared to ordinary time earnings'; tabled by Industry Super Australia at a public hearing in Melbourne on 25 January 2017.
- 2 Media release titled 'Unpaid super costing workers tens of thousands, new research finds'; tabled by Industry Super Australia at a public hearing in Melbourne on 25 January 2017.
- 3 Document containing a table titled 'Employment in ('000s) at end of June'; tabled by Industry Super Australia at a public hearing in Melbourne on 25 January 2017.
- 4 Media release titled 'Average earners hurt by loophole that allows employers to pocket benefits of salary sacrifice super'; tabled by Industry Super Australia at a public hearing in Melbourne on 25 January 2017.
- 5 Media release titled 'Enforcement of the Superannuation Guarantee Charge'; tabled by Senator Ketter at a public hearing in Canberra on 3 March 2017.
- 6 Report titled 'Enforcement of the Superannuation Guarantee Charge'; tabled by Senator Ketter at a public hearing in Canberra on 3 March 2017.
- 7 Document titled 'Bills Digest No. 160 2001-02 Superannuation Guarantee Charge Amendment Bill 2002'; tabled by Senator Ketter at a public hearing in Canberra on 3 March 2017.

Appendix 2

Public hearings

Melbourne, Victoria, 25 January 2017

Committee members in attendance: Senators Ketter, Hume and McAllister.

Witnesses

Industry Super Australia

Mr Matt Linden, Director of Public Affairs
Mr Phil Gallagher, Special Retirement Policy Adviser

Australian Taxation Office

Mr James O'Halloran, Deputy Commissioner, Superannuation
Ms Debbie Rawlings, Assistant Commissioner, Superannuation

Parliament House, Canberra, 3 March 2017

Committee members in attendance: Senators Ketter, Hume, Gallagher and Macdonald.

Witnesses

Australian Payroll Association

Mrs Tracy Angwin, Chief Executive Officer

Australian Business Software Industry Association

Ms Deanne Windsor, Director, Payroll Provider Sector

ADP Australia and New Zealand

Mr Matthew Ryan, Director, Marketing and Relationship Management
Mrs Angela Lehmann, Payroll and Tax Legislation Manager

Australian Prudential Regulation Authority

Mr Louis Serret, General Manager, Central Region, Specialised Institutions Division
Mr Sacha Vidler, Specialist Superannuation, Industry Tech Services, Policy and Advice Division

Australian Securities and Investments Commission

Mr Gerard Fitzpatrick, Senior Executive Leader, Investment Managers and Superannuation

Australian Taxation Office

Mr James O'Halloran, Deputy Commissioner
Ms Debbie Rawlings, Assistant Commissioner

Treasury

Ms Jenny Wilkinson, Division Head
Mr Robb Preston, Manager

Department of Employment

Mr David Denney, Branch Manager, Workplace Relations Policy
Ms Sue Saunders, Branch Manager, Fair Entitlements Guarantee Branch

Australian National Audit Office

Mr Andrew Morris, Executive Director
Ms Isabelle Favre, Senior Director

Fair Work Ombudsman

Mr Michael Campbell, Deputy Fair Work Ombudsman, Operations
Mr Anthony Fogarty, Executive Director, Policy, Media and Communications

Council of Small Business Australia

Mr Peter Strong, Chief Executive Officer

Inspector-General of Taxation

Mr Ali Noroozi, Inspector-General of Taxation
Mr Andrew McLoughlin, Deputy Inspector-General of Taxation
Miss Grace Ng, Director, Tax Complaints and Review

Melbourne, Victoria, 14 March 2017

Committee members in attendance: Senators Ketter and Hume.

Witnesses

Ms Karen Streckfuss, private capacity

Dr Tess Hardy, private capacity

Maurice Blackburn Lawyers

Mr Kamal Faraoque, Principal

Australian Workers' Union

Mr Liam O'Brien, Victorian Branch Assistant Secretary

Office of the Australian Small Business and Family Enterprise Ombudsman

Mr James Strachan, Director, Advocacy
Ms Anne Scott, Principal Adviser

Australian Restructuring Insolvency and Turnaround Association

Mr John Winter, Chief Executive Officer

Ms Narelle Ferrier, Technical and Standards Director

KordaMentha

Mr Mark Korda, Partner

Finance Sector Union of Australia

Ms Julia Angrisano, National Secretary

Commonwealth Bank of Australia

Ms Janine Stewart, Executive General Manager, Human Resources

Mr Andrew Culleton, Executive General Manager, Group People Services

Industry Fund Services

Ms Cath Bowtell, Chief Executive

Textile, Clothing and Footwear Union of Australia

Ms Vivienne Wiles, National Industrial Officer

Industry Super Australia

Mr Matt Linden, Director of Public Affairs

Cbus

Mr Keith Wells-Jansz, Executive Manager, Finance and Corporate Services

Mr Rod Masson, General Manager, Corporate Affairs

Professor Helen Anderson, private capacity

Appendix 3

Terms of reference for the review into the ATO's employer obligations compliance activities conducted by the Inspector-General of Taxation

Easing the compliance burden for employers

1. The distinction between ‘employee’ and ‘contractor’ for Federal taxation and superannuation purposes, its coherence with business practices, state taxation and other legal requirements as well as the interactions with ABN and GST registrations.
2. Simplification of reporting, withholding and payment obligations for employers as well as certain contractors.
3. The effectiveness of the ATO’s use of existing third party data to reduce the compliance burden for employers.
4. Guidance and tools for employers to discharge their employee-related taxation and superannuation obligations, including the level of protection afforded to those relying upon the information provided.
5. Information and support for employees to understand their rights, entitlements and avenues for redress where they become aware of potential non-compliance by their employers.

ATO conduct of compliance activities

6. The effectiveness of the ATO’s risk assessment and verification processes to detect and address non-compliance of employer obligations in a timely manner.
7. The ATO’s consideration of relevant employee entitlements protection and business viability impacts when undertaking compliance actions.
8. The effectiveness of the ATO’s actions to address phoenix activities.
9. The ATO’s conduct during employer obligations compliance activities, including the:
 - a. proportionality and use of information gathering powers;
 - b. access and use of available third party information to verify compliance;
 - c. appropriateness of auditor communications;
 - d. pathways for escalating and resolving issues before such activities are finalised;
 - e. sustainability of audit and penalty decisions;
 - f. costs for employers and employees; and
 - g. the feedback given to employees who notify the ATO of potential employer non-compliance.

10. The ATO's administration of alienation of personal services income provisions and its interaction with other compliance activities including those relating to employer obligations.

11. The extent to which aspects of the administrative penalty regimes encourage or hinder voluntary compliance and self-reporting of non-compliance by employers.

The IGT may also examine other relevant concerns raised or potential improvements identified during the course of this review.