

Chapter 3

Compliance and implementation

3.1 As mentioned in chapter 2, submitters to this inquiry were broadly supportive of the measures in the bills. The two key concerns on governance and transparency of costs for the SuperStream were discussed in chapter 2. In addition, the following concerns were raised about the SuperStream measures, these will be discussed in this chapter:

- compliance; and
- implementation, including the impact of the reforms on smaller employers.

3.2 A number of other concerns were raised in brief — these are listed at the end of the chapter.

Compliance measures

3.3 A number of submitters raised concerns about various aspects of the compliance regime for the SuperStream measures.

3.4 The Australian Chamber of Commerce and Industry (ACCI) outlined the impact that non-compliance could have on employers, and suggested that a 'safe-harbour' provision be considered:

The transition to SuperStream will affect every employer and most, if not all, superannuation entities. It will take place against the background of imperfect understanding and imperfect records and data. The regulators' approach must be directed towards encouraging and assisting funds and employers to become SuperStream compliant with resort to penalty options as a last resort. SuperStream will undoubtedly take time to bed down and early resort to penalties would be unfair, and perceived to be unfair, which will not assist implementation nor to bring confidence to the system...

A principle that must be enshrined in the enforcement policy of the ATO is that it is not in the public interest for employers to be threatened with fines or prosecuted before the courts when a valid contribution has been made into a fund but in circumstances where there is a technical failure to provide the requisite information in an electronic format, or where there is a genuine bona fide reason for non-compliance.

ACCI believes that a "safe-harbour" provision for employers needs to be considered.¹

1 Australian Chamber of Commerce and Industry, *Submission 8*, pp 3–4.

3.5 The Financial Services Council (FSC) submitted that the proposed compliance measures for SuperStream are 'overly severe' and suggested that the penalty regime be reconsidered:

The FSC believes the penalties to be overly severe: a three-pronged enforcement regime of strict liability offences, infringement notices and administrative penalties under the Taxation Administration Act seem excessive, especially when viewed in light of the severity of administrative penalties that are established in Practice Statement 3550, which imposes such penalties on a "per member" basis.

The result of these combined impacts is the potential for the amounts to be paid on a possible single event or error, affecting a large number of members, could amount to penalties exceeding the value of the fund. We do not believe that this is the intention of the policy. We would seek to have the extent of these penalties reconsidered.²

3.6 Subsequently, the FSC suggested that the Australian Taxation Office (ATO) 'should be provided with flexibility where employers have sought to do the right thing (comply with the standards)':

...we believe that employer penalties are necessary to drive good behaviour, but that penalties should neither be overly stringent nor applied without administrative consideration (ATO discretion).

Accordingly, we believe the penalties in the Bill should remain intact providing the ATO is provided with interpretative flexibility. This recognises situations where an employer endeavours to comply with the law but has not done so.³

3.7 FSC recommended that the bill should include a section from the *Taxation Administration Act 1953* (Schedule 1 Section 298-20) which stipulates 'that the ATO can waive or limit penalties for employers who are attempting to comply with the data standards':

298-20 Remission of penalty

(1) The Commissioner may remit all or a part of the penalty.

(2) If the Commissioner decides:

(a) not to remit the penalty; or

(b) to remit only part of the penalty; the Commissioner must give written notice of the decision and the reasons for the decision to the entity.

Note: Section 25D of the Acts Interpretation Act 1901 sets out rules about the contents of a statement of reasons.

2 Financial Services Council, *Submission 6*, p. 11.

3 Financial Services Council, additional information, received 5 June 2012, pp 1–2.

(3) If:

(a) the Commissioner refuses to any extent to remit an amount of penalty; and

(b) the amount of penalty payable after the refusal is more than 2 penalty units; and

Note: See section 4AA of the Crimes Act 1914 for the current value of a penalty unit.

(c) the entity is dissatisfied with the decision; the entity may object against the decision in the manner set out in Part IVC.⁴

3.8 The Association of Superannuation Funds of Australia (ASFA) requested that further information be provided from the ATO on the range of circumstances that will be considered when issuing directions and imposing penalties for non-compliance with the standards.⁵

3.9 The Australian Institute of Superannuation Trustees (AIST) suggested that there should be a 'grace period of 18 months to two years' on compliance. It commented:

...you can send the right money to the right people at the right time, but if you do not send it in the right format you can be guilty of an offence. We think there should be an introductory period.⁶

3.10 The AIST have also suggested that there should be a legislative requirement for superannuation funds or employers to report on compliance with the data and payment standards:⁷

We had concerns with an earlier iteration of this legislation about there being an overly harsh penalty regime. We were particularly concerned about the impact of that harsh regime on employers. That has been addressed. We think there is a much better penalty regime now within the legislation that is before parliament. But now it is even more appropriate, in terms of getting people on board, that there be a mechanism to ensure that—where people do not receive data that is consistent with the data requirements or payment standards—there be a mechanism, firstly, for people to talk amongst themselves about getting the requirements right. But if it has not been addressed within 21 days there needs to be a mechanism to contact the ATO or an appropriate regulatory body.⁸

4 Financial Services Council, additional information, received 5 June 2012, p. 2.

5 Association of Superannuation Funds of Australia, *Submission 1*, pp 4–5.

6 Mr David Haynes, Project Director, Australian Institute of Superannuation Trustees, *Proof Committee Hansard*, 4 June 2012, p. 9.

7 Australian Institute of Superannuation Trustees, *Submission 3*, p. 7.

8 Mr David Haynes, Project Director, Australian Institute of Superannuation Trustees, *Proof Committee Hansard*, 4 June 2012, p. 2.

3.11 Treasury officials outlined that the bill allows for a scaled approach for non-compliance with the SuperStream measures:

Mr Murray: The approach we have taken to the enforcement provisions is to have a strict liability provision which could be used in certain circumstances, but it is not the intent that that provision be used as the starting point and, by having the infringement notice and administrative penalty regime, a lower type of penalty can be applied for breaches. It is also probably of note—and the tax office might want to add something to this—that the ATO's approach to compliance, certainly in the introductory stages to any new measure, is to take an educative approach in the first instance, but we do have these penalty provisions in there, so, in the circumstance where there may be some significant breaches and noncompliance, appropriate action can be taken if necessary.

...

Mr Denney: Having a strict liability offence ultimately means that the court can make a decision on the penalty. As my colleague Nigel Murray mentioned, the intent really when we developed the framework was that, in those most severe instances where there has been noncompliance, there was a final component to the penalty that could be pursued, but really it was designed to have some flexibility and some scalability designed into the system...⁹

3.12 The committee explored this point further with Treasury and ATO officials:

Mr FLETCHER: I am thinking of the situation of the small butcher discharging his obligation to pay superannuation for, say, two or three employees. He or she could pay the amount that is required, pay it when it is required but, if the butcher fails to include all of the items of data that are required under the standards, it is open to the regulator to prosecute him and then it is not open to him as a defence to say, 'I thought I was doing all that I was required to do.'

Mr Olesen: In a strict sense, the answer is yes. The assumption you are making is that we would investigate that and in fact then go to the trouble to prosecute a situation like that, and they are two very big steps that we are perhaps very unlikely to go to in the vast majority of cases. As you would be aware, the tax office administers a whole range of penalties, and we seek to do that in a manner that has regard to the significance of the behaviour that you are coming upon. What we would primarily be trying to do, particularly with the first couple of years of this new regime, is encourage people to understand and help them to comply with the requirements that the laws are placing upon them.

...

9 Mr Nigel Murray, Principal Adviser, Superannuation, Revenue Group, Personal and Retirement Income Division, Treasury and Mr Chris Denney, Senior Adviser, SuperStream, Personal and Retirement Income Division, Treasury, *Proof Committee Hansard*, 4 June 2012, p. 14.

Mr Murray: It is worth noting that the use of strict liability offences is not at all uncommon. In many parts of the superannuation industry, supervision legislation which regulates the superannuation industry has these types of offences. That does not mean, of course, that there is regularly action taken to enforce them. As Mr Olesen has mentioned, the Taxation Office has an approach to compliance that will generally take an educative approach first. These provisions are in the legislation, as they are in many other pieces of legislation, to provide that last step approach if that is ever necessary but that is certainly not the approach that governments or regulators would normally take in the first instance. I am also aware that the Taxation Office does publish, for example, its approach to compliance measures and would be doing similar types of things in relation to these provisions as well.¹⁰

3.13 The ATO further highlighted to the committee the educative role it would take in the first instance, particularly in the first couple of years of operation of the proposed system:

Our intention for the first couple of years would be to focus on helping people understand and meet their obligations, much the same as we did with the GST when it was introduced, much the same as we have done with other non-shortfall penalties that were introduced a couple of years ago. We have not thought to use those at all in the last two years. The focus will be very much on trying to get people to understand and meet their obligations. Then as we move into a more mature system, the framework as Mr Murray has set out gives us a range of flexible approaches. The administrative penalties would be our starting point and they allow us to impose a lower penalty that has regard to the actual behaviour that we are seeing. So people are trying to do their best and investing in the technology they need to meet these standards.

We would not be seeking to impose a penalty. But you can imagine that after a few years with a regime we might start to see funds and employers who really ought to be able to comply with the obligations not complying to the extent that becomes a serious issue. Then we have the flexibility to start using the administrative penalties in the most egregious cases. I imagine this would be several years down the track. You might contemplate prosecution action against a large employer or a large fund that has persistently, consistently and recklessly not had regard to their obligations under the standards. That would be an extraordinary case.¹¹

Committee view

3.14 The committee asserts that the compliance measures for SuperStream are necessary to protect the integrity of the standard data and payment system. It notes

10 Mr Neil Olesen, Deputy Commissioner, Superannuation, Australian Taxation Office, and Mr Nigel Murray, Principal Adviser, Superannuation, Revenue Group, Personal and Retirement Income Division, Treasury, *Proof Committee Hansard*, 4 June 2012, p. 14.

11 Mr Neil Olesen, Deputy Commissioner, Superannuation, Australian Taxation Office, *Proof Committee Hansard*, 4 June 2012, p. 15.

that strict liability provisions have been a feature of superannuation legislation for over ten years and that the scalability built into the current penalty regime, along with the educative approach of the ATO on the reforms, will provide a sound balance for instances of non-compliance.¹²

3.15 The committee acknowledges the requests from ASFA that further information be provided from the ATO on the range of circumstances that will be considered when issuing directions and imposing penalties for non-compliance with the standards. The committee encourages the ATO to respond to these requests.

3.16 Given the complexity of the legislation and the nature of the strict liability penalty provisions, the committee notes that the ATO has advised that it has some administrative flexibility to waive or limit penalties where employers are attempting to comply with the data standards but commit inadvertent technical breaches. The committee urges the ATO to use its discretion to waive or limit penalties in appropriate circumstances.

Implementation

3.17 The committee received some comments on implementation of the SuperStream measures. The Australian Administration Services (AAS) expressed concern at the pace of the reforms and the FSC made a proposal on how the levy should be administered. There was also some discussion on the impact on small businesses.

3.18 The AAS, a superannuation administration provider, raised concerns about the pace of, and uncertainty surrounding, implementation of the MySuper component of the Stronger Super reforms:

The pace of the reform agenda is aggressive, and as such organisations are gearing up and spending money now to meet tight deadlines. Given the lack of certainty and clarity of detail, including upcoming legislation and regulations, there is a high risk of large amounts of Members' superannuation money being spent without a result.

...

Uncertainty around the MySuper component of the Stronger Super reforms is putting at risk the entire program. This largely stems from inconsistent messages from Treasury and APRA around the design of MySuper.

...Once a unified approach to MySuper has been determined, we then suggest Treasury and APRA clarify the detail of MySuper with the Industry, in particular the implications of legislation on Fund operations. This summit should occur no later than July 2012.¹³

12 'A significant number of the strict liability provisions in the SIS Act were introduced in 2000 under reforms introduced under the Financial Sector Legislation Amendment Bill (No. 1) 2000'. Treasury, answer to question on notice, 4 June 2012 (received 8 June 2012).

13 Australian Administration Services, *Submission 4*, p. 2.

Consistency with other government policy

3.19 The FSC highlighted certain aspects of the *Australian Government Cost Recovery Guidelines* that require cost recovery measures to 'occur in a cost effective, efficient and consistent way'. It emphasised that the guidelines require that cost recovery measures are consistent with other Australian Government policies.¹⁴ In light of this requirement, the FSC outlined the current mechanical process for determination and allocation of the supervisory levy imposed on superannuation entities:

- For superannuation funds other than small APRA funds (SAFs), the restricted levy component on the value of assets for 2011/12 was 0.01264% to 0.00965%- subject to a minimum of \$570 and a maximum of \$260,000. The unrestricted rate for 2011/12 is 0.001534% of assets ;
- SAFs were levied a flat amount of \$500;
- The levies are used to fund the operational costs of APRA, and certain market integrity and consumer protection functions undertaken by ASIC and the ATO in relation to APRA-regulated institutions;
- A separate determination sets out the amounts allocated to activities undertaken by ASIC and the ATO under each of the financial sector levy imposition Acts. The total amount allocated for the 2011/12 financial year to ASIC was \$20.7m and the total amount allocated to the ATO was \$7.2m (see Legislative Instrument F2011L01329).¹⁵

3.20 FSC argued that the levy for the SuperStream costs should be administered in a similar way to the current levy as outlined above.

Impact on small businesses

3.21 Members of the industry highlighted to the committee that the Medicare clearing house will benefit small employers in the roll out of SuperStream. Ms Pauline Vamos of ASFA and Mr David Haynes of AIST commented on the implementation process:

Ms Vamos: The industry using the standards is really not a big thing here with the clearing houses we have at the moment. The clearing houses are interposed between the employers and the funds, so whatever the data format is it goes through the clearing house and then it is given to the funds in the format they require. The big change, and this is where the on-boarding costs come in for the employers, will be for both large and small employers and for their payroll houses. That is where a lot of that will be, and we really have not started that process yet. That is the big one; that is the big gap.

...

14 Australian Government Cost Recovery Guidelines, p. 40 as cited in Financial Services Council, *Submission 6*, p. 7.

15 Financial Services Council, *Submission 6*, p. 8.

It is a different impact [between large and small employers] because the payrolls and contributions of your larger employers and your medium-sized employers are usually paid by payroll houses. There has been a lot of discussion already with payroll houses, so MYOB and all of the other payroll houses are part of this group so that they can make their system changes...

Mr Haynes: I agree with everything that Pauline has said, but the counterpoint to that will be the efficiencies that result from the implementation of SuperStream: medium sized employers who at the moment sit down and perhaps write out cheques to 18 different superannuation funds will have a streamlined approach to their superannuation and its administration where they can just send the same minimum information in one job lot, which will then go to each of the superannuation funds in question. There will be massive savings and a lot fewer headaches for employers as a result of that.¹⁶

3.22 ACCI expressed strong support for the measures taken to assist small business with compliance for the SuperStream measures:

ACCI strongly supports the continuation of the Superannuation Small Business Clearing House (administered by Medicare Australia). This will be essential for small business, particularly where they are currently using non-electronic means to make contributions and a review should be conducted to ascertain whether it should be extended to medium sized firms in the near future.¹⁷

3.23 The departmental officials provided assurances that attention has been given to the needs of small business in the development of SuperStream and stated:

The tax office will be undertaking a range of communication and education activities in the lead-up to 2015 and beyond to make sure that small and other employers have a full understanding of their obligations under these laws.¹⁸

3.24 The officials gave an overview of the two key elements that are part of the reforms to support small businesses:

- the Medicare clearing house; and
- discussions with payroll suppliers.

3.25 Mr Murray of the Treasury and Mr Hind of the ATO gave an overview of the workings of the Medicare clearing house and how it applies to the SuperStream requirements for small employers:

16 *Proof Committee Hansard*, 4 June 2012, pp 8–9.

17 Australian Chamber of Commerce and Industry, *Submission 8*, p. 5.

18 Mr Neil Olesen, Deputy Commissioner, Superannuation, Australian Taxation Office, *Proof Committee Hansard*, 4 June 2012, p. 16.

Mr Murray: The Medicare clearing house is a facility that is already available for a small business and provides a simplified electronic process for employers to use the clearing house to pass on contributions to different funds, so removing that obligation on employers. It has been quite successful and certainly the feedback that Medicare have received from employers who have used the service is that it has been very highly regarded by those small employers who have been using it. That service will continue to be available into the future.

...

Mr Hind: The small business clearing house will be converting its electronic files over to what is called the data standard format or the XBRL format, which is the technical term to describe that, within the next six to 12 months roughly and make all that available in the normal way that it transmits contributions on behalf of employers into funds. So, from an employer's perspective, if they have already signed up for the small business clearing house and are using it today or if they join at any stage during the next 12 months or so, they will find that they are able to comply with the standard with virtually no perceived change in their current business processes or operations. The small business clearing house will effectively shield them from the impact of any of that change.

...

There are about 23,000 small employers registered with the clearing house and making regular payments through the clearing house...I think it is a pretty small percentage at this stage. There is a large number of small employers in Australia, several hundreds of thousands, so 23,000 of those is a very good start but we have got a way to go and part of our effort will be trying to encourage people to understand and sign on for that service if it suits their business.¹⁹

3.26 Mr Hind, National Program Manager of Data Standards and E-Commerce at the ATO, also provided an overview of developments with payroll suppliers and outlined that suppliers were prepared for the implementation of SuperStream:

We have been talking extensively with payroll suppliers over the last 12 months about the nature of the data standard and how it is designed. One of the key design principles that we have followed is that the contributions information that is required from an employer should be able to be produced natively from a payroll system and involve the least data required to meet the obligation. In those consultations with payroll suppliers—and we have been dealing with not only the top 10 but also many of the smaller ones as well—it is clear that all of them will be able to embrace this

19 *Proof Committee Hansard*, 4 June 2012, p. 18.

Around 3.2 per cent of small employers use the Clearing House operated by the Department of Human Services. Since its inception in mid 2010, it has processed over \$316.5 million in superannuation payments representing over 561 000 superannuation contributions made for employees.

Australian Taxation Office, answer to question on notice, 4 June 2012 (received 7 June 2012).

standard and utilise that within their systems and therefore provide employers progressively over the coming years the capability to produce contributions in the new data standard format as effectively part of their normal payroll and contribution cycles.²⁰

Other comments from submitters

3.27 The following comments were highlighted in brief to the committee:

- ASFA recommended that the capacity for regulations to be made delaying the implementation date for small employers be removed (Item 30, (3)(b)).²¹
- ASFA also recommended that the amendment to allow the Minister to make more than one determination per year be limited to 2012–13 in line with the explanation in the EM that this amendment is to 'provide flexibility for the Treasurer in the event that amendments to the APRA Act...are delayed beyond 30 June 2012'.²²
- Subsection 34K(2) stipulates that regulations may prescribe different requirements for different classes of superannuation entities. The AIST recommended that a time limit be placed on this provision to avoid compromising the 'very narrow bounds' required for standardisation of the SuperStream measures.²³
- AIST suggested that the initial focus of the SuperStream measures was on contributions, rollovers and reporting to government. It argued that there should be capacity in the bills to accommodate 'wide ranging efficiencies throughout the superannuation system...on a wider basis over time'. It proposed a number of amendments to allow for future changes to the superannuation system to be accommodated through regulations.²⁴
- ACCI questioned whether a casual employee would count towards the determination of the size of an employer. It argued that regular casuals, or having casuals "on the books", may skew the size determination of an employer and therefore, the date that the provisions of the bill would apply to it.²⁵

20 *Proof Committee Hansard*, 4 June 2012, p. 17. See also pp 19–20.

21 Association of Superannuation Funds of Australia, *Submission 1*, p. 5.

22 Association of Superannuation Funds of Australia, *Submission 1*, pp 7–8.

23 Australian Institute of Superannuation Trustees, *Submission 3*, p. 6.

24 Australian Institute of Superannuation Trustees, *Submission 3*, pp 6–7.

25 Australian Chamber of Commerce and Industry, *Submission 8*, p. 4.

Concluding comments

3.28 The committee is encouraged by the efforts already undertaken by industry to adopt the SuperStream measures and improve efficiencies in the administration of superannuation for the benefit of all employers and superannuation members.

3.29 The committee highlights the staged implementation of the SuperStream reforms (see paragraphs 1.19–1.20), and asserts that this approach provides ample consideration to the needs of the full spectrum in scale of funds and employers.

3.30 The committee commends the extensive consultation and collaboration between industry and government officials that has been undertaken on the SuperStream measures. The committee applauds the open dialogue between industry and government officials and the measures currently underway to:

- consult on the costs of the SuperStream levy through the current consultation paper (as discussed in chapter 2); and
- establish a governance framework through the SuperStream Advisory Council to allow users of the data standards to monitor, review and advise government on the SuperStream measures.

Recommendation 2

3.31 The committee recommends that the bills be passed.

Ms Deborah O'Neill, MP

Chair

