

## **Submission to the Senate Economics References Committee *Inquiry into Superannuation Guarantee non-payment***

### **My Background**

I am a Chartered Accountant and former registered liquidator, with more than 20 years' experience in financial and professional services at Nab, ANZ Bank, and Ernst & Young.

In my current role I lead complex loan workouts across the Institutional and Corporate platforms at Nab, and I am an ARITA Vic./Tas. board member.

I very much appreciate the opportunity to provide a submission to the Senate Economics References Committee *Inquiry into Superannuation Guarantee non-payment*, which for clarity represent my personal views and is not made on behalf of either my employer, or ARITA.

### **Summary**

My submission is in relation to term of reference c (v) - *employment and contracting arrangements, including remedies to recoup SG in the event of company insolvency and collapse, including last resort employee entitlement schemes.*

I wish to draw the committee's attention to a recent decision of the Supreme Court of New South Wales *In the matter of Independent Contractor Services (Aust) Pty Limited ACN 119 186 971 (in liquidation) (No 2) [2016] NSWSC 106* (available online [here](#)), the consequences of that decision, and a possible solution.

### **Issue: that statutory priorities do not apply in respect of trust assets**

At paragraph 25 of *Independent Contractor Services* the Court held that:

*"The statutory priority referred to in s 556 does not apply in respect of trust assets."*

That means that a business that is operated through a trust structure is outside of the operation of section 556. This decision affects the priority afforded to SG debts under sub-section 556(1)(e)(i), but for clarity it also applies to **all** forms of employee entitlements, such as unpaid wages and annual leave. In commercial practice the use of discretionary trusts is widespread, and so the decision will impact the entitlements and superannuation administration of many thousands of employees.

There is a very large group of stakeholders *potentially* impacted by the decision, and if *actually* impacted, they will be very significantly disadvantaged.

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, that is:

- Inequitable, because there is no business or commercial justification for such a difference; and
- Impractical, because we cannot expect employees to be able to identify the type of structure by which they are employed, or understand the consequences of the structure.

*Independent Contractor* has been followed by the Federal Court in *In Woodgate, in the matter of Bell Hire Services Pty Ltd (in liquidation) [2016] FCA 1583* (available online [here](#)).

## **Suggested solution**

The *Corporations Act* should be modified so that the section 556 priorities apply in all liquidations.

This would implement the recommendation set out in paragraph 265 of the Australian Law Reform Commission's 1988 Harmer Report (General Insolvency Inquiry [1988] ALRC 45).

An appropriate modification could be achieved by:

- Amendment to section 556; or
- 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*.

Any changes should be drafted to allow for the possibility that corporate entities might be the trustee of more than one trust, or might also employ staff in their own right.