

SENATE ECONOMICS COMMITTEE

Inquiry into Superannuation Guarantee non-payment

ISA SUPPLEMENTARY SUBMISSION

March 2017



ABOUT INDUSTRY SUPER AUSTRALIA

Industry Super Australia is a research and advocacy body for Industry SuperFunds. ISA manages collective projects on behalf of a number of industry super funds with the objective of maximising the retirement savings of over five million industry super members. Please direct questions and comments to:

Matthew Linden
Director of Public Affairs

Cameron Sinclair
Public Affairs Adviser

Phil Gallagher
Special Retirement Policy
Adviser

SUPERANNUATION GUARANTEE NON-PAYMENT

Contents

Introduction and Background	1
Terms of Reference	2
1. The economic impacts	2
1.1 Impact on workers' superannuation balances and retirement incomes	2
1.2 Economic impact on competitive neutrality among employers	8
1.3 Economic impact on government revenue, including forgone superannuation contributions, earnings taxes, and SG charge penalties, over both the forward estimates and the medium term	9
2. The accuracy and adequacy of:	10
2.1 Information and data collected by the ATO, APRA, and ASIC on SG non-payment	10
2.2 Information and data on SG non-payment collected by other agencies, such as the Fair Work Ombudsman	10
2.3 Any legislative, privacy, or other reporting barriers preventing the collection of accurate information and data on SG non-payment	10
3. The role and effectiveness of	14
3.1 ATO monitoring, investigations, and recovery of unpaid SG, including technology and data collection to predict and prevent non-payment	14
3.2 Role and effectiveness of resources and coordination between government agencies and other stakeholders to prevent non-payment	15
3.3 Role and effectiveness of legislation and penalties to ensure timely and fair payment of SG	16
3.4 Role and effectiveness of superannuation funds in detecting and recovering unpaid SG	18
3.5 Role and effectiveness of employment and contracting arrangements, including remedies to recoup SG in the event of company insolvency and collapse, including last resort employee entitlement schemes	20
3.6 Role and effectiveness of measures to improve compliance with the payment of SG	22
4. The appropriateness of responses by	23
4.1 ATO receiving complaints and 'tip-offs' about SG non-payment	23
4.2 Members of Parliament asked to assist and support constituents who have been impacted by SG non-payment	23
4.3 Accountants, auditors, creditors and financial institutions who become aware of SG non-payment	23

Tables

Table 1 - Ratio of Employer Contributions to Ordinary Time Earnings	3
Table 2 - Employer Contributions Gap compared to 8.5% of Ordinary Time Earnings	3
Table 3 - Employer Contributions Gap by Ratio of employer Contribution to OTE	4
Table 4 - SG Eligible Population: Wages of 'the Underpaid' versus Wages of 'those Not Underpaid' by Age Group	5
Table 5 - SG Eligible Population: Wages of the Underpaid versus Wages of the Not Underpaid by Broad Occupation	5
Table 6 - Dollar differences in Balances between those Underpaid and Not Underpaid in 2013-14 by Age and Salary	6
Table 7 - Percentage difference in Balances between those Underpaid and Not Underpaid in 2013-14 by Age and Salary	6
Table 8 - Growth in the Impact on Savings over a Decade	7

KEY RECOMMENDATIONS

1. At least monthly Super Guarantee (SG) payments

- a) Amend the Superannuation Guarantee (Administration) Act to require SG to be paid at least monthly, preferably in alignment with the pay cycle, starting from 1 July 2018.
- b) Amend the Fair Work Act to require payslips to state the SG amount paid into an employee's super fund, instead of the amount due.

2. Improve the ATO monitoring, investigation, enforcement and penalty regime

The current ATO compliance risk regime should be overhauled, including:

- a) Publishing as quickly as possible 'top down' SG gap estimates as well as bottom up unit record analysis of SG underpayment from matched taxpayer and Member Contribution Statement (MCS) data;
- b) Making systematic use of unit record data to identify SG non-payment and underpayment and target audit activity accordingly;
- c) Not weakening existing penalties but considering for serious or repetitive employer non-payment graduated penalties and reporting to credit reporting agencies;
- d) Better cooperation is needed with other agencies who may detect non-compliance, particularly the Fair Work Ombudsman;
- e) The ATO enter a two-year systems audit, reviewed by an inter-agency group with a clear mandate to objectively reduce both the estimated number of people affected and estimated amount of underpayment by at least 50 per cent;
- f) Introduce legislation requiring the ATO to publish significantly more data on SG and SGC quarterly, and annual aggregate estimates of underpayment by geographical region and electorate.

3. Extend Single Touch Payroll (STP) coverage to all employees, including contractors

The introduction of the Single Touch Payroll (STP) will give the ATO payroll data in real time, but as currently proposed, 45 per cent of all employees (many of whom are most at risk of underpayment) will not be captured. Even the most basic payroll systems will be fully STP compliant (and as noted above, to also meet their SG obligations in real time). By the time STP becomes compulsory in July 2018, it should cover all employing businesses (regardless of size) and cover *all* employees, including contractors.

4. Close the Salary Sacrifice Loophole

Simple amendments are required to the Superannuation Guarantee (Administration) Act 1992 to close the loophole allowing an employee's voluntary 'salary sacrifice' contributions to reduce the Ordinary Time Earnings (OTE) base and be counted towards the employer's compulsory SG obligation. 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.

RECOMMENDATIONS CONTINUED...

5. Improving transparency and coverage of the SG

Consideration should be given to removing the \$450 per month threshold for payment of SG as well as assessing the benefits of paying SG on all wage and salary earnings including its impact on simplifying administration. The threshold for SG eligibility is currently anyone aged 18 or over, earning more than \$450 per month in Ordinary Time Earnings (OTE). This means people aged 17 or under, and many others working in part time, casual, or occasional employment are not receiving SG. Some workplaces are deliberately rostering staff to keep OTE under this threshold; others have developed EBA's restricting the classification of OTE hours, ensuring additional hours worked are overtime and fall outside the SG base.

6. Providing clear standing for employees (and parties acting on their behalf) to seek recovery of unpaid SG

To remedy gaps in the standing of employees or those acting on their behalf to recover unpaid super from an employer, consideration should be given to amending the Superannuation Guarantee Administration Act 1992 to allow an individual or an agent (such as a fund or service provider to them) to recover a superannuation guarantee shortfall on application to the ATO.

7. Preserve exemption to allow a single fund to be nominated at a workplace where there is a risk of SG non-compliance

Exemptions should remain in Part 3A of the Superannuation Guarantee (Administration) Act to allow an employer to satisfy choice of fund requirements if a single fund is nominated to receive SG contributions in a workplace determination or enterprise agreement in instances where there is a known risk SG non-payment or underpayment in a particular workplace or industry.

8. Extend FEG scheme to cover SG

The Fair Entitlements Guarantee (FEG) is a legislative safety net scheme of last resort covering the unpaid employment entitlements (including wages, annual leave, payment in lieu of notice, and redundancy) for eligible employees who lose their job due to the liquidation of their employer. Employees trying to recover unpaid SG in the same circumstances are referred to the ATO. The Cooper Review recommended extending this safety net to cover SG in 2010. We reiterate this recommendation.

RECOMMENDATIONS CONTINUED...

9. Comprehensive expert review of SG data collection and legislation

Given the brevity of this inquiry and the scale and complexity of the Australian super system, ISA recommends the ATO continue consultation with its expert superannuation panels to carefully evaluate the usefulness, timeliness, and accuracy of the SG data collected by Australian government agencies; and to review the interaction, effectiveness, and consistency between the various Acts and instruments governing the administration and enforcement of the SG system.

Introduction and Background

Industry Super Australia (ISA) welcomes the opportunity to address the terms of reference of the Senate Economics Committee inquiry into unpaid superannuation. This document is an additional submission supplementing our earlier report with Tria Investment Partners (for Cbus) "*Overdue – Time for Action on Unpaid Super*", published in December 2016, and which the committee accepted as submission 7 to this inquiry on 25 January 2017. We have attempted to avoid repetition between the two submissions.

Our December 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**. This is unacceptable in a compulsory superannuation system.

The SG was introduced in 1992 at a rate of three per cent. The SG has gradually increased to its current level of 9.5 per cent, and is scheduled to reach 12 per cent by 2025. It is important for both politicians and regulators to recognise that as the SG rate increases, so do the incentives for employers to avoid, minimise, or exploit their obligations. This risk is being compounded by a quarterly payment system. Underpayment of the SG will increase the pressure on the age pension system, and put honest employers at a competitive disadvantage against those who are shirking their SG obligations.

There have been revolutionary advances in both banking and payroll technology in the 25 years since the SG was introduced. It is now much easier for employers to pay SG contributions to funds, for employees and regulatory agencies to monitor these payments, and where necessary, to enforce the SG obligation. The ATO data matching protocol '*SuperStream*', currently allows employers to make all of their SG contributions in a single transaction, even if the contributions are being dispersed to multiple funds. Today's most basic payroll systems allow employers to fully comply with their SG obligations in real time. These advances make it completely unreasonable for employers to claim that SG is an administrative burden, or to deliberately delay their SG obligations.

Despite these technological advances, it remains difficult for employees, funds, and regulatory agencies to actually monitor the payment of SG contributions. It is relatively easy for unscrupulous employers to underpay or avoid their SG obligations. The risk of detection, enforcement of the law, or the imposition of penalties are so low that many employers are wilfully ignoring the SG obligation.

In March 2010, the Inspector General of Taxation (IGT) issued a report on the ATO's administration of the Super Guarantee Charge (SGC) monitoring and penalty regime. The ATO rejected a recommendation to significantly expand its audit activity.

In June 2015, the Australian National Audit Office (ANAO) conducted an audit to assess the effectiveness of the ATO's activities to promote employer compliance with their SG obligations. It notes that the ATO's own internal risk assessments confirm that up to 20 per cent of employers could be non-compliant, with 'endemic' underpayment in small businesses and industries with a large number of cash transaction.

Terms of Reference

1. The economic impacts

1.1 Impact on workers' superannuation balances and retirement incomes

Our earlier report conservatively estimated that \$3.6 billion in annual SG obligations is being either underpaid or not paid at all, which is some ten times greater than the amount of unpaid SG that the ATO recovers each year. While this has a significant compounding impact on both employee super fund balances and retirement incomes, it also has a direct impact on future age pension liabilities.

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 above \$5,400 in wages, not having any 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 underpayment gap.

Our revised estimate of the SG gap is \$5.6 billion rather than \$3.6 billion. The increase comes from the \$2.77 billion for SG cases with no contributions replacing the estimate of \$0.8 billion used by Tria Investment Partners (for Cbus).

The revised modelling shows that 2.76 million people were underpaid (up from 2.4 million), by an average amount of \$2,025 per person each year (up from \$1,489 per person). This is unacceptable in a compulsory superannuation system.

ISA has modelled these projections using the ATO 'matched data' 2 per cent sample file of personal tax and MCS data sets. The ATO could further refine ISA projections by using the complete 'matched data' file, adjusting OTE on a more granular level by industry sector, income, gender and age, adding Division 293 tax data and removing defined benefit cases from the eligible SG population.

Table 1 shows that 2.76 million people (or 32 per cent of the SG population) were paid less than 8.5 per cent of ordinary time earnings (OTE). If this ratio is lowered to a more conservative 7 per cent, the data shows that 1.7 million people (or 20 per cent) are still being underpaid.

Table 1 - Ratio of Employer Contributions to Ordinary Time Earnings

SG Population, including those without employer contributions 2013-14	Estimated Number SG Eligible	Cumulative Numbers	Cumulative Percentage
Employer Contributions to OTE Ratio			
Nil	610,850	610,850	7%
Over 0% and up to 5%	530,200	1,141,050	13%
5% up to 7%	586,950	1,728,000	20%
7% up to 8.0%	592,100	2,320,100	27%
8% up to 8.5%	440,900	2,761,000	32%
8.5% up to 9%	664,300	3,425,300	40%
9% up to 9.5%	1,541,650	4,966,950	58%
9.5% up to 10%	1,138,500	6,105,450	71%
10% up to 11%	751,450	6,856,900	80%
11% up to 15%	963,550	7,820,450	91%
15% and above	781,200	8,601,650	100%
All	8,601,650		

Source: ISA estimates from ATO 2 per cent sample file of matched personal tax and superannuation records for 2013-14

Table 2 shows ranges of the apparent gap amounts in employer payments and the number of people in cash ranges affected, using 8.5 per cent of OTE as a conservative SG estimate.

Table 2 - Employer Contributions Gap compared to 8.5% of Ordinary Time Earnings

SG Population, including those without employer contributions	Estimated Number SG Eligible	Cumulative Numbers	Cumulative Percentage
Apparent Gap in Employer payments from 8.5% (AWOTE adjusted) including zero			
No Gap	5,840,650	5,840,650	68%
\$1 up to \$100	284,950	6,125,600	71%
\$100 up to \$500	683,200	6,808,800	79%
\$500 up to \$1,000	513,850	7,322,650	85%
\$1,000 up to \$1,500	267,400	7,590,050	88%
\$1,500 up to \$2,000	175,450	7,765,500	90%
\$2,000 up to \$2,500	117,750	7,883,250	92%
\$2,500 and over	718,400	8,601,650	100%
All	8,601,650		

Source: ISA estimates from ATO 2 per cent sample file of matched personal tax and superannuation records for 2013-14

Table 3 shows that the revised estimate of the SG Gap at 8.5 per cent is \$5.6 billion rather than \$3.6 billion. The increase comes from the \$2.77 billion for SG cases with no contributions replacing the estimate of \$0.8 billion by Tria Investment Partners (for Cbus). Even using a very conservative cut-off of 7 per cent of imputed ordinary time earnings, the SG Gap would be \$5.25 billion.

Table 3 - Employer Contributions Gap by Ratio of Employer Contribution to OTE

Employer Contributions to OTE Ratio	Apparent Gap in Employer payments from 8.5% (AWOTE adjustment) including zero (\$m)
Nil	\$2,776
Over 0% and up to 5%	\$1,686
5% up to 7%	\$783
7% up to 8.0%	\$294
8% up to 8.5%	\$52
8.5% up to 9%	\$0
9% up to 9.5%	\$0
9.5% up to 10%	\$0
10% up to 11%	\$0
11% up to 15%	\$0
15% and above	\$0
All	\$5,591 million

Source: ISA estimates from ATO 2 per cent sample file of matched personal tax and superannuation records for 2013-14

The data shows that people who are being underpaid their SG do not receive higher wages as compensation. In fact, their wages are also lower. Table 4 shows the difference in average wages by age and Table 5 shows it by occupation. On average SG eligible workers who are being correctly paid have almost \$6,000 more in wages and salaries than those who are being underpaid. Wages are greater in 9 of 11 age categories and 8 out of 10 occupational categories. This evidence is consistent with the view that those being underpaid SG are likely to be more marginal workers.

Table 4 - SG Eligible Population: Wages of 'the Underpaid' versus Wages of 'those Not Underpaid' by Age Group

Age of tax filer	No SG Gap	Has SG Gap	Difference
	Mean Wage	Mean Wage	
20 to 24	\$35,575	\$32,904	\$2,671
25 to 29	\$52,695	\$47,016	\$5,679
30 to 34	\$65,081	\$55,586	\$9,495
35 to 39	\$71,383	\$64,002	\$7,381
40 to 44	\$73,558	\$66,694	\$6,864
45 to 49	\$72,168	\$70,121	\$2,047
50 to 54	\$69,077	\$70,269	-\$1,192
55 to 59	\$65,346	\$65,621	-\$275
60 to 64	\$57,810	\$57,102	\$708
65 to 69	\$50,385	\$44,355	\$6,030
70+	\$43,527	\$30,346	\$13,181
All	\$62,211	\$56,243	\$5,968

Source: ISA estimates from ATO 2 per cent sample file of matched personal tax and superannuation records for 2013-14

Table 5 - SG Eligible Population: Wages of the Underpaid versus Wages of the Not Underpaid by Broad Occupation

Occupation	No SG Gap	Has SG Gap	Difference
	Mean Wage	Mean Wage	
Occupation not listed/ not specified	\$33,543	\$18,516	\$15,027
Managers	\$88,206	\$76,150	\$12,056
Professionals	\$77,211	\$70,816	\$6,395
Technicians and Trades Workers	\$64,776	\$64,861	-\$85
Community and Personal Service Workers	\$40,837	\$39,633	\$1,204
Clerical and Administrative Workers	\$51,781	\$47,022	\$4,759
Sales workers	\$41,963	\$33,778	\$8,185
Machinery operators and drivers	\$65,258	\$65,155	\$103
Labourers	\$42,636	\$44,385	-\$1,749
Consultants, apprentices, not specified or not listed	\$52,733	\$49,884	\$2,849
All	\$62,211	\$56,243	\$5,968

Source: ISA estimates from ATO 2 per cent sample file of matched personal tax and superannuation records for 2013-14

Underpayment of employer SG superannuation is associated with a 47 per cent difference in superannuation balance for eligible employees aged under 65. The average balance difference between employees underpaid in 2013-14 and those that were not was \$19,700. This large difference suggests that SG underpayment persists for many years for some employees.

ISA has now analysed the difference in balances for people who are underpaid employer super by nine categories of age and by six categories of wage and salary. In the matrix of 54 combinations, underpaid super was associated with a markedly lower balance in all combinations. Table 6 shows dollar differences and Table 7 shows percentage differences in account balances at different age and salary levels.

Table 6 - Dollar difference in Balances between those Underpaid and Not Underpaid in 2013-14 by Age and Salary

Age of SG Eligible Person	2013-14 Salary and Wage as Recorded by the ATO						
	\$1 up to \$24,999	\$25,000 up to \$49,999	\$50,000 up to \$74,999	\$75,000 up to \$99,999	\$100,000 up to \$149,999	\$150,000 and over	All
20 to 24	\$1,648	\$2,423	\$3,062	\$5,083	\$8,761	\$33,302	\$2,876
25 to 29	\$2,929	\$4,203	\$3,979	\$5,605	\$13,206	\$21,972	\$6,560
30 to 34	\$1,894	\$3,257	\$6,533	\$8,462	\$16,888	\$32,939	\$11,046
35 to 39	\$6,097	\$5,446	\$5,702	\$14,966	\$18,331	\$38,050	\$15,274
40 to 44	\$8,006	\$6,194	\$11,825	\$19,587	\$31,307	\$45,225	\$20,281
45 to 49	\$8,955	\$9,465	\$13,189	\$30,773	\$29,247	\$74,959	\$22,484
50 to 54	\$15,755	\$15,548	\$20,536	\$30,428	\$34,137	\$99,487	\$25,551
55 to 59	\$12,546	\$21,763	\$16,532	\$35,490	\$76,115	\$235,932	\$35,472
60 to 64	\$4,665	\$18,508	\$35,089	\$41,264	\$39,640	\$172,779	\$23,857
All	\$8,465	\$10,266	\$10,218	\$18,787	\$30,898	\$78,246	\$19,709

Source: ISA estimates from ATO 2 per cent sample file of matched personal tax and superannuation records for 2013-14

Note – Table is for people who are not making voluntary contributions in 2013-14

Table 7 - Percentage difference in Balances between those Underpaid and Not Underpaid in 2013-14 by Age and Salary

Age of SG Eligible Person	2013-14 Salary and Wage as Recorded by the ATO						
	\$1 up to \$24,999	\$25,000 up to \$49,999	\$50,000 up to \$74,999	\$75,000 up to \$99,999	\$100,000 up to \$149,999	\$150,000 and over	All
20 to 24	59%	33%	22%	26%	36%	114%	44%
25 to 29	40%	30%	17%	18%	35%	41%	38%
30 to 34	11%	13%	19%	18%	31%	49%	35%
35 to 39	25%	16%	11%	24%	23%	38%	32%
40 to 44	29%	15%	20%	24%	32%	33%	35%
45 to 49	27%	20%	18%	34%	22%	45%	32%
50 to 54	38%	29%	25%	28%	23%	46%	31%
55 to 59	23%	35%	16%	26%	48%	83%	39%
60 to 64	5%	26%	38%	29%	21%	49%	24%
All	44%	35%	20%	27%	34%	56%	47%

Source: ISA estimates from ATO 2 per cent sample file of matched personal tax and superannuation records for 2013-14

Note: Table is for people not making voluntary contributions in 2013-14

In 49 of the 54 categories in Table 7 (91 per cent of combinations), the balances of those who were underpaid in 2013-14 were 20 per cent lower than those who were not underpaid their SG entitlement. These large differences suggest that SG underpayment is persistent for particular employees. For example, for employees aged 60-64 who are not making voluntary contributions, the average balance of workers with an SG underpayment in 2013-14 was \$23,900 lower than for those without an SG underpayment. The difference was equivalent to 24 per cent of their actual balance.

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 population 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
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. We know from Table 6 that 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). If there are 250,000 current retirees affected (about double a single year impact for 60-64 year olds), this would imply a **\$300 million loss in private retirement drawdown and \$97 million more in age pension payments**. As the underpayments accumulate, these impacts will become larger.

1.2 Economic impact on competitive neutrality among employers

The employers who are not paying SG have a distinct competitive advantage over those complying with the law. Proper enforcement of the SG obligation would 'level the playing field' for business. It is important for both politicians and regulators to recognise that as the SG rate increases (from 9.5 per cent to 12 per cent), so do the incentives for employers to avoid, minimise, or exploit their obligations. It is astonishing that employer groups have been silent on the obvious problems of competitive neutrality by those circumventing their SG obligation.

There is a loophole in current legislation allowing companies to deduct voluntary employee 'salary sacrificed' contributions before calculating employee SG obligations. This was likely never the intention of the legislation, and a simple amendment would prevent efforts by individuals to increase their retirement savings from being undermined. Using voluntary salary sacrifice contributions to satisfy compulsory SG obligations gives unscrupulous employers a particularly unfair competitive advantage and is not within the spirit of the law.

The ATO have ruled that voluntary contributions reduce an employee's Ordinary Time Earnings (OTE), which an employer uses to calculate their SG obligation. Under Superannuation Guarantee Determination 2 of 2006¹, 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 who are 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, \$3,891 per person.

The government should prioritise closing this loophole to ensure additional salary sacrifice contributions are not offset against employer contributions. It is unlikely that any legislator intended to create this anomaly, and surprising that this anomaly has not been addressed in more than a decade.

Salary sacrifice contributions (known as Reportable Employer Superannuation Contributions, or RESC) have been reported in the personal tax system since 1 July 2009. The ATO systems can use this information to distinguish between employer and personal deductible contributions. The ATO is currently revising its system design for personal contributions, and this presents an opportunity to both measure, and also address the salary sacrifice issue.

Recommendation:

Close the loophole that allows salary sacrifice contributions made by the employee to be considered employer contributions for the purposes of the SG by amending the Superannuation Guarantee Administration Act 1992 as follows:

- Clarify Reportable Employer Super Contributions (RESC) is 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 therefore their super guarantee shortfall (section 23)
- Clarify that a RESC is a component of 'Ordinary Time Earnings' as defined in subsection (2) (section 23)

¹ <http://law.ato.gov.au/atolaw/view.htm?docid=SGD/SGD20062/NAT/ATO/00001>

1.3 Economic impact on government revenue, including forgone superannuation contributions, earnings taxes, and SG charge penalties, over both the forward estimates and the medium term

Table 4 shows that the SG underpayment for 2013-14 is estimated at \$5.6 billion. This implies a contributions tax loss of \$838 million in a single year (and a cumulative contributions tax loss over the Forward Estimates of approximately \$4 billion). By 2023-24 ISA projects that the annual contributions tax lost on unpaid contributions will reach \$1.5 billion. The cumulative historical asset loss is not known, but Table 8 shows that only five years of cumulative retirement savings loss would be \$34 billion.

This would imply an annual earnings tax loss of \$117 million (with the effective earnings tax rate set at 8 per cent, after allowing for dividend imputation credits and the concessional taxation of capital gains in a balanced portfolio).

There is some uncertainty around whether these contribution and earnings tax gains would be offset by the loss of tax revenue (possibly at a higher marginal tax rate) on higher business profits arising from lower employee costs. This is difficult to accurately determine without examining the profitability of non-compliant businesses. Analysis of this may be possible from more detailed data held by the ATO.

2. The accuracy and adequacy of:

2.1 Information and data collected by the ATO, APRA, and ASIC on SG non-payment

2.2 Information and data on SG non-payment collected by other agencies, such as the Fair Work Ombudsman

2.3 Any legislative, privacy, or other reporting barriers preventing the collection of accurate information and data on SG non-payment

It is vital that better quality information is published on the extent of SG non-payment and underpayment. Both 'top down estimates' (as it agreed to do so for the Australian National Audit Office) as well as bottom up estimates would be valuable in providing a sound basis for better targeting compliance activities and measuring progress.

In its submission to the Inquiry and public testimony the ATO conceded its proactive audit activity using matched unit records of employees and employers had a higher strike rate than employee initiated complaints.

Recommendation:

To provide a better starting point for compliance improvements the ATO should as quickly as possible:

- Publish 'top down' SG Gap estimates as well as bottom up unit record analysis of SG underpayment from matched taxpayer and Member Contribution Statement (MCS) data;

In the medium term, to more effectively and accurately monitor SG compliance, a regulator requires information on:

- The employer contribution made;
- The OTE base in the same period
- The presence of exemption characteristics; and
- The amount of personal salary sacrifice contribution (RESA) included in employer contributions.

The ATO can access information at the level of the individual and the 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.

Currently, employers do not report individual superannuation payment data to the ATO. It is reported to the receiving superannuation fund at the time payments are made (as required by the SIS Act). The receiving superannuation funds notify the ATO via the annual member contribution statement (MCS), though there are some minor exceptions. Employers with an SG shortfall for the quarter are obliged to report this to the ATO. The Tax Commissioner can require further selective reporting from an employer.

The introduction of the Single Touch Payroll (STP) data sharing protocol will give the ATO payroll data in real time. From 1 July 2018 the Tax Administration Act 1953 will require 'substantial employers' to:

- Report payment of super contributions which would reduce the SG charge;
- Reporting of OTE for employees who are not contractors (defined by Section 12(3) of the SGAA);
- Reporting of the payment of salary and wages to an employee who is not a contractor;
- Report tax withheld.

The EM noted that an employer might not need to report OTE if they report their SG obligation (on the basis that OTE could be calculated). For the first 12 months there will be no administrative penalties. A substantial employer is one with 20 or more employees (persons, not FTE) on a date after 1 April 2018 or is a wholly owned entity in a group with more than 19 employees. Non-substantial employers may voluntarily participate in STP. The ATO is also conducting STP trials with small employers. The Tax Commissioner can deem a class of employers or a single employer as not needing to comply (if for example, a town has no viable internet). The intention is to allow employees to view the progress of payments through MyGov. Employers using STP to report data do not need to re-report it on payment summaries.

The availability of real time data will improve when Single Touch Payroll (STP) is introduced, but almost half the workforce will not be covered by this measure. ABS data² shows that 45 per cent of employees are working in 'small business' with less than 19 employees or less, which will be exempted from STP, a cohort that the ATO concedes has a very high incidence of unpaid super.

In addition to requiring substantial employers to use STP, any employer can volunteer to report RESC and fringe benefits via STP by 14 July 2019 or in subsequent years. Voluntary reporting of these amounts will remove the need to include them in payment summaries.

There are a number of significant deficiencies in this legislation from a SG compliance perspective.

- The small employer exemption creates a significant monitoring problem, because (by the ATO's own admission) they present the highest risk of underpaying their staff.
- Contractors (as defined by section 12.3 in SGAA) are exempt from STP, presumably based on the assumption that they are not on the payroll system.
- STP will not change the quarterly payment system.
- The EM notes the implied requirement for Standard Business Reporting (SBR) software; there could be problems if SBR is used to replace on time reporting to superfunds under the SIS Act.
- The Act gives very broad discretion to the Commissioner to exempt classes of employers from STP.

Recommendation:

To address these deficiencies, we suggest that the *Tax Administration Act 1953* should be amended so:

- That all contractors on the payroll are covered by STP, so that OTE and accuracy of payment is visible (Section 389-5, Column 1 Item 2(b)).
- That substantial employers are employers with any employees (Section 389-5 (6)).
- That all substantial employers are required to report RESC and reportable fringe benefits (Section 389-5 (3)).
- That STP always requires the reporting of OTE, irrespective of other data supplied. This is vital for short lag compliance activity (see EM Chapter 23, page 258, paragraph 3).
- That OTE be required on payment summaries, if not provided through STP.

The ATO is proposing a rationalisation of *SuperStream*, STP and the Member Contribution Statement systems. The revised real time system is currently called 'the Member Attributes System'. One objective is for

² <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8155.0Main+Features12014-15?OpenDocument>

employers to only report superannuation payment and OTE information once. If they were to report to superannuation funds, this would allow funds to become involved in the detection of SG underpayment, and play a more active role in identifying non-compliance, representing their member in disputes and reporting breaches to the ATO.

Recommendation:

The ATO to continue consultation with its expert superannuation panels on the frequency of data collection, actively identify blind spots, and whether any data is being double-counted (such as inter-fund transfers); the information and operations that will and will not be captured by the introduction Single Touch Payroll (STP) technology; and also evaluate and identify any legislative, privacy, or other reporting barriers preventing the collection of accurate information and data on superannuation payments in the following legislation:

- Superannuation Industry (Supervision) Act 1993
- Super Guarantee (Administration) Act 1992
- Corporations Act 2001
- Tax Administration Act 1953
- Income Tax Assessment Act 1997

Recommendation:

The ATO the ATO expand the statistics used in the Annual Report of the Commissioner, which could be published quarterly online as pivot tables:

Outcome variables:

- SG payments verified as correct
- SG payment that cannot be verified
- SG debt raised (liabilities identified?)
- SG debt not paid due to a) refusal, or b) insolvency
- SG payment not yet investigated

Source variable:

- By ATO initiated investigation of employer
- By ATO initiated investigation of employee
- By employee complaint
- By employer self-report
- By FWO report
- By Fund report

Counting variables

- number of people
- dollars underpaid
- dollars of debt raised
- dollars paid.

Date variables:

- date case initiated
- income year subject to investigation
- dates of payment or no further action decision.

Employer characteristics:

- detailed industry
- size of employer
- statistical region

Employee characteristics:

- age
- gender
- detailed occupation

Statistical reports required by parliament might include:

- Income year * source * Status with counts being cases and dollars;
- Income year * source * Status * employer characteristics with counts being cases and dollars;
- Income year * source * Status * employee characteristics with counts being cases and dollars;

3. The role and effectiveness of

3.1 ATO monitoring, investigations, and recovery of unpaid SG, including technology and data collection to predict and prevent non-payment

The 2015-16 ATO annual report provides statistics on their casework: 10,700 complaints resulted in a liability raised, but in 4,100 there was 'no result'. The ATO admit that proactive audits have a much higher rate of identifying a liability (82 per cent) than relying on employee reporting (65 per cent). Their submission (6) to this inquiry, confirms that ATO initiated cases result in higher adjustments to SGC with an average adjustment \$68,000 per employer compared with the \$25,000 resulting from employer notification cases. The 2015-16 annual report states that \$373 million was recovered and distributed to individuals or funds, only about half of the liability identified.

Employees who discover that their employer is not paying the SG are required to report unpaid super to the ATO, which has the power to impose the 'Super Guarantee Charge' (SGC), which includes the superannuation guarantee shortfall as well as a nominal interest charge of 10 per cent per annum from the start of the SG payment period to compensate employees for lost superannuation earnings on late payments. While the ATO has a mandate and resources to recover unpaid super, this has created some confusion and the assumption that the SG is a form of taxation.

While we recognise the complexity of the legislative and regulatory system governing superannuation, we urge government to provide the ATO with a clearer mandate to monitor, investigate, and enforce the SG, while ensuring that the agency is properly resourced to fulfil this duty (rather than attempting to re-prioritise existing resources).

Recommendation:

The current ATO compliance risk regime should be overhauled, including:

- a) The ATO develop a more sophisticated matched file to better target auditing and compliance monitoring by combining Member Contributions Statements (MCS), Division 293 and personal tax data. Using this data, the ATO can report to parliament on the ratio of employer contributions to imputed OTE. It should report apparent underpayment by range (with 8.5 per cent and 7 per cent as markers), detailed industry, size of employer, statistical region, as well as the age, gender and detailed occupation of workers. This data should also be used to provide an annual aggregated report on SG underpayment by federal electorate
- b) The ATO currently reports on superannuation co-contributions quarterly, and includes data on SG complaints and SGC liabilities in its annual reports. We suggest that legislation is introduced (or amended) requiring the ATO to publish significantly more data on SG and SGC quarterly.
- c) The ATO enters a two-year systems audit, reviewed by an inter-agency group with representatives of the ANAO, IGT, FWO, and the *Superannuation Industry Stewardship Group*; with a clear mandate to objectively reduce both the estimated number of people affected and estimated amount of underpayment by at least 50 per cent.

3.2 Role and effectiveness of resources and coordination between government agencies and other stakeholders to prevent non-payment

The Australian taxation and superannuation systems do not currently capture accurate data on the OTE base that SG payments are calculated on; and superannuation funds have limited capacity to verify that the SG contribution payments they are receiving are being made in accordance with an employee's OTE (or any additional voluntary contributions). It is obvious that the ATO have been given responsibility for monitoring, investigating and enforcing the SG due primarily to their data collection role in the tax system. While Superfunds have data on the SG contributions they are receiving, they do not have information to verify what they should be receiving. Even the most diligent Member of Parliament would agree that this complexity makes it virtually impossible for employees to reliably monitor their OTE, SG contribution payments (and any additional voluntary contributions).

Even when we accept this system is blurry and tangled in places, it is tremendously disappointing that checks and balances are so woefully ineffective at ensuring that employees are receiving the SG that they are entitled to.

While there are many stakeholders who may be in a position to identify possibly underpayment of the SG and alert the ATO, their standing with the tax office varies greatly:

- Employee, their accountant, or union who may identify underpayment risk, particularly where a company may be approaching insolvency.
- Superannuation funds who can identify irregularities or non-payment of contributions (but not underpayment)
- ASIC (and in some cases, the AFP), where an employer presents a solvency risk
- FWO, where an employer is identified underpaying other employee entitlements

The Senate Economics References Committee 2015 inquiry into insolvency in the construction industry³ made several recommendations to government to improve how regulatory agencies collect and share data that we support:

"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."

"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."

Recommendation:

The ATO:

- a) work with other agencies – particularly ASIC and FWO - to increase their formal cooperation to coordinate measures around early detection of possible non-payment;
- an
- b) Work proactively with superannuation funds to enhance early detection on non-payment and where necessary address potential privacy provisions that may be a stumbling block.

³ http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction/Report

3.3 Role and effectiveness of legislation and penalties to ensure timely and fair payment of SG

As noted, there is currently up to a four-month delay between an employee's SG obligation (amount due) being stated on their payslip and it being paid into a fund. This delay makes it very difficult for an employee to check that they are paid the correct amount and it also means non-payment may not be detected for many months.

Recommendation:

We recommend amending the Fair Work Act and associated regulations to require payslips to also state the SG amount paid to super funds (instead of just the amount due).

As the SG rate increases, so do the incentives for employers to avoid, minimise, or exploit their obligations. This risk is being compounded by a quarterly payment system. Even the most basic payroll software systems now allow employers to pay SG as part of their normal payroll cycle. It is vital that the employee, ATO, and the fund have timely information to detect superannuation underpayment.

Recommendation:

As a priority, ISA recommends amending the Superannuation Guarantee (Administration) Act to require that SG contributions are paid to at least a monthly payment cycle before 1 July 2018, preferably in alignment with wage and salary payments.

In the absence of an award, or other industrial agreement requiring payment of a specific superannuation amount, the SGAA may be the only legal instrument imposing a specific legal obligation on an employer to pay contributions. Enforcement of the SGAA relies upon the potential imposition of a SGC by the Commissioner of Taxation. In these instances, both the individuals affected and the funds seeking to act on their behalf are powerless to take any action themselves.

The regime for the SGC places the onus on the employer to lodge an SGC statement if they have not paid SG by the required date or have failed to pay enough. Accordingly the regime relies almost entirely upon non-compliant employers self-reporting.

It has been asserted by some (including the ATO) the penalties applying to employers who don't pay on time are excessive and onerous. Late payment of SG results in an SGC penalty that comprises three components including; calculation of the SG on all wage and salary earnings, a nominal 10 percent per annum interest charge, and a modest \$20 per employee per quarter administration charge.

Depending on the nature of the employer and likelihood employees work overtime for instance the application of the SGC to all wage and salary income may not make any difference to the amount payable to that which would apply if Ordinary Time Earnings (OTE) were used.

The nominal 10 percent per annum penalty is designed to compensate employees for lost investment returns. It should be borne in mind that employers paying late (or indeed paying quarterly) obtain a cash flow benefit from not paying SG in a timely way including interest savings on business loans, business credit cards, lines of credit or overdrafts. These interest rate benefits accruing to the employer may offset substantially the effect of the nominal 10 percent per annum interest charge.

After taking these factors into account the effective penalty from paying late may be very modest indeed and an insufficient deterrent

Should an employer not lodge an SGC statement and a subsequent audit be triggered a more significant 200% penalty may apply – this is obviously a more serious deterrent.

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 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.

Recommendation:

Penalties for non-compliance should not be weakened but for serious or repetitive employer non-payment consideration should be given to graduated penalties and even the use of market based mechanisms including reporting of to credit reporting agencies. Other non-financial deterrents that could be imposed include a business being subject to a regime of randomised audits.

In 2013–14, the ATO issued director penalty notices to around 1,400 companies, representing 2.8 per cent of the companies with SG charge liabilities.

We suggest that when the ATO issues a director penalty notices it should also automatically trigger the risk of being subject to further randomised audits for a period of three years.

Apart from the SGAA there are limited other avenues to seek remedy for unpaid super if an employee is paid under an award or enterprise agreement which includes specific superannuation provisions. Remedies are available via the Fair Work Commission, Fair Work Ombudsman (FWO), Federal Court or an eligible State or Territory Court.

In most instances the FWO will be the relevant jurisdiction to seek orders to recover debts (and impose penalties). A breach of the Fair Work act includes access to civil remedy provisions outlined in s539 (2). Under these provisions the maximum penalty for unlawful adverse action is up to \$54,000 for a corporation, and up to \$10,800 for an individual.

3.4 Role and effectiveness of superannuation funds in detecting and recovering unpaid SG

Superannuation funds can, and should, play an important role in monitoring employer compliance with their SG obligation. As noted in 3.2, funds have limited capacity to verify that the SG contribution payments they are receiving are being made in accordance with employee OTE (or that they include any voluntary contributions) – they have data on the contributions they *are* receiving, but they do not have information to verify what they *should* be receiving.

The Industry Funds Credit Control (IFCC) submission provides a useful insight for policy makers explaining how funds monitor contributions on behalf of their members to identify possible arrears. It emphasized that while they have developed administrative systems to identify *non-payment*, they cannot identify *underpayment* with the current information reporting regime. Their submission outlines how IFCC funds identify possible arrears, the credit recovery process, and the obstacles facing funds pursuing enforcement proceedings on behalf of members.

Under common law the equitable duties of a superannuation funds trustee includes a *'duty to ensure to the best of the trustees ability the economic wellbeing of the trust by securing possession of trust property, preserving the assets of the trust fund and investing assets of the trust appropriately.'* Arguably SG contributions that are unpaid and due to a beneficiary of the trust (i.e. the employee/fund member) are a debt owed, which fund trustees have an obligation to secure. Members rightfully expect that their superannuation fund can provide advice and assistance when contributions are not paid, covered by accounts administration fees. Across the superannuation sector, generally only Industry Funds have systems in place to promote compliance with the SG and offer practical assistance to members.

IFCC client funds are alerted to possible arrears when contributions cease after there has been a previous record of contributions payments. Most IFCC client funds will consider an employer 'potentially in arrears' if no payment has been received 90 days after the expected date. At this early stage, the identification of employers potentially in arrears will distinguish whether non-payment is justified; perhaps due to business closure, staff resigning, taking extended leave (such as maternity leave), or switching to another fund. These employers receive a phone inquiry to determine if the non-payment was justified, or whether there is a liability to the employee. At this stage of the process, if there is a liability, funds need to decide whether to proceed to debt recovery. Each IFCC client fund sets its own priorities for arrears collections, based on the size and age do the debt, the number of members affected, and the likelihood of recovery. Not all employers who are identified as potentially in arrears will be considered candidates for the debt recovery process. Most IFCC client funds will not pursue debts from employers that have not formally nominated the fund as their default fund because of lack of clarity regarding their standing to enforce a debt should the matter proceed to litigation.

Having an understanding of this process adds emphasis to the important benefit of the standing that funds have under the existing default fund regime.

The capacity for funds to take effective action on behalf of members may be limited, because there are clear gaps in the legislative remedies that individuals (or funds acting on their behalf) can seek. As noted in 3.3, in the absence of an award, or other industrial agreement requiring payment of a specific superannuation amount, the SGAA may be the only legal instrument imposing a specific legal obligation on an employer to pay. The SGAA relies upon the potential imposition of a SGC by the Commissioner of Taxation, and in these instances, both the individuals affected and the funds seeking to act on their behalf are powerless to take any action themselves.

It would be better for there to be greater certainty around the capacity for funds (or an agent like IFCC) to take action.

Recommendation:

The Superannuation Guarantee (Administration) Act 1992 should be amended to:

- Provide standing for an individual (or agent acting on their behalf) to recover an individual SG shortfall. This could be achieved in a number of ways including permitting the ATO to delegate an agent (such as a fund or service provider to them) to recover unpaid SG on application.

This may prove to be an attractive option to the ATO and Government to recover unpaid super in a cost effective and timely way. This mechanism would also be helpful in cases of insolvency.

Furthermore, the SGAA includes limited exemptions from the choice of fund regime to allow a single fund to be utilised in a workplace. Such arrangements are limited outside the public and corporate sector schemes, however where they have been utilised it is often because there is a concern that an employer may be non-compliant with the SG.

Recommendation:

Exemptions should remain in Part 3A of the SGAA to allow an employer to satisfy choice of fund requirements if a single fund is nominated to receive SG contributions in a workplace determination or enterprise agreement in instances where there is a risk SG non-payment or underpayment is likely having regard to the specific industry or workplace.

Coupled with other recommendations the retention of an exemption will allow active and timely monitoring of compliance with SG requirements by nominated superannuation funds for members working in industries and specific employers where there is an ongoing risk of non-compliance.

3.5 Role and effectiveness of employment and contracting arrangements, including remedies to recoup SG in the event of company insolvency and collapse, including last resort employee entitlement schemes

A significant proportion of the workforce is not covered by either industrial awards or enterprise agreements that impose a specific and legally enforceable obligation on an employer to pay superannuation contributions. In an attempt to bridge these gaps, some superannuation funds have developed deeds of agreement with contributing employers in nominated workplace default fund arrangements that explicitly provide funds with the legal standing to act on behalf of their members. These agreements provide a record of a formal relationship confirming that an employer has nominated a default fund, and set out the superannuation obligations on the employer to fund members, and how obligations will be met.

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 arrangements.

Noting the duty of superannuation funds trustees to recover debts (but the lack of standing that some funds may have due to an absence of industrial award, enterprise agreement or an explicit default fund arrangement), 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.

The lack of standing that funds have to pursue debts is particularly evident during an insolvency. Some insolvency practitioners formally reject the fund(s) Proof of Debt on behalf of its members, preferring to deal with the ATO as the sole creditor. There are a number of risks and problems with this approach, including a failure by ATO to lodge proof of debt, lodgement of inaccurate proof of debt by ATO, and delays in lodgement of proof of debt by ATO.

Refusal by insolvency practitioners to recognise funds as representatives of the ultimate creditor also restricts the ability of the funds to access information regarding the progress of the case and the prospects of recovery. Under-estimates of the size of the debt can occur when the insolvency practitioner relies on the books and records of the company (if available and in good order) to quantify the outstanding SG debt and provide their assessment to the ATO to raise their Proof of Debt, or where the ATO provides its records the practitioner. In contrast, funds ascertain the amount owing by examining awards and enterprise agreements, time sheets and other employment records held by the employees/fund members.

AS noted above we recommend that the Superannuation Guarantee (Administration) Act is amended to allow the ATO to appoint an agent, on application from a relevant party, to recover an individual debt.

Last Resort Employee Entitlements Schemes

The 2010 Cooper Review recommended⁴ that (what was then known as) the General Employee Entitlement and Redundancy Scheme (GEERS), a taxpayer funded legislative safety net scheme of last resort, be extended to cover up to three months of unpaid employer SG contributions. The then Labor Government rejected this recommendation, and replaced GEERS with the Fair Entitlements Guarantee (FEG) scheme 2012, which still does not cover unpaid employer SG contributions. Employees are advised to ‘pursue’ their unpaid super through the ATO⁵.

The FEG scheme is administered by the Department of Employment. Eligible employees can claim:

- unpaid wages—up to 13 weeks
- unpaid annual leave and long service leave
- payment in lieu of notice—up to five weeks
- redundancy pay—up to four weeks per full year of service.

The Department of Employment has expressed a view in their submission to this inquiry (submission 24) that superannuation is ‘related to retirement planning’, ‘a feature within Australia’s retirement income policy’, and positioned within the ‘superannuation system’. This view is myopic. As the title infers, SG is a ‘guaranteed’ employee entitlement, to be met by an employer. In Treasurer John Dawkins second reading speech introducing the Superannuation Guarantee (Administration) Act on 2 April 1992⁶, he states that what was then called the ‘superannuation guarantee levy’ would provide:

- an efficient method of encouraging employers to comply with their award obligations; and
- an orderly mechanism by which employer superannuation support can be increased over time

The Department also warns that extending the FEG scheme to SG would ‘exacerbate the existing moral hazard in the scheme’, creating a perverse incentive for unscrupulous employers to stop paying contributions knowing the taxpayer will cover debts in insolvency. Further, the department estimates of the fiscal impact including (and administering) SG as part of the FEG at some \$840m over the Forward Estimates, adding (paragraph 37) that “*cost offsets would need to be identified from other government programs to fund inclusion of SG contributions in FEG*”.

Assuming this estimate is broadly correct, the cost will likely be born, in part, over time by the Department of Social Services through the Age Pension. Furthermore the Department of Employment’s submission overlooks the effect inclusion in the FEG would have by creating an incentive for Government to have an effective SG compliance regime. All things being equal an effective regime would reduce non-compliance and the Government’s own exposure via the FEG.

Many accountants concur that an inability to meet SG obligations is one of the first signs that a business is having cash flow problems or heading for insolvency, and indeed this is noted in submissions 3, 8, and (tangentially in) 25⁷. It is important that both politicians and public servants can recognise that the risks to the taxpayer noted above are compounded by the ingrained problems in the existing SG system. Reform will reduce these risks.

As part of a comprehensive overhaul of the administration, monitoring, and enforcement of the SG, we recommend the government expand the FEG scheme to cover SG.

4

https://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/Reviews%20and%20Inquiries/2009/supersystem/Documents/Final%20Report/PDF/Final_Report_Part_1_Consolidated.aspx, see recommendation 10.19, page 60

⁵ https://www.ato.gov.au/individuals/super/in-detail/growing/unpaid-super/?page=1#Other_ways_to_obtain_your_unpaid_super

⁶ <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F1992-04-02%2F0105%22>

⁷ “*In particular, during periods of poor business conditions, where the perceived risk of business foreclosure or job loss is high, employees may make the decision that they are better off foregoing the 9.5 per cent super payment if that will help the business remain sustainable, and in term help them retain their job. In most cases it is very difficult for an individual employee to assess the complex risks to their financial situation when they are likely to have minimal information about the businesses true operating position.*”

3.6 Role and effectiveness of measures to improve compliance with the payment of SG

The superannuation industry remains perplexed by the attempt to weaken penalties for non-compliant employers contained in Treasury Legislation Amendment (Repeal Day 2015) Bill 2015. This Bill lapsed at prorogation in April 2016, but seem to remain government policy.

The threshold for SG eligibility is currently anyone aged 18 or over, earning more than \$450 per month in Ordinary Time Earnings (OTE). This means people aged 17 or under, and many others working in part time, casual, or occasional employment are not receiving SG. Some workplaces are deliberately rostering staff to keep OTE under this threshold; others have developed EBA's restricting the classification of OTE hours, ensuring additional hours worked are overtime and fall outside the SG base. As a longer-term solution, we recommend that the SG be payable on all wage and salary earnings, which would improve transparency for employees and also simplify compliance administration

4. The appropriateness of responses by

4.1 ATO receiving complaints and 'tip-offs' about SG non-payment

4.2 Members of Parliament asked to assist and support constituents who have been impacted by SG non-payment

4.3 Accountants, auditors, creditors and financial institutions who become aware of SG non-payment

As noted in 3.1, the that proactive audits have a much higher rate of identifying a liability (82 per cent) than relying on employee reporting (65 per cent), and higher adjustments to SGC with an average adjustment \$68,000 per employer compared with the \$25,000 resulting from employer notification cases.

ISA welcomes the support of Members of Parliament and Senators to assist their constituents in the recovery of unpaid super through contact with the ATO (and IGT), but suspect that with the exception of companies entering insolvency, that there are limited opportunities to have an awareness of the extent of underpayment. We understand that the concerted support of state and federal politicians were instrumental in ensuring that outstanding SG obligations were prioritised by creditors after the collapse of Queensland Nickel, for example.

We note the interest of senators on the Senate Economics Committee – both those on the Legislation committee in Senate Estimates, and on the References committee conducting this inquiry – have drawn significant attention to the problem of unpaid superannuation, including in their 2015 inquiry into phoenix activity in the construction industry.

As noted in 3.5, many accountants concur that an inability to meet SG obligations is one of the first signs that a business is having cash flow problems or heading for insolvency. We note the recommendation made by CPA Australia (submission 32) to align the payment of SG with an employers pay cycle.



Melbourne
Casselden Place
Level 39, 2 Lonsdale Street
Melbourne VIC 3000
P: (03) 9657 4321

 [@IndustrySuper](https://twitter.com/IndustrySuper)
admin@industriysuper.com

Canberra
Level 3, 39 Brisbane Ave
Barton ACT 2600
P: (02) 6273 4333

Consider a fund's PDS and your objectives, financial situation and needs, which are not accounted for in this information before making an investment decision.