

Parliamentary Joint Committee on Corporations and Financial Services
Inquiry into the Structure and Operation of the Superannuation Industry

ANSWERS TO QUESTIONS ON NOTICE

Question 1 (Hansard page 6):

Senator SHERRY asked:

'I have one final point on this issue. Could you take it on notice—it is perhaps something that APRA should do as well—to from your perspective identify cases over the last 20 years in respect of compensation theft and fraud under part 23 and other examples, if you can find them—and I would be interested if you could find them—where you believe there has been a serious breach leading to investment losses of the prudent person principle by trustees? So there are two categories of response: part 23 and significant losses outside the SMSF sector, which I think is a different category.'

Answer:

Part 23 of the *Superannuation Industry (Supervision) Act 1993* (the SIS Act) came into effect on 1 July 1994. There were, however, no grants of financial assistance made to any superannuation funds under Part 23 of the SIS Act prior to the 2001-02 financial year. From financial year 2001-02 to date, there have been 65 payments made under Part 23 of the SIS Act, covering 923 grants of financial assistance totalling \$43,432,309.54 (see Table 1 below for details).

TABLE 1: COMPENSATION MADE UNDER PART 23 OF THE SIS ACT

FUNDS	NO. OF PAYMENTS	NO. OF GRANTS	TOTAL OF GRANTS (\$)
Australian Independent Superannuation Fund	1	1	893,222
Funds managed by Commercial Nominees of Australia Limited	58	916	40,226,507.51
Lifespan Superannuation Fund	1	1	243,000.30
Colors Superannuation Fund	1	1	255,478.50
Tunstall Bond Superannuation Fund	1	1	368,835.33
KC Park Safe Superannuation Fund	1	1	287,738.80
Independent Fire Sprinklers Superannuation Fund	1	1	985,069.91
Osborne Superannuation Fund	1	1	172,457.19
TOTAL	65	923	43,432,309.54

In addition, the Australian Prudential Regulation Authority (APRA) has identified seven specific cases where a serious breach of the prudent person principle by trustees resulted in investment losses that did not fall within the eligibility criteria for compensation under Part 23 of the SIS Act (see Table 2 below for details).

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TABLE 2: INVESTMENT LOSSES OUTSIDE OF PART 23 OF THE SIS ACT

FUND NAME	NON-PART 23 LOSSES (\$)
Strategic Capital Superannuation Fund	\$7,100,000
Wall and Ceiling Superannuation Fund	\$600,000
Harts Australia Staff Superannuation Fund	\$900,000
Corrections Corporation Staff Superannuation Fund	\$1,100,000
Colors Pty Ltd Superannuation Fund	\$33,000
Media Labs Superannuation Fund	\$24,000
Employees Productivity Award Superannuation Fund	\$10,000,000*
TOTAL	\$19,757,000

* The figure in relation to the Employees Productivity Award Superannuation Fund is an approximate figure based on an estimate made at the time of the losses in 1998.

Question 2 (Hansard page 14):

Senator SHERRY asked:

‘Go back and take on notice, please, what the results are of consumer testing—the percentage of people who can read and who cannot read these documents. Here we are, four or five years on, and we still have not got this issue sorted out. So please go and get what hard data you can find on readability of these documents and give it to us on notice.’

Answer:

Treasury does not have any specific information concerning the results of consumer testing on the readability of product disclosure statements. Feedback from industry and the Australian Securities and Investments Commission (ASIC) suggests that there has been no research at an industry level concerning what proportion of individuals can or cannot read disclosure documents generally.

While Treasury has been informed that individual financial service providers do test different versions of their disclosure documents on consumers, the results of these tests are confidential and limited to the documents of that particular firm. ASIC has not tested the readability of product disclosure statements on consumers, but encourages the industry to undertake this activity.

Ultimately, product issuers are responsible for ensuring that their disclosure documents are presented in a clear, concise and effective manner in accordance with the legislative requirement. Where disclosure documents are not presented in this way, the effect may be that the particular product is less attractive to consumers relative to other products, which is contrary to the commercial interest of product providers.

In respect of superannuation products, the Association of Superannuation Funds of Australia (ASFA) undertook consumer testing of Super Choice Key Features

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Statements in December 2000 in the lead up to the introduction of the *Financial Services Reform Act 2001*. Findings from this research indicated particular styles of presentation and disclosure that were found by consumers to be effective for superannuation providers in meeting their (then) forthcoming requirement to provide clear, concise and effective disclosure.

Question 3 (Hansard page 30):

Senator MURRAY asked:

‘I would like you to take on notice this question: does Treasury think there is any value in doing some basic research to establish whether SMSFs are regarded as just part of an overall retirement income strategy or if they are regarded as the principal retirement income strategy by consumers? My instinct is to the former and not the latter, but I do not know. In other words, is it an all-the-eggs-in-one-basket approach?’

Answer:

Self managed superannuation funds (SMSFs) represent a large, and growing, sector of the superannuation industry, and the Government is aware that there have been a number of commercial and industry group surveys into the motives and retirement strategies of individuals with SMSFs. The Government does not consider that a Government-run survey would add significant value to the information already available.

Question 4 (Hansard pages 30-31):

Ms BURKE MP asked:

‘I want to put on notice at this point two things to look at. The biggest issue I get of concern is when someone leaves their employment—it is not just insolvency—and the employer has not paid their super. Getting the ATO to follow it up—it is not the ATO’s problem—or getting the employer to actually pay the money that they should have been given is virtually impossible. So (a) it happens obviously in insolvency but (b) it happens a lot to people, period. Their company is still ongoing and getting someone to pay. Should it be paid more regularly? Should your SGC contributions be paid monthly? Does Treasury have a view on that one?’

Answer:

The *Superannuation Guarantee (Administration) Act 1992* requires all employers to make sufficient superannuation contributions to a complying superannuation fund for their eligible employees on a quarterly basis.

Where an employer fails to pay the required amount of superannuation by the due date they become liable to pay the superannuation guarantee (SG) charge to the Australian Taxation Office. The SG charge includes amounts for the employer’s superannuation shortfall, an interest component and an administrative charge. Also,

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unlike superannuation contributions, the SG charge is not tax deductible to the employer.

Since 1 July 2003, employers have been required to make superannuation contributions on behalf of their employees at least quarterly in order to meet their SG obligations. The Government's objective in introducing a quarterly SG regime was to provide the benefits to employees of more regular superannuation payments while minimising the administrative burden to employers. The approach of quarterly SG contributions is also consistent with a recommendation made by the Senate Select Committee on Superannuation and Financial Services in its report *Enforcement of the Superannuation Guarantee Charge*.

Question 5 (Hansard page 31):

Ms BURKE MP asked:

'And should super now form part of the GEERS as well?'

Answer:

Superannuation has its own legislative and regulatory framework. In supporting the security of superannuation entitlements, the focus should be on maximising the effectiveness of the existing superannuation regime and corporate laws.

The Government is very concerned to protect the entitlements of employees whose employment is terminated as a result of the insolvency of their employer. Corporate laws include many features that aim to encourage directors of companies to conduct their businesses responsibly. Directors are subject to common law and statutory duties that apply to directors in all aspects of the company's business and to all transactions entered into by the company, including the payment of employee entitlements and superannuation contributions on behalf of employees. They owe a fiduciary duty to the company, which means that a director has special obligations to the company and generally occupies a position of trust. Directors must act honestly, in good faith, and to the best of their ability in the interests of the company. They must not allow conflicting interest or personal advantage to override the interests of the company. They are subject to a duty to prevent insolvent trading by their company. A breach of those duties may result in criminal or civil penalties.

On 13 November 2006, the Government released a package of legislative proposals to improve the operation of corporate insolvency laws. Those proposals include a number of initiatives aimed at strengthening the protection of employee entitlements in the event of employer insolvency.

Under the Corporations Act, employee entitlements rank highly in the statutory order of payment in the distribution of the property of an insolvent company. However, under the current law there is some uncertainty about the standing of the Superannuation Guarantee Charge (SGC) in different forms of insolvency proceedings.

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The proposed measures will clarify the status and priority of the SGC in insolvency. They will give SGC the highest priority, along with wages and superannuation, that employee entitlements enjoy under the law. SGC will enjoy a superior priority over other unsecured creditors such as suppliers, subcontractors, customers and creditors whose debts are secured by a floating charge. These measures will improve the prospect of recovery of outstanding superannuation obligations in the event of employer insolvency.

Question 6 (Hansard page 31):

Senator MURRAY asked:

‘My question on notice is: with respect to the new insolvency laws, will Treasury have a mechanism to assess whether the effects are beneficial once that law comes into place in increasing the entitlements being paid that were formerly lost? I have expressed that rather badly. What I am concerned about is that the existing insolvency law results, I think, in a situation where entitlements are lost, and I hope that the changes will mean that they are not lost to the same extent. I am really asking about a monitoring process once the law is in place.’

...

‘I am conscious of having expressed that badly. I just want to be sure that, once the law comes into place, we have a before-and-after sense of things and that we have improved it.’

Answer:

Treasury will not be administering the new laws. Depending on the particular laws referred to, the ATO, ASIC and/or insolvency practitioners who are registered with ASIC may have responsibilities in relation to the proper and beneficial administration of those laws. In anticipation of the enactment of the proposed laws, agencies prepare for their introduction and set-up mechanisms to give optimal effect to those laws and/or monitor their administration.

ASIC collects a large amount of information from insolvency practitioners about the impact of corporate insolvencies. Its EXAD project, completed in 2005, facilitates online lodgement of insolvency reports by receivers, administrators and liquidators and enables ASIC to acquire more accurate and consistent empirical data about the impact of insolvency laws than has previously been possible and make meaningful and relevant data more widely available. Information obtained is tied to strategies and targets in business plans and relevant ASIC compliance strategies and assists in evaluating the beneficial effects of the laws ASIC administers.

Insolvency practitioners have a range of reporting obligations. ASIC Practice Note 50 outlines insolvency practitioners’ reporting obligations under the *Corporations Act 2001* and ASIC’s requirements for effective lodgement of documents. Schedule B to Practice Note 50 requires, among other things, the reporting of information about the impact of insolvencies on different classes of creditors including employees. It

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requires information about unpaid entitlements for superannuation as well as information about other unpaid employee entitlements such as wages, annual leave, pay in lieu of notice, redundancy and long service leave. Practice Note 50 states that ASIC will use Schedule B information for statistical purposes. The data will be collated and published in an aggregated and anonymous form, and will be available to Government, the profession and others.

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Questions taken on notice by Treasury during ATO evidence

Question 1 (Hansard page 41):

Senator SHERRY asked:

‘I want to know the estimated number of people who will pay the new tax penalty because their employer has not provided their tax file numbers. Given there is an estimated amount in the budget plan, what is the estimated number going forward over the forward estimates?’

Answer:

Estimates of the number of individuals that will pay the tax and the amount of revenue included in the forward estimates as a result of the additional tax have not been published.

Question 2 (Hansard pages 43 and 48):

Senator SHERRY asked:

‘Treasury, why should an employee who is a member of a superannuation fund face a penalty tax increase due to the failure of the employer to provide the TFN?’

...

‘So they will get a refund of the tax penalty if they provide it within those four years. Will they get interest on their money?’

Answer:

Tax Laws Amendment (Simplified Superannuation) Bill 2006, implementing the Government’s simplified superannuation plan, was introduced into the Parliament on 7 December 2006. Under the legislation, where a tax file number (TFN) is not attached to an individual’s account, deductible contributions are included in the superannuation fund’s no-TFN contributions income and additional tax is paid.

Where a TFN is subsequently provided within a four year period the superannuation fund will be entitled to claim a tax offset against the additional tax paid.

Under amendments contained in the above bill where:

- an individual has quoted their TFN to their employer before the end of the income year; and
- their employer fails to comply with the requirements to inform the superannuation provider to which they make contributions of the individual’s TFN before the end of the income year;

then, interest will also be payable on any amounts refunded.