



Tabled 20/6/02

OFFICE OF THE
MINISTER FOR REVENUE AND
ASSISTANT TREASURER

Senator the Hon Helen Coonan

PARLIAMENT HOUSE
CANBERRA ACT 2600

Telephone: (02) 6277 7360

Facsimile: (02) 6273 4125

assistant.treasurer.gov.au

Senator John Watson
Chair
Senate Select Committee on Superannuation and Financial Services
Parliament House
CANBERRA ACT 2600

12 JUN 2002

Dear Senator Watson

Government response to the report *Enforcement of the Superannuation Guarantee Charge*

I have pleasure in attaching a copy of the Government's response to the Senate Select Committee on Superannuation and Financial Services report - *Enforcement of the Superannuation Guarantee Charge*.

Please treat this report in confidence until it is released publicly.

Yours sincerely

HELEN COONAN

Encl.

GOVERNMENT RESPONSE TO THE
SENATE SELECT COMMITTEE
ON SUPERANNUATION AND FINANCIAL
SERVICES REPORT ON THE
ENFORCEMENT OF THE SUPERANNUATION
GUARANTEE CHARGE

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Recommendation 1 — Chapter 2, para. 2.52

The Committee recommends that the ATO and the Department of the Treasury examine the severity of the current SGC penalty.

Government Response

Supported in Principle.

The Government notes that no employer need pay the Superannuation Guarantee Charge (SGC). Employers can avoid paying the SGC by making superannuation contributions to a complying superannuation fund by 28 July each year.

The Government recognises the need to remove unnecessary and/or harsh imposts on business. However, key aspects of the current Superannuation Guarantee (SG) regime underpin employer compliance with the SG (eg lack of discretion around timing of payments and lack of deductibility for the Charge). Nevertheless, the Government has asked the Australian Taxation Office (ATO) to consider this issue further.

Recommendation 2 — Chapter 2, para 2.70

The Committee recommends that the ATO continue educating employers and employees in SG rights and responsibilities, with greater targeting of 'at risk' individuals and groups.

Government Response

Supported in Principle.

The Government understands the ATO has recently created the Corporate Communication Line to maximise the impact of its communication efforts.

The Government supports the ATO's continuing activities to safeguard the interests of 'at risk' employees through a number of education/information strategies, including:

- contacting all new employers via its call centre;
- having information regarding superannuation in the ATO's 'Bizstart' package; and
- working with non-compliant employer groups in consultation with the Department of Employment and Workplace Relations.

The ATO also targets the information needs of 'at risk' groups through a number of channels including:

- partnerships with community advocacy groups such as Jobwatch Vic;
- participation at industry forums and expos;
- information in school programs; and
- the ATO's SBS Radio program.

The Government understands the ATO's education activities will continue to be an important facet of its administration of the Superannuation Guarantee system. The ATO will continue to work closely with industry groups to help educate employers and employees about their superannuation obligations and entitlements.

The Government also recognises the role that can be played by members of the superannuation industry in disseminating information to 'at risk' individuals and groups and calls upon industry to lend its support to educational activities.

Recommendation 3 — Chapter 2, para. 2.71

The Committee recommends that employers, employees and superannuation funds be given greater access to the ATO's SG databases, where appropriate, and that the ATO increase its promotion of the availability of this information.

Government Response

Noted.

The Government understands the ATO and the superannuation industry are already working closely to facilitate access by superannuation funds to information held by the ATO in respect of lost members, unremitted Superannuation Guarantee vouchers and the Superannuation Holding Accounts Reserve.

This 'SuperMatch' system has recently commenced and approximately 20 funds (including a number of large industry and public offer funds) have already taken this opportunity to enhance their services to members by participating in this scheme.

The Government understands the ATO devotes considerable resources to promoting the availability of its information material, through attendance at expos and industry forums, and the provision of web based resources.

However, much of the information held by the ATO in relation to individual superannuation matters is protected by secrecy legislation and cannot be made

available to the public. This does not of course prevent taxpayers making enquiries to the ATO in respect of their individual affairs.

Recommendation 4 — Chapter 3, para 3.23

The Committee recommends that the ATO focus more attention on prosecuting employers who repeatedly default on their SG responsibilities.

Government Response

Supported in Principle.

The Government believes that employers must meet their superannuation obligations. The Government notes that the ATO has implemented a strategy to ensure that these obligations are met and encourages the ATO's approach of education and assistance to make sure that employers are aware of their obligations.

The ATO now has improved capability to use its data holdings (for example, surcharge data and information from income tax returns) to identify employers that appear:

- a) not to have made contributions for employees; or
- b) not to have made sufficient contributions for employees.

Once identified, these employers will be required to advise the ATO of the names of all employees for whom no or insufficient contributions were made in the financial year. An employer that fails to provide the information will be subject to prosecution action for failing to comply with the requirement to furnish information — the ATO has indicated it will seek court orders requiring the employer to give the information.

Legal debt recovery action forms part of the ATO's overall collection policy but the ATO advises that it is not always practical to initiate formal recovery processes through the courts against an employer that does not comply with an arrangement to pay an established SG liability over time.

The Government also acknowledges that the ATO's collection policy operates under the general principle that there is no benefit in liquidating corporate debtors or bankrupting individual debtors if they can demonstrate they have an ability to pay an established SG liability over time.

Recommendation 5 — Chapter 3, para 3.24

The Committee recommends that employers be required to show details of their Superannuation Guarantee contributions on individual employees' payslips.

Government Response

Supported in Principle.

The Government notes the benefits of increasing employees' awareness of their superannuation entitlements, and that this can be achieved through regular reporting to employees of superannuation contributions made on their behalf.

Many employers currently advise their employees about the superannuation contributions made on their behalf and the Government encourages others to adopt this practice.

There is currently a requirement under the federal *Workplace Relations Act 1996* that details of relevant superannuation contributions made under a federal award or federal agreement be included on employees' payslips [Workplace Relations Regulations 1996, Reg 132B(1)(l)]. This is not always the case for State workplace relations systems, although some do have similar requirements.

If employers were to be required to provide details of their SG contributions on employees' payslips, such change would best be implemented through the SG legislation rather than through awards or by amending the *Workplace Relations Act 1996*, as the latter options would be highly unlikely to achieve national consistency.

In implementing quarterly Superannuation Guarantee contributions, the Government will require employers to report to their employees the amount and destination of SG contributions.

Recommendation 6 — Chapter 3, para 3.58

The Committee recommends that the ATO and the Department of the Treasury explore options for enabling members, or their nominated representatives, to follow up on SG complaints and obtain more information on complaint action progress.

Government Response.

Supported in Principle.

The Government understands the ATO recently adopted a new approach to handling SG complaints which is faster so the need to follow up will be limited. The Government notes it is the ATO's practice to advise employees:

- when it has collected any outstanding SGC for them;
- if contributions have actually been made to a superannuation fund; or
- if the employer is declared bankrupt, insolvent or enters voluntary administration.

Much of the information held by the ATO in relation to Superannuation Guarantee matters is protected by secrecy legislation and cannot be made available to third parties.

Recommendation 7 — Chapter 4, para 4.24

The Committee recommends that the requirement for compulsory SG contributions by employers, where it is not currently monthly, be varied to provide for quarterly payments.

Government Response.

Supported.

The Government has introduced legislation into Parliament that, from 1 July 2003, will require all employers to make at least quarterly superannuation contributions on behalf of their employees. This measure will ensure fairness between employees and encourage employers to make regular superannuation contributions.

Recommendation 8 — Chapter 4, para 4.53

The Committee recommends that:

- a) the ATO and APRA clarify the extent to which employers and/or others may be legally liable for employees' insurance cover lapsing due to late or non-payment of the SG; and
- b) the ATO and APRA act to enforce this.

Government Response

Noted.

The Superannuation Guarantee (Administration) Act 1992 (SGAA) does not require an employer or a superannuation fund to provide insurance for an employee. Nor does the legislation directly provide a right for an employee to recover unpaid Superannuation Guarantee contributions or any amount of insurance that those contributions would have covered.

Woodforde & Anor v Landline Investments Pty Ltd & Ors [2000] QDC 258 held that the SGAA does not provide an employee with an implied right of action for damages for breach of statutory obligations. Therefore, based on *Woodforde v Landline* an employer cannot be held liable for a lapse in employee's insurance cover as a result of late or non-payment of SG.

The Government considers the law in this area to be clear and does not plan to change the arrangements at this time. However, the Government will continue to monitor the situation.

Recommendation 9 — Chapter 5, para. 5.29

The Committee recommends that the ATO, the Department of the Treasury and the Australian Securities and Investments Commission (ASIC) establish further mechanisms for coordination across government, industry and employer groups to address the problem of unclaimed monies.

Government Response

Supported in Principle.

The Government has amended legislation to allow Tax File Numbers for lost members to be reported to the ATO along with other lost member information. This will enhance the matching of lost members with their superannuation.

The Government understands the ATO has also recently launched SuperMatch, a process that allows superannuation funds to trace lost monies on behalf of their members, which is further engaging the superannuation industry in the solution to this issue.

Individual employees are also able to request a search of the ATO's lost member data to determine if there are any amounts belonging to them that have been reported to the ATO as lost.

ASIC does not have any responsibility for requirements relating to the treatment of unclaimed superannuation monies or the maintenance and administration of the Lost Member Register. However, ASIC does have responsibility for disclosure about the circumstances in which benefits can be paid out of a superannuation fund including very specific requirements for disclosure of the circumstances in which lost or

inactive members may have their benefits transferred to an eligible rollover fund (ERF) without their consent. The effectiveness of these disclosure requirements has implications for the unclaimed money problem and the ability of members to keep track of their benefits. ASIC monitors these requirements as part of its normal surveillance activities.

To facilitate coordination across government, industry and employer groups the ATO has established the Superannuation Advisory Committee (SAC). SAC is a committee that includes representatives of APRA, ASIC and Treasury in conjunction with representatives of the superannuation industry and employers. This committee allows both industry and Government organisations involved in superannuation to meet and discuss topics relevant to the administration of superannuation, including issues associated with unclaimed monies.

To help address the issue of unclaimed money the Government has restated its commitment to give employees greater choice as to the superannuation fund or Retirement Savings Account into which their superannuation contributions are paid. In conjunction with the Government's policy to ensure that superannuation benefits are 'portable' between funds, this will result in a decrease in the number of lost members as it will enable employees to consolidate future Superannuation Guarantee contributions into one superannuation account. The passage of the Government's choice legislation has previously been blocked by the opposition parties.

Recommendation 10 — Chapter 5, para. 5.51

The Committee recommends that the Government review the preservation rules for superannuation funds for non-Australian resident itinerant workers, in view of the impact that this could have on limiting legitimate access to superannuation monies for those workers departing Australia.

Government Response

Supported in Principle.

From 1 July 2002, eligible temporary residents will be able to access their superannuation benefits upon permanent departure from Australia. Access will be subject to withholding tax arrangements to return the tax concessions provided to these superannuation benefits.

Recommendation 11 — Chapter 5, para. 5.76

The Committee recommends that the ATO and the Department of the Treasury review the current SG voucher system.

Government Response

Noted.

The Government understands the ATO has examined the voucher system within the existing law. The ATO is working to reduce the number of unclaimed vouchers. The introduction of the SuperMatch system is one example of how the ATO is tackling this problem. New regulations have been put into place to facilitate the matching of unclaimed vouchers.

Legislation currently before the Parliament would allow the Commissioner of Taxation to deposit amounts directly into a superannuation account of the relevant employee. This amendment is expected to significantly reduce the problem of unredeemed vouchers.

Recommendation 12 — Chapter 6, para 6.32

The Committee recommends that the current age limits and work tests that apply to SG contributions for individuals under 70 years be removed from the legislation.

Government Response

Not Supported.

The restrictions that apply to superannuation contributions after age 65 reflect the primary object of the superannuation system, being the provision of retirement income. They also ensure that superannuation, which benefits from generous taxation concessions, is used for genuine retirement income.

However, it is current Government policy for over 65s to be able to make personal contributions if they work at least part-time (10 hours each week) and the Government has already raised the eligibility age for SG payments to 70. These SG payments are subject to the usual SG earnings threshold of at least \$450 per month. The Government has also announced, as part of its election commitments, that it will be increasing the upper age limit for voluntary contributions to 75. The Government has consulted with stakeholders on the implementation details of this initiative.

The Government has also asked the Treasury to review the monitoring requirements for superannuation funds in respect of the 10 hours per week part-time gainful employment work test for persons aged between 65 and 70 years.

Recommendation 13 — Chapter 6, para. 6.49

The Committee recommends that the ATO re-examine the appropriateness of the current threshold level for SG eligibility for established itinerant vocations or professions.

Government Response

Noted.

Under the Superannuation Guarantee arrangements, employers are exempt from making contributions where employees receive salary and wages of less than \$450 per month. The \$450 threshold endeavours to strike a balance between the desirability of providing superannuation coverage to as wide a range of employees as possible and the desire to minimise costs to business.

The Government's view is that it is not appropriate for employees' access to superannuation to be determined by the industry in which they work.

Notwithstanding the above, the Government proposes to change the threshold from \$450 per month to \$1,350 per quarter in moving to a regime of quarterly SG contributions.

Recommendation 14 — Chapter 6, para 6.68

The Committee recommends that the Department of the Treasury develop model rules or guidelines for award conditions to facilitate greater consistency between the Federal SG system and awards.

Government Response

Not Supported.

There is already a framework superannuation clause for federal awards, established in the Australian Industrial Relations Commission's (AIRC) 1994 *Superannuation Test Case*, and reaffirmed in the AIRC's *Superannuation Decision* of 1999. Both of these decisions dealt explicitly with the matter of the consistency of awards with the SG system, and in December 2000 an AIRC Full Bench commented that these decisions 'go as far as it is at present appropriate to go with respect to the provision of general guidance and a framework clause' [Print T4144, paragraph 20].

Recommendation 15 — Chapter 6, para. 6.98

The Committee recommends that the pre 21 August 1991 notional earnings bases be removed from the *Superannuation Guarantee (Administration) Act 1992*.

Government Response

Noted.

Removing pre-1991 notional earnings bases could lead to considerable increases in the superannuation contributions that some employers must make for their employees. Such increases to labour costs would work to undermine employment and could prove disadvantageous for those industries as a whole.

Removing pre 21 August 1991 notional earnings bases is also a piecemeal approach to the issue of earnings bases given that the SGAA recognises award and agreement earnings bases more generally. The Government will consult with industry to establish whether it is feasible to move to a simplified earnings base provision over a period of time. Such consultation would involve the Department of Employment and Workplace Relations portfolio.

Recommendation 16 — Chapter 6, para. 6.99

The Committee recommends that for SG purposes, the notional earnings base, where there is an employer/employee relationship, should include income derived from commissions.

Government Response

Noted.

The relevant earnings base is usually specified in the superannuation fund trust deed, a law of the Commonwealth, a State or Territory, an industrial award or a workplace agreement. Some of the earnings bases included in these arrangements do not include commissions for the purpose of calculating SG.

If there is otherwise no acceptable earnings base, a default earnings base equivalent to the ordinary time earnings of the employee will apply. Ordinary time earnings of an employee are the total of the employee's earnings in respect of ordinary hours of work and earnings consisting of over-award payments, shift loading or commission.

As noted in the response to recommendation 15, the Government will consult with industry to establish whether it is feasible to move to a simplified earnings base provision over a period of time.