Senate Select Committee on Superannuation and Financial Services

Main Inquiry
Reference (a) + (c)

Submission No. 13

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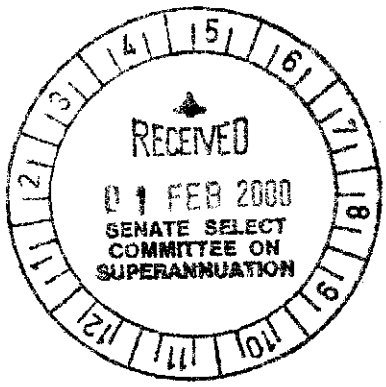

NATIONAL
FARMERS'
FEDERATION
AUSTRALIA

1 February 2000

Mr Frank Nugent
Secretary
Senate Select Committee
Superannuation and Financial Services
Parliament House
CANBERRA ACT 2600

Dear Mr Nugent

SUBMISSION FOR REFERENCE ON THE SUPERANNUATION GUARANTEE CHARGE

We refer to the facsimile dated 20 December 1999 from Richard Calver, Director of Industrial Relations about the abovementioned subject.

Thank you for the extension for lodgement of the National Farmers' Federation (NFF) submission. We now attach a copy of our submission.

We would appreciate early confirmation of a date for NFF to provide oral evidence regarding the issues raised.

Kind regards

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NATIONAL
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National Farmers' Federation

Submission to the Senate Select Committee on Superannuation and Financial Services on the Superannuation Guarantee Charge, its Enforcement and Prudential Supervision and Consumer Protection for Superannuation

January 2000

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Executive Summary

The exploration of issues surrounding the regulation of superannuation and, specifically, the Superannuation Guarantee Charge (SGC) is vital to determine the future direction of the major platform of Australia's retirement incomes policy.

For some considerable period, NFF had been opposed to the SGC and the complex regulation underpinning the scheme. NFF did not countenance that on introduction the SGC would be a successful mechanism for permitting Government to increase the age pension in line with community expectations and that will not occur under current arrangements.

It is the perception of many farmers and other rural people as employers that the burden of compliance with Awards, taxation administration, discrimination laws, workers compensation, occupational health and safety and, of course, the SGC is excessive. The SGC legislation stands as an example of a regulatory regime that is both difficult in concept and administratively onerous and which changes at a rate that is unsettling. Whilst these considerations remain real and emphasise the systemic faults of the SGC scheme, NFF has accepted that the scheme has become institutionalised.

NFF believes that the SGC should continue but in modified form. NFF rejects calls from the superannuation industry for a lifting of the SGC employer rate from the current maximum proposed 9 per cent of wages. In Australia, at present, it seems that merely raising the SGC percentage rate will exacerbate the trend to early retirement, and a concomitant running down of assets ahead of achieving the right to receive the age pension.

In section 90A *Workplace Relations Act*, 1996 (Cth), Government has recognised that the intention is for the overall cost of employment to be taken into account when adjusting safety net wage levels. The actual manifestation of this policy, however, differs from its original intent. In other words, the superannuation statutes, particularly for agriculture, operate to increase the SGC burden when there is an increase in the safety net wage levels because the SGC percentage rate is applied to higher levels of Award earnings.

Other problems for small employers in particular abound. An employer who pays the SG charge instead of making superannuation contributions will not be discharged from the obligation to provide superannuation contributions under the relevant award. It is not commonly understood by a number of small businesses that the payment of the SGC will not extinguish the separate civil liability created by Award or contract of employment obligations. Compliance would be made easier if the relevant shortfall payment could merely be made to the fund by the recalcitrant employer and the legislation then deem such payment to have satisfied the SGC. There should be a time limit with which this deeming may occur, say 18 months. This proposal would especially assist small business and, hence, compliance in the agricultural sector. Many of the problems in this area may be addressed by the Senate passing the *Workplace Relations and Other Legislation Amendment (Superannuation) Bill* 1998. This, in effect, means that the SGC becomes the safety net – a satisfactory state of affairs. NFF supports superannuation being removed from the jurisdiction of the Federal tribunal and from State industrial tribunals. The SGC should stand as the sole safety net component of the contract of employment in respect of superannuation.

The SGC is a strange construct built upon the "slender foundation" of the taxing power in section 51(ii) of the Constitution. The consequences of failing to provide the prescribed level of employer superannuation support leads to harsh consequences. The operation of section 23(6A) SGAA alleviates some of the harsh consequences of SGC enforcement and eases part of this administrative burden and should be retained.

It is NFF policy that no further taxes or imposts should be applied to superannuation and that a thorough rationalisation of the taxation rules needs a separate inquiry.

NFF believes that it is important that the standards of prudential regulation are such that a superannuation fund cannot charge administration costs against a protected member's account where those administration costs would exceed investment earnings credited to that account. This current protection should continue to be a vital element of the superannuation legal system.

NFF asks that Government reconsider the position concerning the quarterly exemption threshold issue. Particularly, NFF would ask that Government review its conclusion concerning the issue of apprehended constructed avoidance by employers of the SGC through deliberate casualisation of the workforce.

The Government has proposed, and NFF supports, that certain employees need not be part of the SGC system. The Government has proposed that employees earning between $450.00 and $900.00 a month from a specific employer may receive salary or wages instead of the SGC amount. This makes sense where workers who are not well remunerated require funds to meet current consumption rather than for

future savings. NFF supports these recommendations despite increased administrative difficulties for small business. However, the quarterly threshold issue partly subsumes the rationale for the "opting out" proposal.

NFF does not intend to weigh into the controversy over choice of funds except to point out that a balance between an increase in employers' administrative burdens and the employee's right of choice seems to NFF to apply where the limited choice option is mandatory. Note that a regime that establishes a clear requirement of disclosure to consumers about fees, commissions, charges and a history of investment returns of all funds should be a mandatory requirement so that choice does not lead to wasteful switching between funds, caused by inaccurate perceptions.

The overwhelming notion that confronts farmers about this area of the economy is that superannuation has become riddled with complex rules that reduce its attraction in regard to its fundamental purpose – the accumulation of sufficient capital for the maintenance of income for retirees.

1. Introduction

1.1 This submission is made by the National Farmers' Federation (NFF) in response to the Senate Select Committee on Superannuation and Financial Services inquiry, the terms of reference for which were issued on 11 October 1999. Whilst the terms of reference seek for comment on the prudential supervision of and consumer protection for superannuation, banking and financial services, this submission is limited to comment about superannuation. Similarly, this submission does not fully address item (b) in the Committee's terms of reference, that is the opportunities and constraints for Australia to become a centre for the provision of global financial services.

1.2 NFF believes that the exploration of issues surrounding the regulation of superannuation and, specifically, the Superannuation Guarantee Charge (SGC) is vital to determine the future direction of the major platform of Australia's retirement incomes policy. Accordingly, NFF has set out in some detail its views regarding the operation of the SGC. We have taken this opportunity to outline NFF's broad superannuation policy and that is why this submission is lodged at the end of January, slightly beyond the Committee's deadline.

2.0 The Superannuation Guarantee Charge (SGC) – A Flawed Institution

2.1 In its August 1991 Budget, the then Federal Labor Government foreshadowed legislation that would require employers to make compulsory superannuation contributions for their employees (this scheme came about, we contend, not as a properly planned model for the future of retirement incomes but from a complex industrial relations milieu, the history of which is not relevant for the current inquiry).

Almost a year later the SGC regime was implemented with the following 2 principal statutes and the Statutory Regulations under each comprising the basis of the scheme:

- *Superannuation Guarantee Charge Act 1992 (SGCA)*

Broadly, this Act imposes the SGC on employers who do not provide the legislated level of superannuation support for employees.

- *Superannuation Guarantee (Administration) Act 1992 (SGAA)*

This Act sets out the administrative arrangements for the operation of the SGC, including assessment of the employer's liability, calculation of the SGC, payment of the SGC and distribution of payments received.

The *Superannuation Industry (Supervision) Act* 1993 (Cth) (SIS) and the *Superannuation (Resolution of Complaints) Act* 1993 (Complaints) are also important parts of the Australian superannuation legislative arrangements.

2.2 The purported basis for the SGC scheme was, essentially, threefold:

- to boost national savings;
- to arrest the rising cost of age pensions; and
- to provide adequate retirement support for workers.[1]

In substantiation of this summary, we note that the then Treasurer issued a statement on 16 June 1992 announcing the purpose of the Bills as follows:

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1 See "Super Guarantee Bills" Second Report of the Senate Select Committee on Superannuation June 1992 especially Chapter 3.

The passage of these Bills represents a major advance in superannuation policies for all Australian working men and women. It will allow future retirees to benefit from a higher retirement income; it will allow future Governments to increase the age pension in line with community expectations; it will reduce the burden on today's youth because of Australia's increasing aged-dependence ratio; and it will provide for a welcome increase in private and public savings.[2]

2.3 For some considerable period, NFF had been opposed to the SGC and the complex regulation underpinning the scheme. The main reasons for this stance have been as follows:

- Job losses associated with the introduction of the SGC scheme, attending to the increased cost of employment and the fact that at one level, the SGC is a tax on jobs;[3]

- An increase in the administrative burden relating to employee entitlements (particularly in the early stages of the operation of the SGC) especially where Award arrangements and the SGC arrangements are not properly aligned – see section 4 of this submission;

- The harsh sanctions associated with enforcement – see section 5 of this submission; and

- A view that employers should not bear the major burden of the cost of funding retirement in Australia and, relatedly, that the employment relationship should not be the principal vehicle to fund a national retirement incomes policy.

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2 Treasurer Press Release 16 June 1992 "Government and Australian Democrats Agree on Superannuation Guarantee Bills".

3 See Australian Chamber of Commerce and Industry ACCI Review "Employment Effects of Superannuation Guarantee" July 1994 p 6.

2.4 In brief, our position has been that the SGC scheme is fundamentally flawed in that it focuses on providing for a limited proportion of future retirement income by taxing the employment contract rather than by focussing on individuals as income earners. NFF, further, did not countenance that the SGC would be a successful mechanism for permitting Government to increase the age pension in line with community expectations, as foreshadowed by the then Treasurer – see paragraph 2.2. The numbers do not add up for that hope to be satisfied! However, NFF's principal concern was the burden on farmers as employers. In Australia this concern is very important because of the high regulatory burden that is created in any event once a contract of employment is held to exist. It is the perception of many farmers and other rural people as employers that the burden of compliance with Awards, taxation administration, discrimination laws, workers compensation, occupational health and safety and, of course, the SGC is excessive.

2.5 NFF is concerned that, frequently, these perceptions are dismissed as relating more to the "lack of knowledge" of small business than to the inherent complexity of a number of Australia's regulatory constructs. This negative attitude was recently expressed in a Senate Committee report entitled *Jobs For The Regions*[4] where, at paragraph 2.46, the Committee reported as follows:

> The Committee is sympathetic to the anxieties of small business proprietors in regard to their statutory obligations to employees, but it considers that the evidence presented to it reveals above all the lack of knowledge afflicting many small proprietors, as well as their lack of confidence in the area of personnel management.

4 Senate Employment, Workplace Relations, Small Business and Education References Committee "Jobs For The Regions: A report on the inquiry into regional employment and unemployment" September 1999.

2.6 These dismissive comments go against the grain of a range of Government initiatives directed towards reducing the burden of regulation on small business.[5] Where complex and overly prescriptive regulations exist, they create an unnecessary compliance burden and a suspicion about the utility of superannuation as an appropriate retirement and investment vehicle. Overseas investors, we contend, are equally suspicious of overly complex regulatory regimes and seek to properly understand the regulation of markets for financial services before committing funds to a jurisdiction. The SGC legislation stands as an example of a regulatory regime that is both difficult in concept and administratively onerous and which changes at a rate that is unsettling. As Wheeler has remarked:

> In addition to the complex, if not confusing rules, there are onerous obligations imposed upon employers for maintaining records of superannuation arrangements. Employers are required to keep separate records for each employee detailing every transaction relating to the legislation.[6]

2.7 Whilst these considerations remain real and emphasise the systemic faults of the SGC scheme, NFF has accepted that the scheme has become institutionalised, has bipartisan political support and, at a practical level, can no longer be resisted. This view underlines the need for the administrative arrangements associated with its operation to be as efficient as possible within the flawed framework that prevails. NFF, indeed, has views about the future shape of the SGC that impinge on this point and which are further elaborated in this submission. Essentially, NFF recognises the entrenched nature of the scheme in the Australian financial system and the importance of the mechanism in Australia's national savings profile.

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5 See especially "More Time for Business" statement by the Prime Minister, The Honourable John Howard 24 March 1997 being the Government's response to the Small Business Deregulation Task Force, chaired by Mr Charlie Bell.

6 G Wheeler "The Superannuation Guarantee Charge" Commercial Issues Autumn 1993 p 2.

2.8 The Australian Prudential Regulation Authority (APRA) statistics confirm the entrenched elements of the superannuation system.[7] In September 1999 there were around 200,700 separate superannuation funds in Australia managing $415.1 billion in assets on behalf of 20.3 million member accounts. Importantly, APRA notes that as around 7 million individual Australians are covered by superannuation, this indicates that, on average, each individual is a member of 3.0 superannuation schemes! This matter is taken up below.

3.0 NFF Policy on SGC Generally

3.1 In the context of the comments that were made in section 2 of this submission, NFF believes that the SGC should continue but in modified form. Further, NFF rejects calls from the superannuation industry for a lifting of the SGC employer rate from the current maximum proposed 9 per cent of wages (SGAA sections 20 and 21 - see Table 1) to a rate around 12 per cent.[8] The rationale proposed for this target rate is that "contributions of 12 per cent over 30 years are needed to get people closer to their target of adequacy and to help reduce reliance on the age pension."[9] Yet, as the article goes on to note, there is no community or government agreement about the notion of "adequacy". Any benchmark requirement is, of course, a matter that is quite subjective and which depends upon the amount that private individuals should "properly" provide for their own retirement and the nexus between social security payments and compulsory superannuation. Generally,

7 See isc.gov.au/iands/Marketstats/super_stats.htm

8 See the comments by ASFA in P Smith "Supersensitive: confirming an age old problem" Australian Financial Review 10/12/99 p 33. This article appears to draw its conclusions from the ASFA paper "Achieving an adequate retirement income – how much is enough? (October 1999).

9 Id.

the capital amount needed at retirement to fund even basic requirements exceeds popular expectations.[10]

3.2 Clearly, superannuation, with its constricting rules, is not the only way to create wealth for retirement. Of course, those who administer superannuation wish for the SGC to be mandated at increasingly higher levels. However, because of the complex rules in this area, our understanding is that, at a practical level, the SGC does not and would not operate to reduce reliance on the age pension – it seems, instead, to have facilitated a move to early retirement: see paragraph 3.5.

Table 1

Financial Year	**Charge Percentage (%)**	
	Where employer's base year payroll is $1m or less	Where employer's base year payroll is above $1m
1992/93	3	4
1992/93	3	5
1993/94	3	5
1994/95	4	5
1995/96	5	6
1996/97	6	6
1997/98	6	6
1998/99	7	7
1999/2000	7	7
2000/01	8	8
2001/02	8	8
2002/03	9	9

Source: Australian Master Superannuation Guide 1999-2000 p. 418

3.3 NFF notes that people who only receive the SGC rate, even over an extended career, at 9 per cent, and who also receive an age pension,

10 See M Rice "How Much is Enough?" Personal Investment March 1997 p 3.

will fall short of their pre-retirement standard of living unless they have other savings.[11] Tinnion and Rothman[12] have noted that there is agreement amongst researchers that superannuation contributions of over 15 per cent of working income are needed over a 40 year working life to achieve "adequate" retirement income with no contribution from the age pension. This ideal falls well short of current realities. In Australia at present, it seems that merely raising the SGC percentage rate will exacerbate the trend to early retirement, and a concomitant running down of assets ahead of achieving the right to receive the age pension:

> 'Concessional' tax treatment of superannuation and the introduction of compulsory contributions seem so far to have been mainly facilitating early retirement - voluntary or otherwise – rather than easing the burden on future taxpayers of providing the age pension.[13]

The stark picture that the analyses undertaken in this area show is that when significant superannuation benefits are drawn by early retirees they are used mainly for income ahead of eligibility for the age pension. The rules that currently prevail, therefore, undermine the apparent Government strategy to increase the importance of funded superannuation benefits and to reduce dependence on the means-tested age pension. Hence, the SGC cannot be seen as a hallmark of fiscal responsibility towards future generations when one of its fundamental purposes is, in practical effect, not being met.

3.4 A majority of retirees believe that superannuation will not be their main source of income. A recent survey conducted by the Australian Bureau of Statistics[14] found that 35 per cent of persons aged 45 and over who

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11 See discussion in Fitzgerald V and Rooney C "Rethinking Work and Retirement" NAB (1999) at p 14.

12 J Tinnion and G Rothman "Retirement Income Adequacy and the Emerging Superannuation System: New Estimates" paper presented at the Seventh Colloquium of Superannuation Researchers 8 & 9 July 1999.

13 Supra note 11 at p 15: our emphasis.

14 Australian Bureau of Statistics "Retirement and Retirement Intentions" November 1997 at p. 8.

intended to retire from full-time work believed that their main source of income would be a superannuation funded annuity. Twenty per cent believed their main source of income would be the aged, service, widow or war widow pension. A further twenty per cent did not know what their main source of income would be. It is clear from analysis referred to in the paragraph above and Australians' expectations about retirement income generally that the SGC is not a panacea for reducing the dependence on the means-tested aged pension.

3.5 The point made in paragraph 3.3 cannot be taken as the only argument against an increase in the SGC percentage. Increasing the cost of employment by increasing the SGC percentage is also to be discouraged, given that a major priority of Government, and organisations like NFF, is to reduce unemployment. Across the board increases akin to substantial deferred wage increases would flow by increasing the SGC percentage. NFF would continue to oppose the increase unless there was a clear and enforceable policy that future minimum wage rises were to be discounted by the lifetime increase in the SGC percentage. Not only does this appear to be an unlikely scenario but the ability to properly quantify the increase is difficult having regard to the need to predict future wage levels that the percentage rate would be applied to. This proposal would, indeed, mean a substantial strengthening of the current obligations placed upon the Australian Industrial Relations Commission (AIRC) under section 90A *Workplace Relations Act* 1996 which is as follows:

In making a National Wage Case decision, the Commission must have regard to the operation of:

(a) the *Superannuation Guarantee Charge Act 1992*; and
(b) the *Superannuation Guarantee (Administration) Act 1992*.

This point is taken up further in section 4 of this submission.

3.6 In short, the answer to a better SGC scheme lies not in increasing the employers' cost burden but in addressing some of the broad reforms outlined by Fitzgerald and Rooney. Because of the reliance we have placed upon their research, it is useful to set out the recommendations that Fitzgerald and Rooney have articulated:

For governments:

- Reform of the age pension system, particularly to accommodate partial retirement without the imposition of excessively high marginal tax rates;

- Taxation of superannuation on an 'expenditure basis', i.e. primarily at the benefit stage - thereby favouring income streams over lump sums;

- Review of the overall 'mesh' between superannuation and age pension rules, to reduce incentives to 'double dip'; and

- A thorough review of rules and restrictions relating to age or classifying people as either 'retired' or 'non retired' to reduce the barriers for people wishing to phase down from work to retirement.

For employers and their associations, and unions:

- Rejection of negative stereotypes which are based on generally false assumptions about the productivity, employment costs and adaptability/'trainability', of older workers;

- Implementation of changes to workplace organisation and practice which encourage job sharing and the creation of more flexible employment opportunities for older people; and

- Promulgation of positive models.

For individuals and their advisers:

- Education about the realities of financial provision for retirement and the long-term benefits that can accrue from delaying and/or withdrawal from the workforce;

- Adoption of a richer view of the lifestyle opportunities available in retirement and lifting of aspirations above the age pension; and

- Realisation that a higher quality of life can be often achieved by balancing both work and leisure well beyond traditional retirement age.[15]

3.7 It can be seen from the comprehensive set of recommendations set out in paragraph 3.6 that the SGC cannot be viewed in isolation. The recommendations in respect of Government action, in particular, require that there be concerted efforts to reduce the trend to early retirement and particularly that taxation of income streams be favoured over lump sum payments (but not, we emphasise, to increase the overall taxation burden upon superannuation).[16] Until there is a comprehensive change in the structure of the SGC, there will not be a general alleviation of the tax burden required to fund age pensions, one of the fundamental rationales for the scheme.

4.0 The SGC and Industrial Relations

4.1 Reference has already been made to Section 90A *Workplace Relations Act*, 1996 (Cth). Clearly, Government has recognised that the intention is for the overall cost of employment to be taken into account when adjusting safety net wage levels. The actual manifestation of this policy, however, differs from its original intent. The intent is expressed

15 Supra note 11 at p. 67-68.

16 A useful starting point for addressing this problem is discussed in J Edstein "Is the Surcharge the Future?: The future tax policy for superannuation funds" Australian Tax Review December 1998 p 204.

by the then Treasurer where he gave a commitment to modify the then Industrial Relations Act as follows:

> The Government has agreed to propose an amendment to the Industrial Relations Act 1998 which would require the Industrial Relations Commission to take into account in arriving at national wage case decisions increased superannuation contributions made by employers. This agreement gives effect to the Government's policy that employers' contributions should be taken into account in future wage decisions.[17]

In the April 1999 *Safety Net Review* decision[18] the AIRC did, indeed, have regard to the statutes mentioned in section 90A. However, rather than take the perspective that increased Award wages would automatically increase the level of superannuation support, given that the SGC operates as a percentage of ordinary time earnings[19], the AIRC justified the level of minimum wages ordered partly on the basis that no increase "in the level (sic) of employer superannuation contributions" in the year then in prospect was to occur.[20] With respect to the AIRC, the levels of contributions required to be paid by a number of employers, especially in agriculture, rose as a concomitant of an increase in safety net Award wages. However, there was not an increase in the percentage rate of the SGC in the year then in prospect. This distinction is important, and one which the AIRC appears to have overlooked in applying section 90A. In other words, the superannuation statutes, particularly for agriculture, operate to increase the SGC burden when there is an increase in the safety net wage levels because the SGC percentage rate is applied to higher levels of Award earnings.

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17 Treasurer Press Release 16 June 1999 supra note 2.

18 Print R1999 dated 29 April 1999.

19 This is a simplification – see SGR 94/1.

20 Supra note 18 paragraph 89.

4.2 It should be made clear that the SGC and Federal Award arrangements have never been properly aligned. The SGC operates quite independently of Award superannuation arrangements, save that an employer is able to treat payments made under Awards or industrial agreements in full or part satisfaction of the SGC depending upon the level specified in a particular Award or agreement. Awards and industrial agreements often provide for superannuation contributions above the level of the SGC, although the incidence of this is declining with the increase in the SGC percentage rate – see Table 1. Certainly, the problems created by Award and SGC arrangements being premised upon different administrative arrangements as isolated in the Senate Committee Report of February 1995 have, for agriculture, largely been solved.[21] However, fundamental problems remain, the majority of which have been identified by Leow and Murphy[22] as follows:

- an employer's superannuation contributions to a complying superannuation fund which is not the nominated superannuation fund in an award will satisfy SGAA but not the award (although there is a mechanism in NSW, Queensland and Western Australian industrial relations legislation for the award to be overridden on this point);

- an employer who pays the SG charge instead of making superannuation contributions will not be discharged from the obligation to provide superannuation contributions under the award;

- an award may contain exemptions from coverage for certain types of employees but the earnings of those employees may not be exempt for SG purposes; conversely, SGAA may not require contributions for certain employees (eg those earning less than $450 per month) but the award may require the contributions;

- the earnings base for calculation of employer superannuation contributions under an award may require the contributions to be

21 Senate Select Committee on Superannuation "Super Guarantee: Its Track Record" February 1995 especially Chapter 10.

22 LP Leow and Shirley Murphy *1999/2000 Australian Master Superannuation Guide* p 404.

based on flat dollar amounts rather than a percentage level of earnings as required under the SG scheme.

These problems, and others, previously existed in Federal agricultural Awards but they have been ameliorated through the co-operation between NFF and its affiliates and the Australian Workers' Union by making superannuation provisions in Federal agricultural Awards consistent with the AIRC Superannuation test case[23] and with the Australian Primary Superannuation Fund (APSF) as an agreed default fund.

4.3 The second problem mentioned by Leow and Murphy links directly to the issue of enforcement. It is not commonly understood by a number of small businesses that the payment of the SGC will not extinguish the separate civil liability created by Award or contract of employment obligations. This is especially the case where an employer may pay contributions to a complying superannuation fund or a Retirement Savings Account (RSA) on, say, 29 July 2000 rather than by the required date of 28 July 2000. Theoretically, superannuation administrators should not accept these monies but should remit them to the Australian Taxation Office (ATO) and then have the full consequences of the law brought to bear on employers. Logically, this is a nonsense, given that section 65 SGAA and the Regulations authorise a distribution by the ATO of the shortfall component of the SGC to the relevant employees. (It is unclear whether this process satisfies the civil law, but it would be unlikely to overcome a per se breach of an Award condition). That process is, however, quite elaborate and requires the ATO to receive a formal notification from the trustee of a fund to receive the shortfall following a request made to

23 Although for the sake of accuracy, it must be noted that the original NFF application was not presaged upon a co-operative approach see Print M2320 dated 7 June 1995 regarding the setting aside of the *Pastoral Industry (Superannuation) Award* 1988 see also Print L5100 dated 7 September 1994 being the superannuation test case and the more recent consideration of the issue under the Award simplification principles in Print R7700 dated 11 August 1999.

a trustee to that effect by the employee who has been notified by the ATO! It is quite a compliance dance. Surely, compliance would be made easier if the relevant shortfall payment could merely be made to the fund by the recalcitrant employer and the legislation then deem such payment to have satisfied the SGC. There should be a time limit with which this deeming may occur, say 18 months. This proposal would especially assist small business and, hence, compliance in the agricultural sector.

4.4 The Committee could recommend that the ATO conduct an exercise that would quantify the extent of the compliance difficulties outlined in paragraph 4.3. To reiterate, the employer first pays the relevant contribution, interest and an administrative fee to the ATO. The ATO then issues a so-called SGC voucher to the last known address of the employee. We are informed that the ATO nominated superannuation fund is oblivious of these arrangements until it receives the ATO voucher from the employee but that is, of course, dependent upon the employee notifying the superannuation fund. The extent to which this system is not working could be assessed by the ATO reporting the number of vouchers that have not been redeemed by employees.

4.5 Three of the four problems isolated in paragraph 4.2 (but not the problem discussed in 4.3) may be addressed by the Senate passing the *Workplace Relations and Other Legislation Amendment (Superannuation) Bill* 1998. This Bill will remove superannuation from the list of 'allowable award matters' set out in subsection 89A(2) of the *Workplace Relations Act 1996*. The effect of the amendments will be that the AIRC will not be permitted to deal with disputes about superannuation by arbitration. The Commission will not be permitted to prevent or settle disputes about superannuation by making awards or

orders. This, in effect, means that the SGC becomes the safety net – a satisfactory state of affairs.

4.6 Recently, NFF made a submission seeking Federal and State Government support for a standardisation of the Australian industrial relations system[24] that would see the creation of a unitary system. The submission was written in part as a result of the Commonwealth's encouragement of debate on harmonisation of Federal and State industrial relations systems. In line with that approach, NFF supports superannuation being removed from the jurisdiction of the Federal tribunal, as mentioned in paragraph 4.5, and from State industrial tribunals. The SGC should stand as the sole safety net component of the contract of employment in respect of superannuation. That reform alone would make the system much simpler and permit greater employer compliance.

5.0 Enforcing the SGC

5.1 The SGC is a strange construct built upon the "slender foundation"[25] of the taxing power in section 51(ii) of the Constitution. The consequences of failing to provide the prescribed level of employer superannuation support leads to harsh consequences. First, whereas superannuation contributions are generally tax deductible,[26] the SGC is not a tax deductible tax. This is because section 51(9) *Income Tax Assessment Act*, 1936 (ITAA 36) provides as follows:

> A deduction is not allowable under section 8-1 of the Income Tax Assessment Act 1997 in respect of charge imposed by the Superannuation Guarantee Charge Act 1992.

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24 See NFF submission "A Simpler Industrial Relations System" (November 1999).

25 Term used by AH Slater in Editorial Australian Tax Review March 1997 p 3.

26 See 82AAA to 82AAR ITAA 36

5.2 Secondly, the SGC that must be paid in fact comprises:

- The total of the employer's Superannuation Guarantee shortfalls;

- A nominal interest component of 10 per cent per annum, calculated from the beginning of the previous financial year (1 July) to 14 August or the date of lodgement of the *Superannuation Guarantee Statement* that shows the ATO how the employer calculated the charge if that point is in contention[27], whichever is the later; and

- An administration fee of $50.00 per annum plus $30.00 for each employee not fully covered.

As well as these amounts (and the issue of non-deductibility) as discussed in paragraph 4.3, the civil obligations of the employer remain. We reiterate that the SGC enforcement process could be eased and the system made more logical by adopting the recommendations contained in paragraph 4.3.

5.3 As stated earlier, the administrative burden of the SGC is quite large, especially for smaller employers with a high turnover of workers who may operate intensively for a short period of time, say, horticulturalists who engage large numbers for a short harvest period. The operation of section 23(6A) SGAA alleviates some of the harsh consequences of SGC enforcement and eases part of this administrative burden. NFF rejects calls by ASFA for the repeal of section 23(6A).[28] The SGC shortfall is required to be calculated on a quarterly basis. In other

27 The SGC system is, of course, self assessing.

28 See ASFA submission to the Senate Employment, Workplace Relations, Small Business and Education Committee "Inquiry into the Workplace Relations Legislation (More Jobs, Better Pay) Bill 1999" dated 17 September 1999.

words, an employer's SGC shortfall for an employee is the total of the employer's quarterly shortfalls for that employee for the year. The four contribution periods are expressed in s6(1) SGAA. However, pursuant to section 23(6A) a contribution is able to be made in respect of any contribution period "starting on the first day of a year and ending on the twenty eighth day after the end of the year." Thus, employers do not need to make quarterly returns and their compliance burden is eased so long as they make the appropriate payment for each employee by 28 July in each year. This eases the compliance burden from a quarterly to an annual administrative task, and is supported.

5.4 Generally, it appears that employer SGC compliance is good but evidence of the extent of compliance is, in fact, slim. In December 1999, the ATO published a media release[29] that summarised details of research conducted by that organisation between August and October 1999. A summary of the research was obtained by NFF from the ATO. The study's results show that only 1 percent of employers are fully SGC non-compliant. That and other results have engendered encouraging comment from the ATO in the media release:

> This very pleasing result indicates that the Tax Office Superannuation Guarantee compliance strategy is effectively targeting identified risk areas and achieving positive outcomes for the community.[30]

However, the summary of the study released by the ATO :

- does not articulate the aims and objectives or the basis of the ATO enforcement and compliance strategy;

29 Nat 99/87 "Superannuation Guarantee Compliance Up - Women Contractors and Regional Areas Benefit"
30 Ibid

- reveals that only one unnamed regional area was included in the 1998 and 1999 studies and the finding with regard to regional areas "cannot be assumed to necessarily apply across regional areas in general."[31]

- does not properly express the ATO methodology.

NFF recommends that the broad detail of the study be released at the same time as a document detailing the full compliance strategy is released in order that greater scrutiny of the work in this area can be made.

6.0 Superannuation Taxation Regime

6.1 In paragraph 3.6, NFF has already mentioned that part of its policy concerning the taxation of superannuation is for an increased focus on taxation of superannuation as a retirement income stream but not so as to increase the overall rate of superannuation taxation. There is a current general perception that superannuation is overly concessionally taxed. This is not the case when considering that the purpose of the "concessions" is to encourage private funding that should alleviate the tax burden to be met through publicly funded old age pensions. In this regard, NFF supports the ASFA call for a shift from the taxation of contributions and earnings to the taxation of benefits only.[32]

6.2 The taxation of superannuation at all levels, at the contribution stage, at the entity stage and at the benefit stage, has become overly complex. The fact that there are these three layers of taxation in itself is confusing. The addition of the regimes concerning the superannuation

31 ATO "Superannuation Guarantee (SG) 99 Backgrounder" (December 1999) p 3.

32 See ASFA "Superannuation Tax Concessions – Recent Trends and Levels" (April 1999) especially at p 21.

contributions surcharge (SCS)[33] and the termination payments surcharge (TPS)[34] has brought complexity to ludicrous levels and has created information compliance costs for superannuation funds that make the SCS, in particular, an inefficient tax, especially given its small tax base. From the NFF's connection with the APSF (see paragraph 4.2) we are aware of the ludicrous compliance costs in connection with the SCS. APSF has informed us that around the time of the introduction of the SCS it collected just under 35 percent of the tax file numbers of its 163,766 members. Only 183 members paid the SCS amounting to only $29,392! The costs to APSF, and hence all members, of complying with the SCS far exceed this amount of tax. The APSF spent over $200,000 in changing systems software. An approximate further $80,000 was spent in communication costs in collecting tax file numbers. An estimated further $20,000 in special reports for the ATO and in follow up of tax file numbers' administration was incurred. The fund thus had to expend about ~~$20.00~~ $2.00 per member when only about 180 were involved. The SCS is the worst form of tax possible – the majority pay a heavy compliance cost for a small amount of money to be collected from the few. In turn, the tax acts as a disincentive for those who are unable to salary package to place further funds in superannuation.

Amended by NFF at Public Hearing in Canberra on 16/10/00

6.3 NFF's view is that public confidence in superannuation has been substantially eroded by the nature and extent of changes to taxation rules affecting superannuation.[35] It is NFF policy that no further taxes or imposts should be applied to superannuation and that a thorough rationalisation of the taxation rules needs a separate inquiry. Again, here NFF policy emulates the ASFA policy – that organisation has

33 See *Superannuation Contributions Tax (Assessment and Collection) Act*, 1997 (Cth) and the *Superannuation Contributions Tax Act*, 1997 (Cth).

34 See *Termination Payments Tax Act*, 1997 (Cth).

35 This is especially the case with the introduction of the new Commonwealth CGT regime where short term speculators and long term investors who are able to obtain returns in excess of inflation will benefit from the new rules. Superannuation funds will not.

voiced a similar message. It is difficult to conceive that Australia can become an international financial centre when the rules governing taxation of superannuation and other financial areas reflect such complexity that users of the system are confounded. Compared with the thrust of the new tax system based upon the Ralph Review (which will increase after tax rates of return for, amongst others, foreign investors thus assisting to attract international capital) the superannuation tax system is antediluvian.

7.0 Other Regulatory Issues

We now take the opportunity to comment on three areas of prudential regulation that we believe require reform.

7.1 The Problem of Small Amounts

7.1.1 The problem of small amounts was addressed in the Fifteenth Senate Select Committee Report on Superannuation.[36] A major impact of the SGC has been the creation of a huge number of small balance accounts. The Senate Select Committee in its report made a number of recommendations with regard to small balance accounts and focussed upon, in particular, the impact the SGC has on women, part-time and casual workers. The Senate Committee noted that member accounts with small balances are open to erosion by administrative fees and charges. These fees are generally in excess of investment income earned and once contributions cease to be made, the account could eventually dwindle to a zero balance. Farmers, in particular, believed that the waste of resources represented by this process in the early stages of the SGC was an indictment of the SGC.

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36 Supra note 21.

7.1.2 In making its recommendations, the Senate Committee highlighted a number of issues of concern. Two of the issues included:

- The SGC $450.00 per month exemption threshold;
- Preservation rules and, in particular, access to amounts less than $500.00

7.1.3 Casual or part-time workers on low or intermittent incomes receive small and irregular contributions, often across a number of funds (note the point made in paragraph 2.8 about the fact that each worker is, on average, a member of about 3 funds) which result in small capital accumulation and relative low returns. Often such workers require all remuneration for current needs.

7.1.4 Erosion of the benefits by fees and charges exacerbates these problems outlined in the last paragraph. The erosion of small amounts of superannuation contributions has to some extent been ameliorated by prudential measures whereby fund members who have account balances of less than $1,000 are now classified as protected members. NFF believes that it is important that the standards of prudential regulation are such that a superannuation fund cannot charge administration costs against a protected member's account where those administration costs would exceed investment earnings credited to that account. Our understanding is that this is the current state of the law and should be upheld despite any issues of cross–subsidisation by other superannuation fund members that obviously arise. This current protection should continue to be a vital element of the superannuation legal system but should not be viewed in isolation. It is important that the problem of small amounts is addressed having regard to the details set out in paragraph 7.2.

7.2 The SGC Threshold

7.2.1 SGC contributions must be made by an employer, subject to a number of other limited exemptions, when an employee earns more than $450.00 gross in a calendar month. The Senate Committee in its fifteenth report noted that there was considerable community debate as to whether the SGC threshold should be increased or decreased. There was also debate on whether the timing of the threshold calculations should be on a monthly, quarterly or annual basis. This debate arose not only in the context of the small amount problem but also in relation to the inconsistency between the SGC threshold and Award thresholds discussed in section 4 of this submission. Principally, those in favour of raising the threshold argued that a higher threshold would reduce the small amounts problem and the administrative burden of deducting contributions for lower paid workers, especially itinerant workers.

7.2.2 The Senate Committee cited submissions from a number of prominent horticultural groups. Those groups, as well as the Victorian Farmers' Federation (VFF), made submissions supporting a move to a $1,350 quarterly threshold. In particular, the Riverland Horticultural Council submitted that a $1,350 quarterly threshold would exempt about 70 percent of casuals employed in the horticultural industry and articulated concerns associated with the administrative difficulties in applying the SGC to itinerant workers.

7.2.3 The Senate Committee made the following recommendations:

- To alleviate the small amounts problem consideration should be given to changing the SGC threshold from $450 per month to a quarterly amount of less than $1,350. The Committee

recommended that this consideration be the first element in addressing the small amounts problem.

- That the removal of access to preserved amounts of less than $500.00 be the second element to alleviate the small amounts problem.

- The Senate Committee recommended the removal of contributions tax for the first $500.00 as the third element in its proposal to alleviate the small amounts problem. The Senate Committee further recommended that an assessment be made of the most effective and efficient means of implementing a tax-free threshold.

7.2.4 The Committee's recommendation to alleviate the small amounts problem, that consideration be given to changing the superannuation guarantee threshold from $450.00 per month to a quarterly amount of less than $1,350 was not agreed to by the Government.[37] The Committee's recommendation to remove access to preserved amounts of less than $500.00 as the second element in its proposal to alleviate the small amounts problem was agreed to by the Government. The Government announced in the 1997-98 budget that the $500.00 preservation threshold would be abolished from 1 July 1997. The Government subsequently accepted the recommendation of the Senate Select Committee on Superannuation in its 26th report to reduce the preservation threshold from $500.00 to $200.00 rather than proceed with total abolition. In order to understand the arguments which follow, it is necessary to set out the Government's basis for rejection of the recommendation to increase the threshold to the quarterly amount just set out:

37 Government Response to 15th Report of the Senate Select Committee on Superannuation dated 25 March 1999.

The outcome of the proposal to alter the threshold to a quarterly basis would be to deny access to superannuation benefits to a significant proportion of employees, especially casual and itinerant workers in sectors such as building and construction, horticulture and private nursing. It would also expand considerably the scope and incentive for employers to avoid their SG obligations through the 'casualisation' of their workforces. The Government has announced that from 1 July 1999 employees earning $450 to $900 per month, with their employers consent, will have the option of receiving an equivalent payment in lieu of SG employer contributions (less any compulsory award superannuation contributions). This represents a significant extension of the ability of low income earners to exercise choice and control over their financial arrangements. The Government's opting out policy recognises that low income earners may have a more immediate need for income to maintain current living standards.[38]

7.2.5 NFF asks that Government reconsider the position concerning the quarterly threshold issue. Particularly, we would ask that Government review its conclusion concerning the issue of apprehended constructed avoidance by employers of the SGC through deliberate casualisation of the workforce. Casual employment is increasing in Australia as the labour market requires flexibility, especially in hours. NFF believes that this phenomenon has been correctly analysed by Dawkins and Norris[39] where they argue that the flexibility of casual employees, with regard to their time pattern of work, has become of increasing importance for Australian employers:

For example, the increased incidence of late shopping hours has increased the advantage of casuals in retailing. If sufficient permanent part-time or full-time employees had to be employed to cover the peak demands, there would be a substantial problem of unproductive or slack time when they are present outside of these peak hours.[40]

38 Id

39 P Dawkins and F Norris "Casual Employment in Australia" Australian Bulletin of Labour Vol 16 No 3 1990 p 156.

40 Ibid at 169.

These comments apply equally to agricultural enterprises especially those with peaks and troughs of time based upon the harvest of a product.

7.2.6 In a recent Ministerial Information Paper,[41] Government has charted the rise of casual employment in the Australian labour market:

> A major change in the labour market in Australia in the last fifteen years has been the growth in casual employment. Workers employed as casual employees in their main job comprised 15.8 per cent in 1984 and 17.6 per cent of all employees in 1988, rising to 26.1 per cent in 1996 and 26.9 per cent in 1998.[42]

To reject the SGC reform recommended by the Senate Committee because it may form the basis for an avoidance mechanism, seems to NFF to ignore the phenomenon of casual employment and to confuse cause and effect. The other rationale for rejection of the Senate Committee recommendation is also, we believe, open to question. The Government has proposed, and NFF supports, that certain employees need not be part of the SGC system. The Government has proposed that employees earning between $450.00 and $900.00 a month from a specific employer may receive salary or wages instead of the SGC amount. This makes sense where workers who are not well remunerated require funds to meet current consumption rather than for future savings. NFF supports these recommendations despite increased administrative difficulties for small business. However, the quarterly threshold issue partly subsumes the rationale for the "opting out" proposal. Increasing the threshold will make administration easier. Further, as referred to earlier, calculations of the SGC liability occur in respect of quarterly periods and hence the threshold issue would be better aligned with other administrative details if it too were calculated

41 Minister for Employment Workplace Relations and Small Business "Job Security in Australia" January 2000.

on a quarterly basis. The change would not disadvantage a large number of casual employees given that Government has identified that the average duration of employment for casual employees in 1998 was 3.5 years.[43] It is acknowledged, however, that casual itinerant workers will be disadvantaged. On balance, the quarterly threshold will provide greater benefits than disadvantages to the agricultural sector without any adverse consequences for employees.

7.3 Superannuation Choice of Funds

7.3.1 The *Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill 1998* (the Bill) was introduced into the House of Representatives on 12 November 1998. The Bill was agreed to by the House on 16 February 1999 and has yet to be passed by the Senate. The Bill requires employers to offer an employee eligible to receive SGC contributions a choice of superannuation funds. Employers may use one of two options to do this: a 'limited choice offer' or an 'unlimited choice offer'. An employer will not be required to offer a choice of funds if the employee proposes an eligible fund into which the employer is willing to make contributions. Furthermore, where a Certified Agreement or Australian Workplace Agreement exists and incorporates a provision regarding SGC contributions and a nominated fund, an employer will not be required to offer a choice.

7.3.2 The Bill contains a range of obligations that will impose an additional administrative burden on farmers who employ labour. Those obligations include:

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42 Ibid at p 8.

43 Ibid p 9.

- offers of both a limited choice of funds must be made in writing and contain certain information depending on the option chosen by the employer. Regulations would have to be made prescribing the information that is to be provided in the written offer;

- additional record keeping; and

- making contributions to a greater number of funds than at present.

7.3.3 The Government, in the Explanatory Memorandum issued with the Bill, acknowledges that providing choice of funds will increase costs for some employers. However, the Government believes that the benefits of choice to employees and the community more generally, outweigh those costs. Furthermore, the Government believes that employers exercising their right to choose between an offer of limited or unlimited choice will enable employers to limit the costs. NFF supports choice in this context but does not support the unlimited choice option. There needs to be a limit placed on the additional amount of administration required by small business. Hence, the concept of a limited choice option is preferred by NFF.

7.3.4 The controversy and range of views surrounding the choice of funds issue has been well summarised in a Bills Digest.[44] NFF does not intend to weigh into the controversy except to:

- Point out that a balance between an increase in employers' administrative burdens and the employee's right of choice seems to NFF to apply where the limited choice option is mandatory;

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44 Commonwealth of Australia, Parliamentary Library. Bills Digest No. 104 1998-99. *Superannuation Legislation Amendment (Choice of Superannuation Funds) Bill* 1998.

- Note that a regime that establishes a clear requirement of disclosure to consumers about fees, commissions, charges and a history of investment returns of all funds should be a mandatory requirement so that choice does not lead to wasteful switching between funds, caused by inaccurate perceptions

7.3.5 Feedback from our affiliates on a draft of this submission that was circulated to them, indicated a preference for any choice of fund legislation to have an implementation date no earlier than 2002, given the impact of other legislative change in the 2000-2001 financial year such as the GST start-up.

8.0 Conclusion

This submission has by no means touched upon all controversial issues that affect superannuation. The overwhelming notion that confronts farmers about this area of the economy is that superannuation has become riddled with complex rules that reduce its attraction in regard to its fundamental purpose – the accumulation of sufficient capital for the maintenance of income for retirees. Income earned during a person's working life which is saved through superannuation should not be taxable until used in retirement. The adoption of this proposition alone would ease the regulatory burden and substantially simplify the basis for a major platform of Australia's economic future.

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