


Senate Select Committee on Superannuation and Financial Services

Main Inquiry Reference (c)

Submission No. 17

Submittor: Ms Philippa Smith
Chief Executive Officer
Association of Superannuation
Funds of Australia (ASFA)
PO Box 1485
SYDNEY NSW 1005
 - (02) 9264 9300
 - (02) 9264 8824

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The Secretary
Senate Select Committee on Superannuation and Financial Services
Parliament House
CANBERRA ACT 2600

The Association of Superannuation Funds of Australia's (ASFA) would like to take the opportunity to make a submission to the Senate Select Committee on Superannuation and Financial Services initial inquiry.

ASFA is particularly interested in commenting on item (c) *enforcement of the Superannuation Guarantee Charge*.

The submission is enclosed.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Philippa Smith".

Philippa Smith
Chief Executive Officer

Secretariat

Level 19
Macquarie Tower
133 Castlereagh St
Sydney NSW 2000

PO Box 1485
Sydney NSW 1005
Tel: (02) 9264 9300
Fax: (02) 9264 8824



The Voice of Super

Enforcement of Superannuation Guarantee Charge

Submission to

THE AUSTRALIAN SENATE

**SELECT COMMITTEE ON
SUPERANNUATION AND FINANCIAL
SERVICES**

31 March 2000

Secretariat

Level 19
Piccadilly Tower
1133 Castlereagh St
Sydney NSW 2000

PO Box 1485
Sydney NSW 1005
Tel: (02) 9264 9300
Fax: (02) 9264 8824

The Association of Superannuation Funds of Australia Limited ACN 002 786 290
ASFA Website: www.superannuation.asn.au
Identity Submissions CS&FS00

The Association of Superannuation Funds of Australia (ASFA) is the peak industry body for superannuation. The Association has approximately 600 members who collectively represent 6.5 million Australians. This covers approximately 80% of superannuation members holding accounts and 80% of superannuation assets. One of ASFA's key aims is to represent the interests of superannuation fund members. ASFA has a direct interest in ensuring confidence in superannuation (and provision for retirement) is maintained. Ensuring that the entitlements of superannuation fund members to mandated superannuation contributions are protected, and that those entitlements are not jeopardised by corporate and business failures is of course consistent with that goal.

ASFA wishes to specifically address the following item of the Committee's initial terms of reference:

c) enforcement of the Superannuation Guarantee Charge.

With the increasing number of business closures where employee entitlements are being lost, ASFA views it as a matter of paramount importance that employee superannuation entitlements are correctly identified and promptly delivered.

ASFA notes that the Government is currently grappling with the issue of how best to protect employee leave entitlements. In a submission to the Senate Employment, Workplace Relations, Small Business and Education Legislation Committee inquiry into the *Workplace Relations Legislation (More Jobs, Better Pay) Bill 1999* in September 1999 ASFA made the following observations about **employee superannuation entitlements**:

1. The *Workplace Relations Act 1996* recognises that the remuneration of employees consists of direct and indirect components and immediate and deferred benefits. Superannuation falls into this as both an allowable matter in awards and agreements, and as an indirect component with a deferred benefit.
2. It is the Government's intention to amend Section 179 of the Act to extend an employee's right to seek legal action to recover unpaid entitlements to superannuation entitlements.

Whilst this extension is welcomed, ASFA believes that it underestimates the difficulties many employees would have in securing their legitimate superannuation entitlements through the courts. For those employees able to access the solution proposed in the amendments to the Workplace Relations Act, the resultant legal costs would generally prove to be prohibitive.

3. Further, it is not certain that this avenue of address would be of assistance to employees. For many employees their entitlement to superannuation arises solely under the Superannuation Guarantee legislation. Under this legislation it would appear that an employee whose employer is in breach of the

Superannuation Guarantee Act has no legal standing to take action under that act. The Commissioner of Taxation, as administrator, would appear to be the sole person with legal standing.

This means that the employee must rely totally on the willingness of the Commissioner to actively and effectively administer the legislation. For these employees, deficiencies in the Superannuation Guarantee legislation, combined with ATO administrative processes that treat these complaints as an information gathering exercise, result in the complainant not necessarily receiving an individual remedy.

It is ASFA's view that some simple improvements in the current legislative mechanism would achieve a significant improvement in superannuation coverage and employer compliance and would strengthen the hands of the regulator where employers were non-compliant. The adoption of some additional initiatives suggested below would further enhance the operation of the Australian retirement incomes system.

In the context of the current inquiry, ASFA's primary concerns are:

1. That employee entitlements to employer superannuation contributions are paid in a timely manner,
2. That the constant growth in the number of unclaimed superannuation guarantee vouchers be significantly reduced,
3. That the beneficial ownership of the entitlements is clearly identified at the time the contributions are made,
4. That inappropriate usage of SHAR is discouraged,
5. That defaulting employers are pursued by the regulator,
6. That only appropriate information is placed on the Lost Members Register, and
7. That the information contained on the Lost Members Register is efficiently utilised.

ASFA suggests that the following initiatives would help limit and redress the concerns identified above.

1. Payments Made in a Timely Manner

The entitlement to employer superannuation contributions arises under the Superannuation Guarantee Legislation (*Superannuation Guarantee (Administration)*)

Act 1992 and the *Superannuation Guarantee Charge Act 1992*). The Administration Act mandates that employer superannuation contributions must be made by 28 July of the year following the end of the year of income in which the salary and wages were earned. If this payment to a fund is not made, the employer must pay the Superannuation Guarantee Charge (tax).

As with other entitlements, the longer the gap between an entitlement arising and the entitlement being due for payment, the greater the risk that, for one reason or another, the entitlement will never be paid, or "lost" to the member.

When first enacted, the superannuation guarantee (SG) legislation contained provisions requiring an employer (commencing with the 1993/94 year) to calculate each employees superannuation shortfall on a quarterly basis. A superannuation shortfall is an amount of superannuation that should have been paid, but was not. The SG shortfall, although calculated on a quarterly basis, isn't required to be paid to the ATO until the following 28 July, the due date for payment of the SG charge. The intent of the legislation was thus to require employers to make superannuation contributions on a regular basis, at least quarterly, or be liable for the superannuation guarantee charge with its associated penalties of additional costs and non-deductibility to the employer for income tax purposes.

Amendments to the legislation in 1994 and 1995 inserted Section 23(6A) into the Act. This provision permits an employer contribution made up to 28 July to be applied to any of the earlier contribution periods. The effect of this amendment is that an employer can defer making any employee superannuation contributions until 28 July after the year of income in which the liability arise.

This change has created the following problems for employees.

- Where an employer delays making the payment until the last possible date the employee loses up to 12 months earnings on the contribution.
- Where employers delay payment, or pay the SG Charge, an employee is not covered by death and disability insurance.
- When an employee suspects that an employer is not making contributions no action can be taken by the Australian Taxation Office (ATO), the legislation's administrator, until after 28 July, the final date for determination of the superannuation charge.
- When an employer is audited by the regulator, the ATO can only audit the previous completed financial year.

In combination, these problems work to produce both an actual and a potential loss of benefits to many thousands of Australian employees, and particularly those in part time and casual employment. Whilst the ATO reports a total compliance rate by employers of in excess of 90%, the remaining 10% represents a significant number

of Australian workers. Typically, these employees are those with the least access to the financial resources needed to pursue defaulting employers.

ASFA submits that the opportunity should be taken to restore to the Superannuation Guarantee (Administration) Act 1992 the requirement for employers to make at least quarterly, but preferably monthly, superannuation contributions should they wish to avoid the imposition of a superannuation guarantee charge. This change would strengthen the Commissioner's hand in Superannuation Guarantee audits by the ATO being able to advise employers of both current and future liabilities under the Act.

The opportunity could be taken to align the payment dates for compulsory superannuation contributions with those prescribed for withholders under the *A New Tax System (Pay As You Go) Act 1999* (PAYG). This change would have the twofold advantage of increasing the possibility of employer obligations being met and increasing the ability of the ATO to monitor and regulate current employer behaviour. The enactment of the PAYG legislation reveals a clear intent by the Government for monies held in trust to be remitted in a timely and consistent manner. ASFA believes that compulsory superannuation contributions should be treated in a similar manner.

2. Growth in Unclaimed SG Vouchers

Associated with the payment of SG shortfalls to the ATO is the issue of SG vouchers. When a SG shortfall is paid by an employer to the ATO it is notified to the employee by way of an SG voucher issued by the ATO. The voucher is presented to a superannuation fund who then request transfer of the voucher value from the ATO to the member's account. A significant number of these vouchers are either 'returned unclaimed' to the ATO, or the voucher credit is never claimed from the ATO. It may be possible to address this issue by reviewing some of the administrative provisions of the SG legislation. One option may be to reduce the penalty on an employer who paid an employee's SG quarterly shortfall to a superannuation fund in the following quarter. By reducing the need for the ATO to receive the employee component of the SG charge and thus issue a voucher, ATO administrative costs would be reduced along with future volumes of unclaimed voucher credits and 'returned unclaimed' vouchers.

3. Beneficial Ownership of Entitlements Clearly Identified

For many years, a significant issue for the superannuation industry has been the quality of information supplied to them by an employer opening an account in respect of a new employee. The introduction of the superannuation guarantee and its associated penalties has resulted in many superannuation accounts being opened with limited information about the employee as some employers attempted to beat the superannuation guarantee's 28 July deadline and superannuation fund administrators attempted to meet the needs of their employer clients. In many situations, fund administrators approached the employer for additional information only to find that the employee had moved on and the information was not available.

This activity is reflected in the number of entries on the Lost Members Register, which is administered by the ATO.

The situation with the Lost Member Register is exacerbated by the presence of the Small Holding Accounts Reserve (SHAR) which is also administered by the ATO. The SHAR, which the Government has announced an intention to close, was established in conjunction with the *preservation of small balances* legislation to provide a place to deposit employer contributions where an employer could not find a fund willing to accept them. The original intent appears to be for the SHAR to be used by employers of short term and itinerant employees where superannuation contributions are very small and there is no certainty of ongoing work and therefore ongoing employer superannuation contributions.

The SHAR was a useful policy initiative, but an unintended consequence has been that some employers use the SHAR because it does not require them to seek information from employees. Deposits may be made to the SHAR using only the information available to the employer. With itinerant workers and casual employees this information is often minimal. For these employers there is no penalty for them not maintaining more adequate records and therefore no incentive for them to maintain more adequate records of their employees. The only people disadvantaged / penalised are the employees who quickly lose track of their superannuation entitlements, receive no interest on the SHAR deposit and who ultimately have their entitlement transferred to consolidated revenue.

ASFA submits that the ongoing problem of inadequate identification of some superannuation account holders could in large part be solved by requiring employers who do not have available a minimum mandated amount of information about an employee to pay the SG Charge for that employee. By imposing this financial penalty it would encourage the employer to seek adequate information about their employees at the time of engagement. This process has the advantage that an amount equivalent to the SG contribution plus 10% interest would be available for the employee should the ATO be able to identify them or should the employee identify themselves to the ATO through the Lost Members Register. The process would also have beneficial flow on effects in the administration of Social Security Benefits and Income Tax legislation.

4. Inappropriate use of the Superannuation Holding Accounts Reserve

Coupled with the above problem of employers using SHAR to avoid obtaining employee details, is the issue of inappropriate use of the SHAR and the lack of incentive for employers to find an appropriate fund for their contributions.

Despite the original intention that the SHAR was principally to be used by employers of short term and itinerant employees it appears that this is not the case. Many employers use the SHAR to make superannuation contributions for long term casual employees.

Although there is a requirement for employers using the SHAR to sign a declaration that they have:

.... unsuccessfully attempted to find a superannuation fund willing to accept the amounts included with this form.”

there appears little evidence of the ATO enforcing this rule. This is to be expected as it would be viewed by the ATO as a very low priority in the context of the SG legislation's aim to ensure that contributions are made somewhere.

The only financial penalty placed on an employer who uses the SHAR occurs with the loss of a tax deduction for any contributions in excess of \$1200 made for a single employee in a single financial year. A superannuation contribution of \$1200 represents an annual income of more than \$17,000.

It is suggested that the introduction of an administration charge on employers who use the SHAR system may both assist to reduce inappropriate usage and fund ATO resources to ensure that there is only appropriate usage.

5. Defaulting Employers Are Pursued

ASFA believes that a more vigorous approach should be taken by the ATO towards complaints by employees about non-complying employers.

ASFA receives complaints from people seeking guidance on what action can be taken about employers who have not met their superannuation guarantee responsibilities. At present, only the ATO has the legal capacity to enforce compliance. The ATO position appears to be one of treating an employee notification of an employers non-compliant behaviour as an intelligence gathering exercise, rather than as a complaint requiring a specific response. The ATO appears to take legal action in very few cases. The costs of legal action to individuals, should they have standing under the legislation, would be prohibitive.

The ability of an employee, under the proposed *Workplace Relations Act* amendments, to bring direct action against the employer, whilst welcome, is unlikely to be a satisfactory solution to the problem for the majority of employees. It is anticipated that in many instances where an action could be brought, the combination of legal costs and the court's lack of willingness to adjudicate in respect of relatively small amounts, will result in no private action being taken, or being possible.

6. Appropriateness of Information on the Lost Member Register

There is a concern within the superannuation industry that there is a mismatch between the legislative definition of a lost member and the actuality of who are lost members. The result is that, under the current legislated reporting rules, the Lost Member Register contains the details of many member accounts where the member is only 'lost' in terms of the legislative definition. ASFA would support a review of the reporting requirements that was undertaken with the aim of ensuring that only

genuine 'lost member' cases (rather than 'inactive members) are placed on the register. It is important that the register is not cluttered with unnecessary cases as this will only lead to a lack of focus and potentially loss of confidence in the superannuation system.

7. Extended Use of Lost Member Register Information

At present, legislation requires superannuation funds to supply to the ATO details of 'lost members'. The basic requirement for reporting is that a fund has lost contact with a member. Reunification of a 'lost member' with their entitlements usually requires action from the member. For the benefits of the register to be maximised, ASFA believes that superannuation funds should be given the opportunity to, on behalf of their members, pro-actively use the register in an attempt to re-unite current members with their lost entitlements. ASFA would support the amendment of relevant legislation to enable the ATO and the superannuation industry to work cooperatively to reunite lost members with their entitlements. This action, combined with the current capacity of members to amalgamate superannuation entitlements into a single account would assist members to maximise their retirement benefits.

ASFA submits that the adoption of the above recommendations would significantly enhance the protection of employee entitlements.