



Senate Select Committee on Superannuation and Financial Services

Main Inquiry Reference (c)

Submission No. 75

(Supplementary to Submission No. 7)

Submittor: Australian Taxation Office
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 -

6 September 2000

Ms Sue Morton
Secretariat,
Senate Select Committee on Superannuation and Financial Services
Parliament House
CANBERRA ACT 2600

Dear Sue,

As requested, here is a copy of the Superannuation Guarantee (SG) prosecution strategy. It should also be noted that the Superannuation Business Line of the ATO has always conducted prosecutions on SG. The statistics are:

- 130 prosecutions have been carried out by the ATO in relation to the SG. These were under section 8C of the *Taxation Administration Act 1953* for failure to lodge an SG statement under section 34, and for failure to provide information under section 77 of the SGAA.
- In relation to debt collection, there are 227 cases where legal action has commenced (legal action means a summons, a writ or a section 459E notice). 156 cases are still active and 71 have been finalised.

The strategy will allow us to target or focus our prosecution activity.

Please contact me on (03) 9275 5022 if you require any further details.

Yours faithfully,



David Diment
Assistant Commissioner – Superannuation (*Compliance*)

SPR

Prosecution Pack

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PROCEDURES/CHECKLIST

- the decision to prosecute will be made at the start of a project, during a project or as a one-off. In all cases the decision should be submitted to the Compliance Working Group (CWG) through the segment Business Co-ordinator. The sign-off from the CWG should be placed in the audit file.
- the project manager/auditor must ensure that they refer to the SPR prosecution strategy (page 15) and provide comprehensive details as to why prosecution action should be considered. If prosecution action is to be incorporated in a project, the details should be provided in the Project Initiation Brief.
- if the prosecution decision is approved, the project manager/auditor should liaise with the in-house-prosecutor (IHP) in the relevant branch office (see post code list). IHP will help with drafting notice and will assist with procedures (eg. court procedures may differ from State to State).
- prepare file and send notice (see Referral to Prosecution for action prior to and after sending the notice). Also see example of notice issued pursuant to section 77 of the SGAA that was used in a recent prosecution exercise. The file should contain all information to date plus the Working Papers cover sheet, Address Checklist and Referral Submission form
- refer file to IHP
- note on case notes in CCM
- report progress to Business Co-ordinator
- Business Co-ordinator will report to CWG
- CWG will report to Cross Line Prosecution Group (via SPR representative) if necessary

EXAMPLE OF A NOTICE

NOTICE PURSUANT TO PARAGRAPH 77(1)(a) OF THE *SUPERANNUATION GUARANTEE (ADMINISTRATION) ACT 1992*

Pursuant to paragraph 77(1)(a) of the *Superannuation Guarantee (Administration) Act 1992*, I require you, <<Employer Name>> to give the following information to me, in writing at the Australian Taxation Office, marked to the attention of <<auditor>> at 48-54 Grose Avenue, Cannington, not later than <<date>>.


The powers of the Commissioner of Taxation under section 77 have been delegated to me as Deputy Commissioner of Taxation pursuant to section 8 of *Taxation Administration Act 1953*.

INFORMATION REQUIRED

Please state the following information for each employee that you paid during the period 1 July 1997 to 30 June 1998 inclusive -

- 1] Full name of each employee.
- 2] Tax File Number of each employee.
- 3] Total salary and wages paid to each employee.
- 4] Amount of superannuation contributions that you paid on or before 28 July 1998 to a complying superannuation fund for each employee.
- 5] For each superannuation contribution paid, state:
 - a. Name of superannuation fund,
 - b. Employer Account Number (if applicable),
 - c. Address of the fund, and
 - d. Telephone number of the fund.

DATED THIS THIRD DAY OF DECEMBER 1999.



Leo Bator
DEPUTY COMMISSIONER OF TAXATION

REFERRALS TO PROSECUTION

THE DECISION TO PROSECUTE

1. PREAMBLE

- 1.0 The decision to refer a case(s) to IHP (in-house prosecutor) could be made at the start of a project or during a project (in which case it should be noted in the Project Initiation Brief) or as a one-off action
- 1.1 The decision should be referred to the Compliance Working Group (CWG) through the segment Business Co-ordinators for approval.
- 1.2 The decision will be conveyed to the Cross Line Prosecution Group for assignment of priority

2. POST NOTICE CONTACT

- 2.1 **TAX OFFICE INSTIGATED CONTACT** - The "NOTICE" is the final contact that this office will instigate with a taxpayer / tax agent in relation to the outstanding information specified in a valid notice.

No further contact is to be instigated by the SPR officer. "Intention to Prosecute" letters, confirmation of address letters, phone calls etc are not to be issued / made after the Notice has issued.

In the event that it is evident that a notice has issued incorrectly (eg it contains wrong name, address, years, wording etc. which invalidates the notice), further contact may be necessary with the taxpayer / tax agent prior to the issue of a fresh notice.

- 2.2 **TAXPAYER / TAX AGENT INSTIGATED CONTACT BEFORE CASE IS REFERRED TO IHP** – When a taxpayer / tax agent contacts the SPR officer requesting a further period of time to lodge or a deferral of legal action after a Notice has issued, the following script should be used-

"I am sorry but no extension of time / deferral of legal action can be given. I will note what you have said on your file. The prosecution officer may take this into consideration prior to issuing a summons."

It should be noted that there may be exceptional circumstances for granting a further period to lodge (these will be very rare) and any request must be accompanied by appropriate evidence and be approved by the Business Leader. Granting an extension to lodge or a deferment of legal action, regardless of whether it is formal or informal, voids the Notice.

- 2.3 **TAXPAYER / TAXAGENT INSTIGATED CONTACT AFTER CASE IS REFERRED TO IHP** – When a taxpayer / tax agent contacts the SPR officer after a case has been referred to IHP, the taxpayer / tax agent is to be advised that the case is no longer an SPR case. The SPR officer should transfer the call to the appropriate IHP team.

3.0 AGE OF THE NOTICE

3.1 Any Notice that is more than six months old (ie six months from the date of issue) should be actioned in one of the following ways:

- The Notice may be re issued;
- the SPR operative may discuss the case with the Business Leader if special circumstance are involved. If the team leader / manager agrees that it is a special case, he / she will liaise with IHP to ascertain if they will accept the case. If IHP accepts the case, the notice must not be more than eight months old.

4.0 WHEN DOES THE CASE BECOME AN IHP CASE

4.1 When a case has been referred to IHP it is no longer a SPR case.

After the case has been referred to IHP, all contact with the taxpayer is to be with the appropriate IHP team and not with the SPR operative. In other words, transfer the taxpayer to the IHP team.

5.0 CREATION OF "PROSECUTION WORKING PAPERS" FILE

PREAMBLE

SPR staff are creating a brief of evidence for IHP. They must include (in the "Prosecution Working Papers" file) all information, which has been considered in reaching the decision to refer a case to IHP. This evidence verifies the action that has been taken by SPR staff in attempting to obtain the information.

5.1 The "Prosecution Working Papers" file should include:

- a copy of each Notice issued;
- copies of all reminder letters which have been sent to the taxpayer and / or their tax agent;
- copies of all correspondence (other than reminder letters) which have been sent to the taxpayer and / or their tax agent;
- copies of all correspondence which have been received from the taxpayer and / or their tax agent;
- records of any telephone conversations had with the taxpayer, their tax agent and any other internal / external clients;
- records of any interviews had with the taxpayer, their tax agent and any internal / external clients;
- screen dumps / prints of any relevant working papers on NTS Notes, AIS Notes ADD Notes, CIDC prints, etc;
- screen dumps / prints of any change(s) of name and / or address;

- ASCOT prints for companies;
- any search / tracing information;
- two up to date confirmations of address (ie not more than six months old);
- the completed and approved "Prosecutions Referral Submission".

5.2 All records:

- must be clearly written (if your writing is not clear, type the records);
- must be in ink (not pencil);
- must be dated;
- must have the operatives name printed; and,
- must be signed by the operative.

5.3 All working papers are to be:

- folio numbered;
- in chronological order (from oldest to most recent); and,
- cross-referenced (where required) to the "Prosecution Referral Submission" form.

5.4 The SPR operative must:

- confirm that the Notice and any other correspondence has issued to the correct name and address for service, ie the NTS address.
- confirm that the Notice and any other correspondence has issued to the new address for service where a new address has been located and ensure that the "Untraceable" indicator has been removed.
- confirm the address for the serving of the summons (eg residential, business, registered office etc) and attach confirmation to the working papers – refer to the "Check List For Confirming An Address". An address can be confirmed by finding the same address from two current sources, either internal or external, which are no older than 6 months).
- complete the "Prosecution Referral Submission" form, which must be reviewed for completeness and suitability for referral to IHP. [Note approval by CWG]

6. PROCEDURES (in addition to the above)

6.1 **SPR Operatives will ensure that:**

- an up to date confirmation of address is attached to the working papers;
- the "Prosecution Referral Submission" form is completed and approved;
- if a previous file exists, it should be obtained and amalgamated with the current file.

6.2 IHP Operatives will ensure that:

- referred cases must be examined for suitability for prosecution by IHP.
- if it is decided that IHP requires cases to be placed in Pros folders, this will be done by the IHP operative;
- files for completed PROS cases are archived by IHP.
- where more than one notice has issued for different years for the one taxpayer, IHP will prosecute off all the notices if they are within the 12 month time frame.

6.3 IHP CASES REFERRED BACK TO SPR

- IHP must provide detailed valid reasons in writing for referring a case back to SPR;
- Where the case cannot be actioned by IHP, IHP have two months from the date of referral to make a decision on whether a case is suitable or not for prosecution. If the decision is not to proceed with prosecution action, details must be given for the decision. Although SPR may dispute these reasons IHP will always be prepared to discuss each case on it's merits but ultimately the decision to prosecute rests solely with the prosecutor. Where IHP requires more information, IHP must detail what further information is required;
- Where the summons could not be served, IHP operatives must check EWP and other instantaneous systems checks (eg mainframe) for a new address prior to referral back to SPR. Details of the checks made must be on the file so as to avoid duplication. (These checks must be conducted by IHP regardless of any tracing action which may have been completed by the Process Server.)

6.4 MISCELLANEOUS

- IHP are responsible for issuing any Court Orders (s.8G).
- Prosecution files will not be referred back to SPR between 8C and 8H prosecutions as the decision to prosecute under s.8H lies with IHP.
- SPR are not to monitor IHP work for IHP eg S8C ⇒ S8H cases as this is not the responsibility of SPR.
- Completed PROS files are to stay IHP and be archived by IHP.

WORKING PAPERS

T F N	_____ / _____ / _____
-------------	-----------------------

A B N	_____ / _____ / _____ / _____
-------------	-------------------------------

NAME:
(Last Name) (Other Names)

Business Line: SPR.
Team:.....
Branch Code:.....
Post Code:

<p>BAR CODE: (SPR files are usually not FLOCs marked)</p>
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TICK THE APPROPRIATE BOX(ES) WHERE APPLICABLE (change if necessary)

SG	SURCHARGE	RBL	LMR	SMSF
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LOCATION	DATE	COMPL	ETED
		Initials	Date

Checklist For Confirming An Address

TAXPAYER'S NAME _____

TEN ____ / ____ / ____ ABN ____ / ____ / ____ / ____ ACN ____ / ____ / ____

✓ = confirmed X = Tried but no confirmation.
Place the date the information was updated for each check you action.

CONFIRMATION OF AN ADDRESS CAN BE OBTAINED BY CONFIRMING THE ADDRESS
WITH 2 CURRENT SOURCES (EITHER INTERNAL AND / OR EXTERNAL)

INTERNAL SOURCES

- EWP Date.....Folio..... 1223 Date.....Folio.....
- PHONE BOOK Date.....Folio..... (Look for clients or a relations phone number)
- AIS Date.....Folio.....
Check for latest address info & narrative details

EXTERNAL SOURCES: (Internal plus at least one of these to be checked for an untraceable)

- ELECTRICITY Date checked..... Date updated.....Folio.....
- AUSTRALIA POST Date checked..... Date updated.....Folio.....
- DIMA (Immigration) Date checked..... Date updated.....Folio.....
- LICENCE / REGISTRATION Date checked..... Date updated.....Folio.....
- TAX AGENT Date checked..... Date updated.....Folio.....
- CENTRELINK Date checked..... Date updated.....Folio.....
- EMPLOYER Date checked..... Date updated.....Folio.....
- POLICE Date checked..... Date updated.....Folio.....
- LOCAL GOVERNMENT Date checked..... Date updated.....Folio.....
- AUSTRAC Date checked..... Date updated.....Folio.....
- CITEC / RP DATA Date checked..... Date updated.....Folio.....
- ASIC (ASCOT) Date checked..... Date updated.....Folio.....
- OTHERS Date checked..... Date updated.....Folio.....
 Date checked..... Date updated.....Folio.....

SPR Operative's Name.....Extension.....Date.....

PROSECUTION REFERRAL SUBMISSION FORM

BUSINESS LINE:.....

REFERRING OFFICE:.....

TAXPAYER'S/ENTITY'S FULL NAME:.....
 (*See next page for additional information required for Trusts/Superfunds/Partnerships)

DOB:..... TFN:..... ACN:..... ABN:.....

Tick The Appropriate Box(es) and Give details of periods/years to be summonsed

SG:	SURCHARGE	RBL	LMR
Years:	Years:	Periods:	Periods:
Folios:	Folios:	Folios:	Folios:

Address to Serve Summons:		FOLIO(S)
Residential, Registered office (Attach full ASIC extract), or Other (reasons for use to be given)		
Source of Address	See address tracing sheet	

Notice			
• Date of Issue:	Expiry Date:	Years Demanded:	
• Was a copy issued?	YES/NO	If yes, give address.	

TAXPAYER CONTACT (ATO instigated)		
Reminder Letter(s) • Date of Issue: • Source of Address: NTS, AIS; Other – • Explanation if no reminder letter issued (eg telephone contact)		
Telephone Contact (provide details) 		
Field Visits (provide details) 		
TAXPAYER INITIATED CONTACT YES / NO • If yes - Summarise:		

ADDITIONAL INFORMATION:

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PHONE/FAX NUMBERS	<u>TAXPAYER</u>	<u>TAX AGENT</u>	<u>OTHER (DETAILS)</u>	
	PH:	PH:	PH:	
	FX:	FX:	FX:	
TRUSTS / SUPERFUNDS				
<ul style="list-style-type: none"> • Trustee's Name • Trustee's Address 				
PARTNERSHIPS				
<ul style="list-style-type: none"> • Senior Partner's Name • Senior Partners Address 				

OFFICER'S NAME SECTION EXTENSION DATE

APPROVING OFFICER'S SIGNATURE SECTION EXTENSION DATE

REASONS FOR NON-PROSECUTION ACTION:

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PROSECUTOR'S SIGNATURE PRINT NAME DATE EXTENSION

POSTCODE REFERENCE LIST

The tables below show the break-up of postcode ranges and the appropriate office that would deal with any Prosecution referral.

ALBURY – 1 st FLOOR ALB	2585-2594, 2640-2738, 3483-3520, 3525-3599, 3610-3649, 3666-3709, 3720-3749	Chris Baine Anthony Duck 87386 Dean Tipping 87053	87641
BRISBANE BRI	2372, 2468-2490, 4000-4055, 4059-4077, 4101-4137, 4151-4165, 4169-4179, 4183-4390, 4400-4678	Geoff Barrie Kerry Blond John Pulvirenti 35193	36338 36733
CANBERRA CAN	2536-2539, 2545-2551, 2579-2584, 2600-2633, 2900-2912	Michael Andrews	63612
CASSELDEN PLACE CAS	3000-3005, 3013-3017, 3050-3054, 3065-3068, 3078-3081, 3084-3085, 3087-3099, 3101-3116, 3121-3167, 3181-3191, 3204-3207, 3711-3719, 3754-3755, 3757, 3759-3761, 3763 3765-3799	Noel Weavers	51782
DANDENONG DAN	3168-3180, 3192-3202, 3802-3996	Wilf Dungan Julie Whitfield 53102 Liza Hatzirodos 53272	53693
DARWIN DAR HOBART HOB	0800-0886 7000-7470	Vin Victory Eric O'Brien Campbell Kay 10424 Richard Lennard	39142 10538 10422
MOONEE PONDS MPO	3011-3012, 3018-3023, 3025-3049, 3055-3064, 3070-3076, 3082-3083, 3086, 3211-3482, 3600-3608, 3651-3665, 3750-3753, 3756, 3758, 3762, 3764	John Cozzolino 55041 David Vincent 54067 Carol Maher	55173
NEWCASTLE NEW	2250-2355, 2358-2372, 2379-2394, 2397-2466	Lyn Farmer Robyn Murphy 31176	31312
NORTHBRIDGE NOR	6000-6999	Bill Watts Brian Hinton	85208 85668

PENRITH	2046, 2112-2122, 2137-2177,	Marjorie Fleming	40387
PNR	2356-2357, 2395-2396, 2558-2560,	Helen Schell	40166
	2563-2568, 2570-2571, 2745-2880		
PULTENEY	5000-5999	John Filsell	83673
PUL		Robert Baker	83672
		Geoff Sears	83667
SYDNEY	2000-2045, 2047-2111, 2123-2136,	Kay Marsh	42786
SYD	2178-2234, 2500-2535, 2540-2541,	Ian Tripet	42162
	2569, 2572-2578, 2890-2899	John Fleming 48063	
		John Greathead 48184	
		Peter Hogan	48062
		Kristine Fone 42859	
TOWNSVILLE	4680-4999	Rod Carling	37426
TOW			

SUPERANNUATION (SPR)

PROSECUTION STRATEGY

February 2000

CP4: Strategic Research and Compliance Team

1. PROSECUTABLE AREAS

Superannuation Guarantee

An employer must provide minimum level of superannuation support for each employee.¹ These contributions must be paid to a complying superannuation fund by 28 July after the end of the financial year. If this deadline is not met, the employer is liable to pay the superannuation guarantee (SG) charge and must lodge a SG statement by the 14 August.² If the employer refuses or fails to provide statements or information, penalties could be imposed under subsection 59(1) of the *Superannuation Guarantee (Administration) Act* 1992 (SGAA). The penalty is calculated at 200% of the amount of SG charge payable by the employer in the year.³

Another avenue to collect the information is provided by s 34 SGAA. The Commissioner has the power to require the employer to specify, within a specified period of not less than 14 days, whether the person has a SG shortfall for the year and if so, include the relevant details. Additionally, the Commissioner has wide powers under s 77 SGAA to obtain information from any person, whether or not a taxpayer. This section corresponds with s 264 of the *Income Tax Assessment Act* 1936. The notice only extends to documents in the custody and control of the recipient when the notice is received and cannot compel the bringing into existence of documents or copies that do not already exist.

If the employer does not comply with s 34 or s 77, prosecution action may be initiated. It is offence if a person refuses or fails to furnish any information as required by the law to the extent that the person is capable of doing so. This offence is created by s 8C(1)(a) of the *Taxation Administration Act* 1953, Part III (TAA). The phrase "to the extent that the person is capable of so doing" excuses a failure to comply beyond the person's capacity, but not simple unawareness of the requirement in question.⁴ This provision is a statutory offence of strict responsibility as a "guilty mind" (mens rea) is not required. Accordingly, an honest and reasonable mistake is not a good defence. If convicted, these offences carry fines and in some cases, a term of imprisonment.

Furthermore, as prescribed in s 8K TAA, a taxpayer can be prosecuted if they have made a false or misleading statement in a material particular or omitted something from a statement made to a taxation officer, which makes the statement misleading in a material particular. Additionally, if a scheme has been entered into, prosecution is possible under s 17 of the *Crimes (Taxation Offences) Act* 1980. It is an offence to enter into an arrangement with a purpose of securing that a company or trustee will be, or will be likely to be, unable to pay a SG charge that is payable, or that will or may reasonably be expected to become payable in the future. The maximum penalty is 10-year jail term, a

¹For the 1999/2000 financial year, the charge percentage is set at 7%.

²Section 33 of the *Superannuation Guarantee (Administration) Act* 1992. There is discretion to extend the time to lodge the SG statement (refer to *Superannuation Guarantee Ruling* SGR 94/2).

³The Commissioner may remit all or some of the penalty (s 62(3) SGAA). The circumstances in which the Commissioner can remit the penalty is explained in *Superannuation Guarantee Ruling* SGR 94/3.

⁴*Ambrose v Edmonds-Wilson* (1988) 19 ATR 1217 at 1220; 88 ATC 4173.

fine of \$121,000 or both. If tax fraud is committed, conviction can occur under s 29D of the *Crimes Act 1914*.

Superannuation Contributions Surcharge

Taxpayers are liable to the superannuation contributions surcharge if their adjusted income for the financial year is greater than the surcharge threshold. Section 13 of the *Superannuation Contributions Tax (Assessment and Collection) Act 1997* (SCTA) requires superannuation providers to lodge statements (“member contributions statement”) with the Commissioner containing prescribed information by 31 October. It is on this information that the surcharge assessments can be raised. If the provider does not fulfil their obligation under section 13, they are guilty of an offence punishable on conviction by a fine.⁵

As an alternative to prosecution, the Commissioner may serve a contravention notice under s 35A SCTA.⁶ This imposes an administrative penalty. If a notice is served, it must state that in order for the matter not to be dealt with by court, they must lodge the statement and pay the penalty within 14 days after the notice date. The penalty is set at \$500 per week or part of a week during which the contravention continues.

To obtain information or evidence for the purposes of the SG surcharge, the Commissioner has wide powers under s 39 SCTA. This section is equivalent to s 77 SGAA. As discussed above, this provision does not contain any sanctions. This function is fulfilled by the TAA.

Lost Members Register and Unclaimed Money

The ATO administers a lost members register. Under the *Superannuation (Unclaimed Money and Lost Members) Act 1999*, which received Royal Assent on the 13 October 1999, the regulations may set up a scheme in which providers are to inform the Commissioner of any lost members. Additionally, details on any unclaimed money held for members who have reached eligibility age⁷ or who have died⁸ must be given to the Commissioner. The unclaimed money statements must be given before 1 November for the half-year ending 30 June in that calendar year and by 1 May for the half-year ending 31 December in the previous calendar year. If a superannuation provider does not fulfil their duties, they could be liable to a fine of up to 100 penalty units.⁹ This Act also contains provisions dealing with access to premises and information gathering powers.¹⁰ If the provider does not comply with their obligations, prosecution action can be initiated under the TAA.

⁵Subsection 13(6) SCTA (Not more than \$6,600 for an individual; \$33,000 for a corporation).

⁶There is no requirement for a contravention notice to be served and does not affect the liability of the person to be prosecuted (s 35A(8) SCTA).

⁷The eligibility age is 65 for a man and 60 for a woman.

⁸Statements do not need to be provided to the Commissioner if there is applicable State or territory legislation for unclaimed money.

⁹Subsections 16(5), 17(6), 23(5).

¹⁰Sections 46 and 47.

Eligible Terminations Payments (ETP)

An employer, superannuation fund or other entity, which makes an eligible termination payment (ETP), must comply with ETP information and reporting obligations. The requirements are prescribed in regulation 99 to 100J of the Income Tax Regulations. If the payer breaches their duties, the Commissioner may issue a contravention notice (reg 100A to 100J). The contravention notice must state that, if the person does not want the matter to proceed to court, they may lodge with the Commissioner a signed statement to that effect and pay the penalty imposed. The penalty for a contravention is \$100. If these conditions are not met, the Commissioner can prosecute the person for contravention. In that case, there is no limit on the fine that the court can impose.

Reasonable Benefit Limits (RBLs)

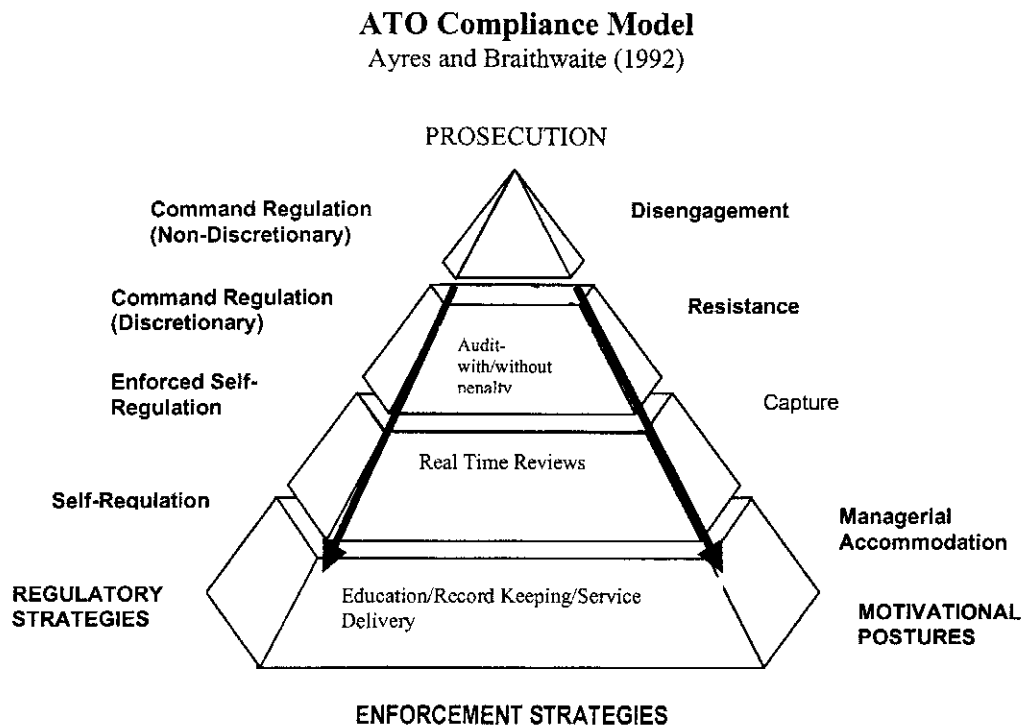
A payer who makes an ETP, or starts to pay a superannuation pension or annuity, must provide certain information to the Commissioner. This is required under s 140M ITAA 1936. Also, under s 140Q, roll-overs are to be notified to the Commissioner. If the payer fails to comply with these notification requirements it is an offence under s 8C TAA. This section creates an offence if a person refuses or fails to furnish any information as required by the law to the extent that the person is capable of doing so (see above for discussion).

2. CIRCUMSTANCES IN WHICH PROSECUTION WOULD BE UNDERTAKEN

Prosecution is an effective enforcement method to deal with tax offenders. It can result in widespread deterrence extending beyond the original offender and encourage people towards compliance. However, it is not appropriate for prosecution action to proceed in all circumstances. For instance, if the taxpayer made an honest and inadvertent mistake caused by an oversight or omission, the Commissioner will be responsive to the taxpayer's efforts to comply. An adjustment will be made together with an explanation of the decision. Prosecutions would only be appropriate where the taxpayer has acted fraudulently, deliberately, recklessly or intentionally to disregard their obligations under the law.

ATO Compliance Model

Various compliance strategies have been recognised by the ATO and adopted in a 'Compliance Model'. This model represents the attitudes to compliance and the regulatory strategies. It advocates a hierarchical approach to compliance improvement. The ATO aims to keep taxpayers at the bottom of the hierarchy by promoting self-regulation strategies such as education, record keeping and service delivery. There is however opportunity to escalate the enforcement strategies if voluntary compliance has been unsuccessful. Stronger compliance strategies, such as prosecution, are only recommended at the top of the hierarchy. This threat of such severe action is still real and is an incentive to encourage more voluntary regulation.



ATO Prosecution Policy

This paper should be read with the understanding that the decision to prosecute is made by the Department of Public Prosecutions (DPP) independently of the ATO. However, the DPP has agreed that the ATO's In-House Prosecutor (IHP) is able to conduct certain prosecutions. This includes cases for failure to supply to information under section 8C of the TAA, which are the majority of cases referred by the Superannuation Business Line. When an offence is identified, the matter should be referred to the Prosecution Investigation Unit (PUI). This unit will then examine it and refer all suitable cases to the DPP or IHP.

According to the ATO Prosecution Policy (May 1999), prosecution action will not commence unless:

- The matter is consistent with the Prosecutions Policy of the Commonwealth and the principles underlying the ATO prosecution policy, in particular, that it is in the public interest for the prosecution to proceed;
- The charge adequately reflects the nature and extent of the non compliant conduct disclosed by the evidence, and was laid as soon as practicable after the offence was committed;
- There is sufficient admissible evidence likely to prove an offence was committed by the taxpayer, which will provide the Court with an adequate basis for sentence;
- The accused taxpayer is given reasonable opportunity to present their case.

The Prosecutor has the sole preserve to determine the evidentiary sufficiency as they have obligations to fulfil by virtue of being an Officer of the Court. The referring area, such as the Superannuation Business Line should respect this discretion.

Additionally, the case selection strategy of the ATO is to select cases:

- that are particularly serious, blatant or involve persistent (habitual) offenders
- which are representative of significant or prevalent non-compliance practices
- for which there is no other effective means of securing compliance or no other sanction and if prosecuted on a timely basis may carry effects wider than those in the particular case.¹¹

¹¹ATO Prosecution Policy – May 1999.

Criteria to Assess Potential Cases

Following the ATO Prosecution Policy and Compliance Model, prosecutions in superannuation would only be initiated in certain circumstances. To determine if prosecution action is suitable, cases should be assessed according to the following criteria:

- Revenue involved
It is important to consider the total of revenue to be collected by the ATO and also any income owing to an individual, such as a large amount of superannuation guarantee for the employee.
- Public Interest¹²
Relevant factors include:
 - Any mitigating or aggravating factors;
 - The youth, age, intelligence, physical health, mental health or special infirmity of the taxpayer;
 - The staleness of the alleged offence;
 - The prevalence of the offence and the need for deterrence, both personal and general; and
 - The necessity to maintain public confidence in such basic institutions as the Parliament, the Courts and the tax system.
- The taxpayer's attitude to compliance
The compliance strategy adopted should depend on the particular taxpayer. Factors such as the degree of cooperation, seriousness of the conduct and the history of the taxpayer should be taken into account. The likelihood that a strategy will influence the taxpayer to change their attitude to compliance within a reasonable time should also be considered. As depicted in the Compliance Model, the ATO should apply strategies that encourage a downward movement of taxpayers from resistance to the preferred self-regulation.
- Availability of an administrative penalty
In many situations a breach of the law can be handled by prosecution and/or an administrative penalty. Administrative penalties are useful as they are simple to implement; impacts directly on the taxpayer; offers greater flexibility; can be applied consistently; are less costly to the community and are immediately available to the ATO. However, an administrative penalty is not always suitable. It will depend on the seriousness of the offence; the degree of culpability; deterrent effect, probability of changed attitude and the characteristics of the taxpayer.¹³

¹²Refer to the Prosecution Policy of the Commonwealth.

¹³ATO Prosecution Policy.

- Size of the employer / superannuation provider and Location
When prosecution action is initiated, the public become aware of the types of offences and penalties involved. As a result, there is an increase in compliance extending beyond the original offender. The Compliance Model endorses this view. Therefore, it is not advisable to prosecute in small isolated cases as the associated publicity will probably be unsuccessful and there is a risk that the general community will be alienated. Alternatively, a number of similar “small” cases can be bundled together to highlight the issue. This is likely to have greater impact than issuing media releases on isolated cases.¹⁴ Associated costs would also be reduced. Furthermore, local communities in rural areas could be alienated if the ATO acts heavy handed and does not respond in the appropriate manner. However, in circumstances where the offences attract publicity and the Magistrate deals with the defendant on a one to one basis, prosecutions could result in a positive experience for those in rural areas.

- The breaches of the law
The compliance strategy selected by the ATO should reflect the requirements which were breached and the manner in which it occurred. For instance, if the taxpayer maintained more than one set of records or used a false name or false documents, a firm response, such as prosecution action, is appropriate.

The response of the officer will be dependent on the facts of each case. But in all cases, the ATO Prosecution Policy should be considered. The court can dismiss the charge or discharge the offender without proceeding to conviction under s 19B of the *Crimes Act* 1914. Factors such as character, age, health, triviality of the offence and other extenuating circumstances are taken into account.

Case Studies

A prominent superannuation provider (or several), with a large number of members, has breached several superannuation requirements. They have failed to lodge statements required for surcharge purposes and the lost members register. The first strategy is to ensure that the provider is well aware of their obligations under the law. If the provider still fails to provide the statements, the next step is to serve a notice requesting the information. A reasonable opportunity should be given to the provider to comply. If they still chose to be non-compliant, the ATO should then use stronger compliance strategies. In these circumstances, prosecution action could be initiated.

However, there are many situations where prosecution is not the appropriate course of action. For example, an employee has not

¹⁴ATO Prosecutions Publicity Policy.

received any superannuation guarantee payments and has completed an employee notification of insufficient employer contributions. An initial telephone call will be made to the employer from an outbound call centre. After speaking to the employer, risk assessment methods are used to allocate the most efficient strategy to deal with the notification received. If the employer is assessed as high risk, they are sent a SG statement that is to be returned to the ATO within four weeks. Follow up action is then undertaken to ensure the statement has been lodged. If the employer fails to return the statement, a default assessment is raised. In addition to the outbound calls, projects are initiated using information contained on the SG database. Strategies undertaken during these projects may include a mixture of education, reminder, warning, or audit measures. By targeting 'groups' of employers (for example by industry, location, PAYE payment record) rather than individual employers, it aims to improve overall compliance in that 'risk profile'. Throughout this process, the degree of non-compliance by the employer does not qualify for the ATO to commence prosecution action.

Publicity

Any publicity which arises from a prosecution should be accordance with the ATO Media Policy.

It is important to note that real or potential publicity is not a relevant consideration in identifying cases suitable for prosecution. Cases will be selected on the basis of the evidentiary strength of the case and whether it is in the public interest that prosecution proceed.

Recommendations

It is recommended that this prosecution policy be used as a guideline in the Superannuation Business Line. Accordingly, officers need to consider the type of work they undertake knowing that prosecution action is unlikely to occur. For instance, it is ineffective to complete work which will result in nil responses and there is no prospect to prosecute. For that reason, prosecutions should be included into any process at the start and not simply added at the end to be used as a weapon.

A procedure should be established for any future prosecution action. A senior officer or a selected committee needs to consider and approve any proposed prosecution case before it is initiated. This would ensure that prosecution action would only occur in appropriate circumstances and is not the regular course of action for work undertaken.¹⁵

¹⁵ Procedures have been developed and form part of this pack

REFERENCES

1. ATO Prosecution Policy
2. ATO Case Selection and Prosecution Guidelines
3. DPP/ATO Liaison Guidelines
4. Penalties, Prosecutions and Offences – Training Module by OCTC Skilling Network