



**Australian Government**

# Superannuation Guarantee Non-compliance

**A report to the Minister for Revenue and Financial Services**

Superannuation Guarantee Cross Agency Working Group

31 March 2017

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# Executive Summary

The Superannuation Guarantee Cross Agency Working Group (the 'Working Group') was established in December 2016 to report to the Minister for Revenue and Financial Services on the operation, administration and extent of non-compliance in the superannuation guarantee system in Australia.

The Working Group was asked to analyse and to develop options for improving superannuation guarantee compliance and to report back to the Minister by 31 March 2017.

The Working Group notes that the Senate Economics References Committee (the 'Senate Committee') is inquiring into the non-payment of superannuation guarantee. The Working Group has reviewed the public submissions to this inquiry, and these have informed its deliberations and recommendations. The Senate Committee's report is now scheduled to be released on 12 April 2017. Therefore the Working Group has been unable to consider or respond to the Senate Committee's recommendations.

There are currently no robust estimates of superannuation guarantee non-compliance. The Australian Taxation Office (ATO) is currently developing an estimate of the 'superannuation guarantee gap' which will be finalised in the coming months.

In December 2016, Industry Super Australia (ISA)<sup>1</sup> estimated non-compliance in 2013-14 to be \$2.8 billion (affecting an estimated 2.15 million employees). In March 2017 this estimate increased to \$5.6 billion (affecting an estimated 3 million employees).<sup>2</sup>

The Working Group believes this estimate should be considered in the context of the \$89.6 billion in total employer contributions made in 2015-16.<sup>3</sup> This total has progressively grown from about \$62 billion in 2006-07.

From the analysis of ISA's methodology, the Working Group considers that the \$5.6 billion estimate is likely to substantially overstate the actual size of the superannuation guarantee gap for a number of reasons. ISA's estimates do not fully account for some data limitations. Further, ISA incorrectly claims that defined benefit members are being underpaid their superannuation guarantee entitlements. More generally, both ISA estimates wrongly identify as underpaid new entrants to the labour market and people who receive a large share of

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<sup>1</sup> ISA, *Overdue: Time for Action on Unpaid Super* (December 2016).

<sup>2</sup> ISA Supplementary Submission (March 2017).

<sup>3</sup> APRA, *Annual Superannuation Bulletin*, Table 4a: Financial performance by fund type (as at 1 February 2017).

their income in overtime, and significantly overstate the number of people underpaid. These errors reflect limitations in the data available on superannuation guarantee entitlements. Additionally, the data is inconsistent with experiences and observations from the ATO's compliance program.

A review of ATO case data indicates that small businesses account for around 70 per cent of reported superannuation guarantee non-compliance. Cash flow problems are often the major reason small business employers provide as to why they did not pay their employees' superannuation guarantee contributions.

The ATO follows up all reported complaints from employees about potential unpaid superannuation guarantee entitlements. There are significant delays in the reporting of these complaints to the ATO for a variety of reasons, including the ease (or lack of) with which employees are able to monitor the payment of superannuation guarantee contributions.

The ATO advises that as a result of its compliance actions some \$2 billion has been transferred by the ATO to employees' superannuation funds since 2010. However only 48 per cent of the total superannuation guarantee charge raised against non-compliant employers is collected by the ATO, often because the employer is insolvent.

The Working Group recognises that while there is, overall, a high level of voluntary compliance by the majority of employers there is scope to improve compliance to better safeguard employee entitlements.

The Working Group has identified two key barriers to maintaining or improving superannuation guarantee compliance.

The first barrier is that the ATO does not currently have any visibility over an employer's superannuation guarantee obligations to their employees. The second barrier is that the ATO only receives information on superannuation guarantee payments received by superannuation funds on an annual basis. Current reporting arrangements mean there can be a lag of up to 14 months in the reporting of contributions that employers have paid. This delay further reduces the effectiveness of the ATO's compliance work.

The Working Group has identified two proposals to overcome these barriers.

Firstly, the Working Group considers that all employers should report superannuation guarantee obligation information to the ATO in a more timely manner. One way this will be achieved is to leverage the Government's introduction of Single Touch Payroll legislation. Single Touch Payroll will commence for businesses with 20 or more employees from 1 July 2018.

The Working Group considers that Single Touch Payroll should be extended to businesses with 19 or fewer employees as soon as practicable. This would ensure that the ATO receives regular and accurate information on superannuation guarantee obligations from all employers.

Secondly, the Working Group considers that superannuation funds should report more information more frequently to the ATO on the superannuation guarantee contributions received from employers. Subject to more detailed design and consultation, it is believed that this change may be able to be implemented from 1 July 2018.

In combination these changes would improve substantially the ATO's capacity to monitor superannuation guarantee compliance on a more reliable and frequent basis.

In the interim, the ATO will undertake more 'proactive' superannuation guarantee compliance work (that is, reviews and audits not triggered by employee complaints). The ATO will aim to ensure the proportion of its superannuation guarantee reviews and audits 'case mix' will increase to 40 per cent (increased from 30 per cent). The Working Group has also identified additional measures to support a more proactive approach to superannuation guarantee compliance. These include improved information sharing between the ATO and the Fair Work Ombudsman (FWO) and improved promotion of the outcomes from the ATO's compliance program in dealing with superannuation guarantee non-compliance. The ATO will also evaluate its current debt collection practices with the aim of increasing recovery of superannuation guarantee charge amounts.

The Working Group considers that some of the behaviours which employers display to avoid superannuation guarantee obligations are closely related to characteristics that are seen in phoenix activity. For this reason the Working Group supports the considerations of the Phoenix Taskforce, which may recommend widening the manner in which the ATO is able to use Security Bonds and more readily securing outstanding superannuation guarantee charge debts through Director Penalty Notices. Such actions will improve the ATO's capacity to deal with high risk employers and to improve recovery of unpaid superannuation.

Of course employers have an important role to play in improving superannuation guarantee compliance. The Working Group supports, and recognises the importance of, the ATO's continued assistance to employers to understand and meet their superannuation guarantee obligations. It is also recognised that there must be strong penalties for employers and directors who breach their superannuation guarantee obligations. However, while the current penalties provide a strong deterrent, they can also have the effect of harshly penalising 'honest employers' who make an inadvertent mistake, thereby discouraging reporting and rectification of underpayment. The current superannuation guarantee charge penalty regime

within which the ATO operates is not consistent with the settings of other areas of taxation administration. The superannuation guarantee charge regime operates largely on a one-size-fits-all basis and does not distinguish between deliberate or repeated non-compliance and inadvertent mistakes. Therefore the Working Group recommends that the regime should be more flexible so that penalties can be tailored to reflect different levels of employer behaviour and culpability.

The Working Group also considers that the Government should clarify the law on how salary sacrifice agreements affect an employer's superannuation guarantee obligations. In particular to, firstly, ensure that employers cannot use an amount an employee salary sacrifices to superannuation to satisfy the employer's superannuation guarantee obligation; and secondly, to ensure that the *ordinary time earnings* base used to calculate an employer's superannuation guarantee obligation includes those salary or wages sacrificed to superannuation. This will ensure that employees receive the full benefit of voluntary contributions.

At present, superannuation guarantee is required to be paid by employers within 28 days of the end of each quarter. While the Working Group sees valid reasons to increase payment frequency, it has not recommended any changes to the current quarterly payment obligation on employers. The Working Group considers that improvements to data visibility are the main priority after which payment frequency could be reviewed. Due to changes in technology and work practices, some employers already pay superannuation guarantee more frequently and some funds require monthly payments. However the Working Group is mindful of the potential implications of more frequent payment on small business cash flow requirements.

The formation of the Working Group has confirmed that there is merit in departments working more closely to promote conformance with, and performance of, the superannuation guarantee system drawing from the respective roles and expertise of each agency. To that end we have agreed to change some information sharing arrangements and collaborative strategies.

Overall, the Working Group is of the view that these changes and improvements present opportunities to bring greater visibility to the payment of superannuation guarantee into employees' funds.

James O'Halloran

Deputy Commissioner

Chairperson, Superannuation Guarantee Cross Agency Working Group

# 1. Recommendations and administrative actions

- 1.1. This chapter sets out recommendations of the Working Group, together with steps agencies will take to improve non-compliance.
- 1.2. These changes aim to ensure that employees receive their superannuation guarantee entitlements and employers are supported and protected when doing the right thing.
- 1.3. These changes cannot prevent all non-compliance from occurring and the ATO, as regulator, cannot prevent every instance of non-compliance. However, non-compliance is not currently readily identifiable by the ATO. The proposed recommendations and actions focus on bringing forward systemic and operational improvements.
- 1.4. It is considered that information is critical not only for the regulator, but also for employees (who need to be aware of their entitlements), and employers (who need to understand their obligations).
- 1.5. To ensure a major improvement in the ability to identify and deal with non-compliance the key recommendations seek to improve visibility by extending Single Touch Payroll to small business and ensure a more appropriate spectrum of sanctions to address employer behaviour based on culpability.

## **RECOMMENDATION 1**

That subject to the findings of the current small business pilot being conducted by the ATO, to improve the ATO's visibility of superannuation obligations it is recommended by the Working Group that all businesses (including small business) comply with Single Touch Payroll.

## **RECOMMENDATION 2**

To improve the ATO's visibility of superannuation guarantee contributions made to employees' superannuation funds, require superannuation funds to report detailed contributions payment information more frequently. It is understood this can be enacted through the creation of a legislative instrument by the Commissioner of Taxation to move from a requirement for superannuation funds to report superannuation contributions annually.

### **RECOMMENDATION 3**

The ATO should inform employees of its actions to collect their superannuation guarantee, including in ATO-initiated cases where this communication is currently constrained by current secrecy provisions. The ATO and Treasury will advise of the administrative and legal changes needed to inform employees that have not self-reported suspected non-payment to the ATO.

### **AGENCY ACTION 1**

In anticipation of Single Touch Payroll commencing for 'substantial' businesses on 1 July 2018 and the proposed more frequent reporting of contributions information by superannuation funds', the ATO will review its data models and processes to be placed to be able to more readily identify apparent non-compliance with superannuation guarantee obligations by employers.

### **AGENCY ACTION 2**

Within ATO's current funding arrangements, the ATO will re-balance the focus of its superannuation guarantee compliance program to increase by 10 per cent the proportion of its ATO-initiated superannuation guarantee case work to 40 per cent.

### **AGENCY ACTION 3**

The ATO, APRA, ASIC and the FWO will meet on a quarterly basis to increase monitoring of the operation of the superannuation guarantee system and to exchange information relevant to identifying and addressing superannuation guarantee non-compliance.

### **AGENCY ACTION 4**

To more frequently monitor the potential non-compliance with superannuation guarantee obligations by employers the ATO and the FWO will increase the regularity of information exchange under their Memorandum of Understanding from six monthly to quarterly.

### **RECOMMENDATION 4**

To improve the overall framework for superannuation guarantee compliance and the collection of superannuation guarantee charge debts, enhancements should be made to the Director Penalty Notice regime and to the Security Bonds Regime.

### **RECOMMENDATION 5**

That the Minister note work being undertaken by other taskforces on deterrents and increasing transparency, with particular reference to recommendations for legislative and administrative reforms to be proposed by the Phoenix Taskforce.

#### **RECOMMENDATION 6**

Ensure the penalty framework surrounding superannuation guarantee is sufficiently flexible to appropriately deal with the spectrum of employer culpability in non-compliance.

#### **RECOMMENDATION 7**

Amend the calculation of the nominal interest component in the *Superannuation Guarantee (Administration) Act 1992* so that interest is only payable for the period contributions are outstanding.

#### **AGENCY ACTION 5**

To increase the visibility of the actions the ATO takes to address non-compliance and to highlight its enforcement responses, the ATO will better promote its compliance program and the 'tool kit' to assist employees and improve compliance amongst employers.

#### **RECOMMENDATION 8**

To prevent contributions made under salary sacrifice arrangements from satisfying an employer's superannuation guarantee obligations the *Superannuation Guarantee (Administration) Act 1992* should be amended.

#### **RECOMMENDATION 9**

Amend the *Superannuation Guarantee (Administration) Act 1992* to specifically include in the base for calculating an employer's superannuation guarantee obligations those salary or wages sacrificed to superannuation as part of salary sacrifice arrangements.

#### **AGENCY ACTION 6**

To assist employers the ATO will actively promote and make more visible its education and assistance services, tools and calculators, including the recently updated Employee Contractor Decision Tool.

#### **AGENCY ACTION 7**

To provide more clarity and administrative ease for employers the ATO will review the useability of the superannuation guarantee charge form, instructions and lodgement processes.

## **AGENCY ACTION 8**

To assist employees, the ATO will actively promote and make more visible its education and assistance services, tools and calculators, to provide more certainty to people about their status as a worker (employee or contractor) and work with the FWO and Department of Employment to provide more certainty on their respective websites to employees about their entitlements under salary sacrifice arrangements.

## 2. Background and report structure

- 2.1. The Superannuation Guarantee Cross Agency Working Group (the 'Working Group') was established at the request of the Minister for Revenue and Financial Services ('the Minister') in December 2016.
- 2.2. The Terms of Reference sought advice on the characteristics and drivers of superannuation guarantee non-compliance and for administrative and policy recommendations to strengthen the superannuation guarantee system. The Terms of Reference are listed at **Appendix A**.
- 2.3. The Working Group is comprised of five federal government agencies that have substantially contributed to and supported the preparation of this report. These agencies are:
  - Australian Taxation Office (ATO)
  - Treasury
  - Department of Employment
  - Australian Securities and Investments Commission (ASIC)
  - Australian Prudential Regulation Authority (APRA)
- 2.4. These agencies are either responsible for advising on superannuation guarantee policy settings; administering the superannuation guarantee framework; or for strategies and programs that affect superannuation guarantee compliance. More information on these agencies can be found at **Appendix B**.
- 2.5. The Working Group has not conducted any consultations with industry or other stakeholder as this report touches on policy and legislative changes. If the recommendations are accepted by Government there would need to be more detailed design and consultation.
- 2.6. The establishment of the Working Group has provided opportunities for member agencies to review and improve their strategies and the coordination of activities for managing non-compliance.

## Report structure

- 2.7. Chapter 3 gives an overview of the superannuation guarantee system and notes the challenges to improving compliance, with further details in **Appendix C**.
- 2.8. Chapter 4 provides commentary on the recommendations and administrative actions that agencies will take to improve the identification of non-compliance, what is done to address it, and the collection and recovery of the debt.
- 2.9. Chapter 5 provides commentary on the recommendations and administrative actions aimed at ensuring the superannuation guarantee system is operating as intended and in a manner that builds community confidence.

## Interim Report

- 2.10. The Working Group provided an Interim Report to the Minister on 31 January 2017. The Interim Report discussed the operation of the superannuation guarantee system and provided observations on the characteristics and behaviours of employers who do not comply.
- 2.11. That report also reviewed the policy recommendations presented by Industry Super Australia (ISA) in its report titled *Overdue: Time for Action on Unpaid Super* released in December 2016.
- 2.12. This Final Report addresses ISA's supplementary submission<sup>4</sup> to the Senate Committee, including its increased estimate of non-compliance. For further details see **Appendix D**.

## Senate Economics References Committee

- 2.13. In December 2016, the Senate referred an inquiry into superannuation guarantee non-payment to the Senate Economics References Committee (the 'Senate Committee').
- 2.14. The Working Group has considered the public submissions put forward to the Senate Committee.

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<sup>4</sup> See supplementary submission 7:  
[http://www.apf.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/SuperannuationGuarantee/Submissions](http://www.apf.gov.au/Parliamentary_Business/Committees/Senate/Economics/SuperannuationGuarantee/Submissions)

2.15. Members of this Working Group appeared before the Senate Committee on 3 March 2017 (one of its three public hearings). Senior representatives from the ATO also appeared as witnesses at the hearing on 25 January 2017.

2.16. The Senate Committee is scheduled to report on 12 April 2017.

## Related Government reviews underway

2.17. There are a number of Government-initiated cross agency reviews in progress that overlap as they are considering the reasons for non-compliance and approaches which may reduce non-compliance. These include: the Black Economy Taskforce, Phoenix Taskforce and Migrant Workers' Taskforce.

2.18. These Taskforces are yet to report to Government and are considering issues relating to matters of deterrence, sanctions, transparency, director behaviour, phoenix activity and insolvent entities. All are relevant to improving superannuation guarantee compliance and addressing the consequences of non-compliance.

2.19. In many instances the recommendations from these reviews will have application to the management of superannuation guarantee non-compliance. For further details see **Appendix G**.

# 3. Superannuation Guarantee System

## Introduction

- 3.1. The superannuation guarantee is a fundamental pillar of Australia's retirement income framework. Introduced in 1992, its intent is to support Australians to save for retirement by requiring employers to make contributions to eligible employees' superannuation funds.
- 3.2. Superannuation guarantee is payable quarterly at a rate of 9.5 per cent of an eligible employee's ordinary time earnings.<sup>5</sup> Failure to pay this amount results in a liability to pay a penalty in the form of the superannuation guarantee charge. This is calculated on the employee's entire salary or wages and not just an employee's ordinary time earnings. For further details see **Appendix C**.
- 3.3. The broad design of the superannuation system is one based on the employment relationship between an employer and their employees, then the relationship between the employer and the employees' superannuation funds.
- 3.4. The ATO annually receives the employee's salary or wage information, but not a report on their ordinary time earnings. Salary or wage information is reported through Pay As You Go (PAYG) withholding reporting. The ATO is advised annually of superannuation guarantee contributions via reporting by the employee's superannuation fund to the ATO. The ATO receives 33 million such reports each year. Given these inherent features, the information set used by the ATO to identify non-compliance has an inbuilt lag and does not produce an adequate level of specificity to be confident in its utility.
- 3.5. The superannuation guarantee system has remained relatively stable since its introduction in terms of its policy and regulatory frameworks. Notable changes include progressive increases to the rate of superannuation guarantee (from 3.0 per cent in 1992 to 9.5 per cent today<sup>6</sup>), the mandating of a quarterly payment cycle (in 2002) and the introduction of choice (in 2005).

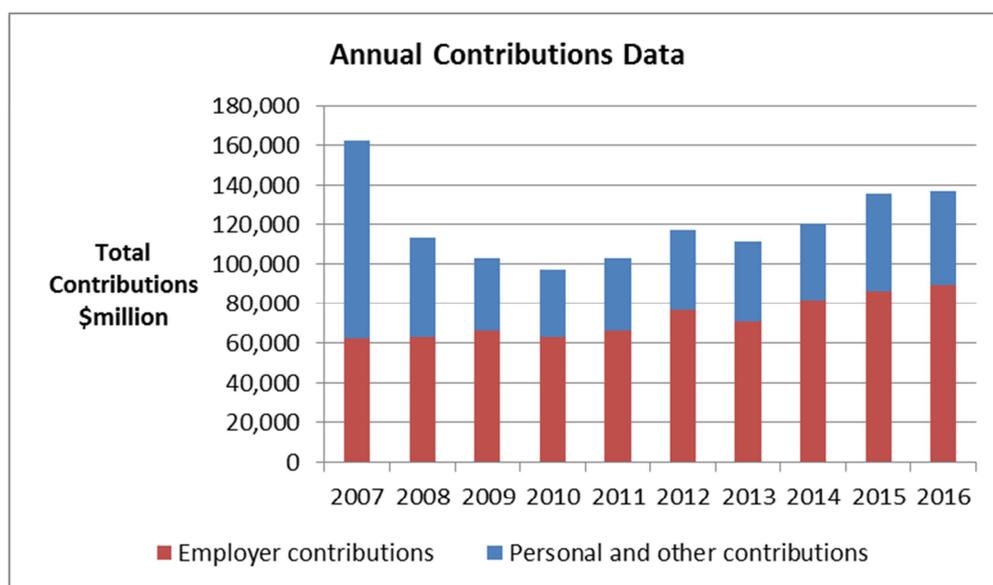
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<sup>5</sup> 'Ordinary time earnings' is lower than total salary or wages as it excludes certain types of remuneration such as bonuses, overtime and termination payments related to unused annual leave.

<sup>6</sup> The rate of superannuation guarantee is set to start increasing by half a per cent each year from 1 July 2021 until it reaches 12 per cent by 1 July 2025.

- 3.6. Arising from the Cooper Review,<sup>7</sup> which examined the efficiency of the superannuation industry in dealing with the processing of superannuation contributions, recent Government reforms have sought to improve payment flows within the superannuation system. SuperStream introduced standard electronic messaging from employers to an employees' superannuation fund.<sup>8</sup>
- 3.7. In a superannuation system in which \$89.6 billion of superannuation contributions were made by employers in 2015-16, SuperStream provides about 11 million employees with greater assurance that their superannuation contributions are being paid into the correct fund on a timely basis.

**Table: Total amount of employer contributions** (source: APRA)<sup>9</sup>



- 3.8. For the December 2016 quarter, some 34 million contributions transactions were made to funds, with 95.6 per cent being made through SuperStream. This move to standard electronic messaging, supported by the use of the employee's Tax File Number as a key identifier, has increased the level of confidence for employees that their

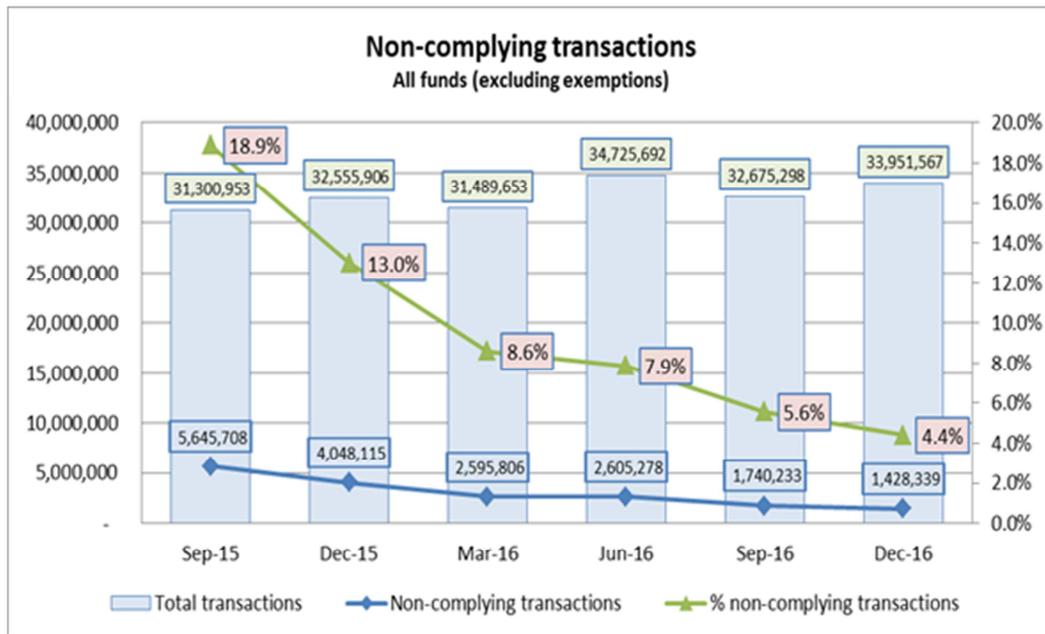
<sup>7</sup> Review into the *Governance, Efficiency, Structure and Operation of Australia's Superannuation System* chaired by Jeremy Cooper.

<sup>8</sup> The Cooper Review identified that there was a need to legislate to standardise the way in which superannuation funds received and processed superannuation contributions from employers on behalf of employees.

<sup>9</sup> APRA, *Annual Superannuation Bulletin* (as at 1 February 2017), Table 4a: Financial performance by fund type

superannuation payments have reached their superannuation fund within days of it being sent by their employer.

**Table: Employer conformance – rate of transactions non-complying with SuperStream (source: ATO)**



3.9. The next stage of reform is the implementation of Single Touch Payroll. This has the potential to significantly improve the visibility of superannuation guarantee obligations. It brings with it the potential for substantially improved data analysis to identify patterns of non-compliance and continue to reduce red tape for employers and build on natural business processes.

3.10. As a free safety net for small business<sup>10</sup>, to support electronic messaging, the ATO operates the Small Business Superannuation Clearing House. It assists employers meet their superannuation guarantee obligations, and reduces red tape and compliance costs. It enables these employers to pay their superannuation guarantee contributions as a single electronic payment.

<sup>10</sup> Employers with fewer than 20 employees or that have less than \$2 million in annual aggregated turnover are eligible to use the Small Business Superannuation Clearing House.

3.11. Over 266,000 small business employers<sup>11</sup> are registered to use the clearing house on behalf of just under 2 million employees. In the year ending 30 June 2016, the clearing house processed 3.9 million payments totalling around \$2.3 billion. This service assists a notable proportion of small business employers comply with their superannuation guarantee obligations.

## Characteristics and incidence of non-compliance

3.12. Non-compliance by employers occurs when employers fail to make the correct superannuation guarantee contributions on time for their employees. This can be because of an honest mistake through to intentional avoidance.<sup>12</sup> Behaviours can be influenced by the nature of a business; the size of a business and cash flow management.

3.13. Non-compliance is typically not spread evenly across the employer population. ATO compliance data shows it is more prevalent in small and micro businesses and in certain industries.<sup>13</sup>

3.14. Such incidence of non-compliance, while perhaps small in relative terms, has a very personal impact on employees who are not paid the correct amount of superannuation guarantee. It reduces their retirement income and diminishes community confidence in the system overall.

## Estimating the size of non-compliance

3.15. The ATO is committed to estimating tax 'gaps' for the taxes it administers. Tax gap estimates are important for the ATO to understand compliance, inform its resource allocation and assess the effectiveness of its work over time against a trend benchmark.

3.16. Estimating tax gaps generally, and the superannuation guarantee gap in particular, is consistent with contemporary international best practice in tax administration. There

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<sup>11</sup> Figures provided by the ATO as at February 2017. This figure should be seen as a proportion of the approximately 700,000 employers eligible to use the service.

<sup>12</sup> An employer's obligations include many things other than superannuation guarantee. They have a range of tax and other non-tax obligations. Employers are generally required to pay income tax, GST, pay-as-you-go withholding, FBT and state payroll tax. Non-tax related employment obligations include superannuation guarantee, choice of superannuation fund, workplace relations legislation, occupational health and safety, leave entitlements and award entitlements.

<sup>13</sup> Analysis based on ATO data including the pattern of employee complaints made to the ATO.

has been a strong interest over recent years from Parliamentary Committees and other stakeholders for the ATO to undertake tax gap estimates.

3.17. The ATO is seeking to complete a credible and reliable estimate of the superannuation gap, but at this stage it is not completed. One of the contributing factors is the lack of real time visibility on reports of non-compliance or patterns of payments. For further details refer **Appendix C**.

## Identifying and dealing with non-compliance

3.18. The Working Group notes that the ATO undertakes a range of activities across education and enforcement to promote superannuation guarantee compliance and collect outstanding obligations.

3.19. The ATO generally identifies *potential* non-compliance through:

- ‘employee notifications’ which are complaints made to the ATO by employees or former employees about the non-payment or under-payment of superannuation guarantee,
- referrals of information from third parties, and
- examination of ATO-held data which direct the ATO-initiated reviews and audits on higher risk employers.

3.20. Over 150 ATO staff work full time on complaint-initiated cases and approximately 300 ATO staff are involved in reviews and audits of employers encompassing all employer obligations (including superannuation guarantee). For 2015-16 this has resulted in \$670 million in superannuation guarantee charge being raised, with \$341 million being collected. This includes the raising of approximately 3,000 default assessments and the issue of 877 Director Penalty Notices for \$130 million. Since 2010 the ATO has collected and distributed to members some \$2 billion in outstanding superannuation guarantee liabilities as a result of its compliance activities. For further details refer **Appendix C**.

## Previous independent reviews

3.21. Since 2010, the Australian National Audit Office and the Inspector General of Taxation have each reviewed aspects of the superannuation guarantee system and the ATO’s administration of the system, including its ability to identify non-compliance, its

response to employee complaints, and the effectiveness of its deterrence and enforcement approaches.

3.22. These reviews ultimately found that the superannuation guarantee system is working well and that the ATO's administration is sound.

3.23. However both reviews highlighted the need for the ATO to get better quality and more timely data. Similar themes were evident in submissions to the current Senate Committee. For further details refer **Appendix H**.

# 4. Improving compliance and collection of debt

## Introduction

- 4.1. Any improvement to the current superannuation guarantee system should focus on:
  - the detection of non-compliance by improving the visibility of the superannuation guarantee obligation and the payment of the contribution,
  - improved enforcement mechanisms, and
  - the level of collections.
- 4.2. Leveraging from the introduction of Single Touch Payroll (where there is a requirement for businesses employing 20 or more employees to report their superannuation guarantee obligation for each employee to the ATO through business payroll software) will improve the ability of the ATO to monitor employers' superannuation guarantee liabilities.
- 4.3. Increasing the ATO's visibility of employers' superannuation guarantee contributions would allow for progressive and timely monitoring of the overall patterns and emerging trends. It will also highlight incidences of non-payment. This will provide better data features which can then be included in more sophisticated predictive data models to detect potential non-compliance.
- 4.4. To improve the collection of superannuation guarantee charge debts, changes are recommended to allow for more decisive enforcement action, thereby increasing the likelihood of the recovery of debts.
- 4.5. The existing mechanisms to enhance debt collection can be improved through specific legislative amendments. Specifically, the current Director Penalty Notice regime and Security Bond regime would benefit from some enhancements to ensure they are working effectively. Suitable amendments should be considered to allow their application to better reflect the compliance history of an employer or active disengagement from the reasonable efforts of the ATO to collect an outstanding superannuation guarantee charge debt.

# Better and more timely information from employers and funds

## **RECOMMENDATION 1**

That subject to the findings of the current small business pilot being conducted by the ATO, to improve the ATO's visibility of superannuation obligations it is recommended by the Working Group that all businesses (including small business) comply with Single Touch Payroll.

## **RECOMMENDATION 2**

To improve the ATO's visibility of superannuation guarantee contributions made to employees' superannuation funds, require superannuation funds to report detailed contributions payment information more frequently. It is understood this can be enacted through the creation of a legislative instrument by the Commissioner of Taxation to move from a requirement for superannuation funds to report superannuation contributions annually.

## **RECOMMENDATION 3**

The ATO should inform employees of its actions to collect their superannuation guarantee, including in ATO-initiated cases where this communication is currently constrained by current secrecy provisions. The ATO and Treasury will advise of the administrative and legal changes needed to inform employees that have not self-reported suspected non-payment to the ATO.

- 4.6. Under the current superannuation guarantee system, the ATO has limited visibility and no timely mechanism by which to monitor employer payment of superannuation guarantee.
- 4.7. The base on which superannuation guarantee is calculated, ordinary time earnings, is not reported by employers to the ATO nor is the accrued superannuation guarantee obligation itself. While employer contributions are reported by superannuation funds to the ATO, this reporting suffers from time lags, inability to distinguish between superannuation guarantee payments and other amounts, and difficulty matching contributions to a member's employer.
- 4.8. The Working Group considers that better and more timely data is fundamental to improved superannuation guarantee compliance. The most effective and efficient mechanism for improving compliance is through improved visibility to both employees and the ATO as regulator. This can be achieved by applying Single Touch Payroll to all employers and requiring more frequent and detailed superannuation fund reporting.

- 4.9. These initiatives will strengthen both the employee's and the ATO's capacity to monitor compliance and to identify non-compliance when it occurs, as well as to improve strategies to prevent it.

## Using Single Touch Payroll to improve compliance

- 4.10. Closer to real-time visibility of superannuation guarantee obligations and payments will enable the ATO to better monitor superannuation guarantee shortfalls at the employer and employee level and engage earlier.
- 4.11. The introduction of Single Touch Payroll from 1 July 2018 will provide this visibility in relation to employers with 20 or more employees. Employers will report wages, superannuation guarantee liabilities and contributions to the ATO on a more frequent basis (although in future, superannuation funds may report contributions instead of employers).
- 4.12. There are benefits for employees as well, primarily the ability to be more informed about their superannuation entitlements. For employees (in a superannuation guarantee context), the ATO (through myGov) will be able to make available timely, accurate and consolidated information about two key things: their superannuation guarantee entitlements; and the amounts that their employers have paid to their superannuation funds. This information will be more visible and accessible to employees as the ATO leverages key 'intervention' points (for example, pop-up text that people will see when they are completing their income tax returns) and behavioural insights to 'nudge' people to engage if there is a possible shortfall.
- 4.13. It would be highly beneficial to require small businesses to comply with Single Touch Payroll from a superannuation guarantee compliance perspective. The ATO is conducting a pilot due to report in April 2017 to demonstrate the deregulation benefits for businesses, with a focus on small business.
- 4.14. The Government is due to consider the extension of Single Touch Payroll to small business in the latter half of 2017. The timing of extending Single Touch Payroll to small business is best considered through the Government approval processes, but could occur at the earliest by 1 July 2019 to provide businesses sufficient time to adapt systems.
- 4.15. Implementation of Single Touch Payroll means the ATO will be in a better position to identify non-compliance with greater certainty and in a timelier manner. It will improve

employer engagement by ensuring that superannuation obligations are front of mind at each payroll cycle.

- 4.16. Single Touch Payroll will also allow the ATO to implement preventative measures for employers, such as: adopting 'nudge' strategies; sending SMS payment reminders; and contacting them when a predicted payment is missed. The ATO could also take compliance action where an employer has a shortfall and has yet to lodge a Superannuation Guarantee Charge Statement.

## Additional reporting by superannuation funds on employer contributions

- 4.17. Currently, superannuation funds report member information each October to the ATO , including contributions and a financial year end balance, through the Member Contribution Statement.
- 4.18. As a result of the 2016-17 Superannuation Budget Measures, there is a recognition by superannuation funds and the ATO of the need for more timely and 'event-based' reporting by superannuation funds.
- 4.19. In March 2017, the ATO and key superannuation industry participants began exploring the feasibility of moving to 'event-based reporting' for a range of ATO requirements for the administration of superannuation. A model, design principles and a proposed 12-18 month indicative timetable is currently being considered by senior executives of APRA-regulated funds. A component of 'event-based reporting' is that funds will be responsible for reporting all contributions (including employer superannuation guarantee contributions) to the ATO when they are received. This event-based approach is still subject to design, compliance costs and some legislative change.
- 4.20. Such action would ensure that the ATO receives timely reporting of all employer contributions, including in relation to small businesses. For employers, it would mean that Single Touch Payroll obligations in respect of contributions information would be satisfied by superannuation funds.
- 4.21. The Working Group notes that issues such as information privacy, implementation costs, and data use and storage are being considered (as at the time of writing).
- 4.22. More regular (and detailed) reporting on superannuation contributions by funds to the ATO would enable the ATO to undertake more timely compliance activity. Specifically the ATO could act if contributions cease in respect of a large proportion of a business'

employees and could identify potentially insolvent businesses earlier, enabling more prompt intervention.

- 4.23. At the same time it may also present opportunities to move to the proactive notification of an employee that the ATO has detected apparent non-payment of superannuation guarantee payments and are already investigating the matter. This would have a positive effect in the confidence of the ATO deal with non-compliance
- 4.24. Longer term benefits for superannuation funds include reduced costs associated with the current Member Contribution Statement reporting; reduced requirement to engage with employers regarding contributions errors; and likely opportunities to significantly improve services for members; and the provision of more timely information to monitor their superannuation guarantee payments.
- 4.25. Better reporting by superannuation funds will improve superannuation guarantee compliance, however the Working Group does not consider it should be done without the extension of Single Touch Payroll to small business. It is highly beneficial to have both the employer report on 'pay day' (to the ATO) what they will pay in superannuation guarantee and then for the ATO to match the actual payment made to superannuation funds.

## Enabling ATO communication with employees in proactive compliance work

- 4.26. Requiring funds to report superannuation contributions earlier will provide the ATO greater visibility and enable the ATO to undertake more proactive compliance activities.
- 4.27. Ideally, the ATO should advise employees (or ex-employees) that it has detected potential non-payment of their superannuation guarantee entitlement and inform them of the actions being undertaken to collect it on their behalf.
- 4.28. However, while the ATO can provide information to employees who have reported the under-payment to the ATO, the ATO is constrained under the current secrecy provisions from providing information to employees about its 'proactive' investigations.
- 4.29. The Working Group recommends that the ATO should advise employees about the actions it undertakes on their behalf, including in proactive investigations. The ATO and Treasury will examine the existing administrative and legislative barriers to this and provide further advice to Government.

## Other proposals not supported by the Working Group

- 4.30. The Working Group considered three other proposals for improving superannuation guarantee compliance that have been raised through submissions to the Senate Committee.
- 4.31. The first involves a fundamental change to the superannuation guarantee system by calculating superannuation guarantee as a flat rate of total salary and wages (rather than ordinary time earnings) and asking employers to remit all superannuation guarantee payments directly to the ATO as part of a single lump sum covering tax and superannuation. The second proposal requires employers to provide payslip information about actual superannuation guarantee payments ('payslip reporting'). The third proposal requires superannuation funds to notify members more frequently about actual contributions received ('fund notification to employees').
- 4.32. The Working Group does not consider that these proposals would be as effective in boosting superannuation guarantee compliance as more frequent reporting to the ATO by employers and superannuation funds discussed above.

## Proposals for more fundamental changes to superannuation guarantee

- 4.33. The Working Group has considered submissions made to the Senate Committee which propose fundamental change to Australia's superannuation guarantee system.
- 4.34. The Council of Small Business of Australia (COSBOA) has previously proposed an alternative approach under which superannuation guarantee is calculated as a flat rate of total salary and wages (rather than ordinary time earnings).
- 4.35. Under this approach, employers would remit all superannuation guarantee payments directly to the ATO as part of a single lump sum covering tax and superannuation. This would occur monthly (for businesses whose annual withholding amount is between \$25,000 and \$1 million) and quarterly (for businesses whose annual withholding amount is less than \$25,000). Responsibility for remitting superannuation guarantee contributions to the superannuation fund would fall to the ATO.<sup>14</sup> It is claimed this

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<sup>14</sup> This model or similar models have garnered some support from other stakeholders such as the Chartered Accountants of Australia and New Zealand and the Australian Small Business and Family Enterprise Ombudsman in their submissions to the Senate Committee.

proposal would reduce compliance costs for small businesses that are currently associated with on-boarding new employees and calculating and remitting superannuation guarantee obligations.

- 4.36. More recently the Productivity Commission's draft report on Alternative Default Models, released in March 2017, contains a draft recommendation that the Australian Government should establish a centralised on-line service that builds on the existing functionality of myGov and Single Touch Payroll that allows members to open, close and consolidate accounts as well as carryover accounts when they change jobs.<sup>15</sup>
- 4.37. The draft report also considers the case for a central clearing house as a means of promoting competition and reducing multiple accounts. It does not make any recommendations on this issue.
- 4.38. Consistent with its terms of reference, the focus of the Working Group has been on improving the operation of the current system and these recommendations have not been considered.
- 4.39. However, it is acknowledged that the move to effectively a 'withholding system' for the collection of superannuation guarantee would place the ATO in the middle of a set of transactions and require extensive investment in systems development as well as risk delays in the transmission of payments to a members' superannuation fund, at a time when SuperStream has significantly sped this process up through electronic messaging.
- 4.40. The Working Group also notes that these initiatives and the existence of the Small Business Superannuation Clearing House deliver many of the efficiencies that COSBOA's proposal aims to achieve. SuperStream has simplified the transfer of superannuation guarantee contributions data between employers and superannuation funds. It has allowed employers to send their entire superannuation guarantee contributions data to their employer-nominated (default) superannuation fund and the default fund is then required to pass the data and payment to the employee's correct fund.
- 4.41. Both the COSBOA proposal and the draft recommendation from the Productivity Commissioner also need to be considered in light of the significant level of investment by government and the superannuation industry in the SuperStream program.

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<sup>15</sup> Productivity Commission, Superannuation: Alternative Default Models, Draft Report (March 2017).

4.42. The Working Group considers that substantial improvements in superannuation guarantee compliance can however be achieved through the proposals and recommendations in this report, particularly extension of Single Touch Payroll to all employers and more frequent and different fund reporting.

## Payslip reporting

4.43. A number of submissions to the Senate Committee<sup>16</sup> have suggested that reporting actual superannuation guarantee amounts paid on payslips would help employees monitor whether superannuation guarantee is being paid.

4.44. This proposal reflects concerns that employees currently have limited visibility over superannuation guarantee payment. They can only detect underpayment by reviewing their account details, either via their superannuation fund or through myGov (which enables members to view their superannuation account details including recent contributions).

4.45. While providing employees with better and more timely information about their superannuation is desirable, this proposal:

- risks confusing employees because under current quarterly payment requirements employers may report a positive figure the four times a year that payments are made and zero otherwise; and
- involves compliance costs of updating payroll software or systems for employers which has previously been strongly resisted by the payroll software industry.

## Fund notification to employees

4.46. More regular reporting by funds to members has also been suggested by submissions to the Senate Committee<sup>17</sup> as a way of improving member visibility of employer contributions.

4.47. Currently, funds are only required to contact members through an annual report that may not be provided until six months after the end of the financial year. Consequently,

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<sup>16</sup> ISA, Australian Super, Australian Institute for Superannuation Trustees, Mine Wealth and Wellbeing, Council of the Ageing, Australian Financial Advisors and United Voice in their submissions to the Senate Committee, and the Inspector General of Taxation report *Review into the ATO's administration of the Superannuation Guarantee Charge* (2010).

<sup>17</sup> ISA, *Overdue: Time for action on unpaid super* (2016) and ISA, Australian Super (in supporting ISA's recommendations) and Professor Helen Anderson in their submissions to the Senate Committee.

employees can be unaware for up to eighteen months that their employer has not made superannuation contributions.

- 4.48. The Working Group has two concerns with this proposal. It would impose compliance costs on superannuation funds by requiring them to update their systems and send more regular information to all members. More importantly, it is unlikely to be very effective due to employee disengagement and reticence to report non-compliance by their employers.

## Improving Compliance Approaches

### **AGENCY ACTION 1**

In anticipation of Single Touch Payroll commencing for 'substantial' businesses on 1 July 2018 and the proposed more frequent reporting of contributions information by superannuation funds', the ATO will review its data models and processes to be placed to be able to more readily identify apparent non-compliance with superannuation guarantee obligations by employers.

### **AGENCY ACTION 2**

Within ATO's current funding arrangements, the ATO will re-balance the focus of its superannuation guarantee compliance program to increase by 10 per cent the proportion of its ATO-initiated superannuation guarantee case work to 40 per cent.

### **AGENCY ACTION 3**

The ATO, APRA, ASIC and the FWO will meet on a quarterly basis to increase monitoring of the operation of the superannuation guarantee system and to exchange information relevant to identifying and addressing superannuation guarantee non-compliance.

### **AGENCY ACTION 4**

To more frequently monitor the potential non-compliance with superannuation guarantee obligations by employers the ATO and the FWO will increase the regularity of information exchange under their Memorandum of Understanding from six monthly to quarterly.

## Data modelling to improve compliance

- 4.49. The ATO's compliance program focuses on employers who, based upon analysis of ATO-held data, are considered a *high risk* of not meeting their superannuation

guarantee obligations or are *suspected* of having not met their superannuation guarantee obligations.

- 4.50. At present, ATO assessments are based on comparing salary and wage data from individual income tax returns with superannuation guarantee payments reported by funds in Member Contribution Statements. This information is then aggregated to an employer level. While these assessments are by no means definitive, they can highlight potential cases of superannuation guarantee underpayment. Review and audit resources are then focused on these cases.
- 4.51. The results of reviews and audits undertaken on the basis of this strategy have consistently produced stronger results in terms of adjustments raised per audit than the ATO's employee notification driven work.
- 4.52. An extension of Single Touch Payroll to all employers and more frequent superannuation fund reporting will provide much better and more timely information for targeting the ATO's proactive compliance activities. The ATO will need to develop new data models to optimise use of this additional information.
- 4.53. The ATO will review and adapt data modelling techniques, procedures and processes ahead of the commencement of Single Touch Payroll for business with 20 or more employees on 1 July 2018.

## A stronger focus on proactive compliance

- 4.54. The ATO has a broad spectrum compliance program. While it remains committed to addressing all 'employee notifications', extension of Single Touch Payroll to all employers and more frequent superannuation fund reporting will enable it to adopt a more targeted and proactive approach to superannuation guarantee compliance.
- 4.55. The ATO will rebalance the focus of its superannuation guarantee compliance program by increasing the proportion of ATO-initiated reviews and audits. Resources will be allocated to support, assist and investigate all complaints from employees.
- 4.56. The ATO finds a greater percentage of non-compliant employers from its proactive case work than from employee notification cases: 82 per cent and 65 per cent respectively.
- 4.57. Enhanced analytical models will be used to create a more complete picture of employers who potentially do not comply (at the individual, industry and/or market level). Better identification of the at-risk population will see the number of ATO-initiated

cases in 2017-18 to increase to 40 per cent (from the current base of 30 per cent) of the total superannuation guarantee cases undertaken.

## Leveraging other sources of compliance information

- 4.58. In addition to reports from employees, the ATO also receives information on possible employer non-compliance from superannuation funds, unions, community referrals directly to the ATO and other third parties. This information is evaluated and compliance action is taken where there is sufficient evidence to proceed.
- 4.59. Third party referrals are an important source of information as 70 per cent of employee notifications are lodged after the employee has left their employer. Third party sources can provide more timely information about potential underpayments. These referrals often complement other information held by the ATO or assist with cases already underway. Of course, not all third party referrals generate audit cases as some lack the necessary information and others have already been resolved.
- 4.60. The ATO works closely with the FWO. Under the Memorandum of Understanding between the FWO and the ATO, the FWO provides six-monthly reports containing details of employers who appear to have not met superannuation guarantee obligations.
- 4.61. The ATO and FWO have undertaken to increase the frequency of this information exchange. Information will now be exchanged on a quarterly rather than six monthly basis.

## Closer cooperation between regulators

- 4.62. Cross-agency information-sharing is crucial to increasing the likelihood that employee entitlements are recovered where companies are in financial distress or entering insolvency. ASIC and APRA both hold information about the operations and viability of participants in the superannuation guarantee system (for example, company director information).
- 4.63. The regulatory bodies involved in this Working Group – ATO, APRA and ASIC – together with the FWO, will meet on a quarterly basis to monitor the operation of the superannuation guarantee system, and to exchange information relevant to identifying and addressing superannuation guarantee non-compliance. This will ensure that existing administrative and legislative mechanisms for dealing with non-compliance are being appropriately utilised. It will also enable identification of issues and trends. The

agencies' focus will evolve once reporting to the ATO matures, reflecting the substantial impact this change will have on the superannuation guarantee system.

4.64. The Working Group notes that the *Australian Securities and Investment Commission Act 2001* has been recently amended to promote greater sharing of information.<sup>18</sup> The process by which ASIC can share information with the ATO has been simplified and this will assist with timely information exchange and enable the respective agencies to identify certain behaviours (such as early warnings of insolvency) that can increase the risk of employers being non-compliant. This will need to be explored in the context of superannuation guarantee.

## Frequency of superannuation guarantee contributions

4.65. Currently employers are required to make superannuation guarantee contributions quarterly (within 28 days after the end of the quarter).

4.66. A number of stakeholders have proposed that employers be required to pay their employees' superannuation guarantee more frequently, such as every month.<sup>19</sup> They assert that the quarterly payment cycle increases the risk of superannuation guarantee non-compliance because it can take many months before employees can identify unpaid superannuation guarantee.

4.67. The ATO has identified that cash flow is cited by employers as a major reason for why they do not comply with their superannuation guarantee obligations.<sup>20</sup> Mandating monthly superannuation guarantee payments could encourage businesses to prioritise their superannuation guarantee commitments better, potentially improving compliance.

4.68. However it could also increase pressure on business and would not necessarily be supported by small business. Previous experience in scoping Single Touch Payroll would suggest that small business will see this as an unnecessary burden given the number of small businesses who do pay their superannuation guarantee in full compliance with the law.

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<sup>18</sup> The Treasury Laws Amendment (2017 Measures No. 1) Bill 2017 passed both Houses on 27 March 2017. As at the time of writing it is awaiting Royal Assent.

<sup>19</sup> ISA, Australian Chamber of Commerce and Industry, Chartered Accountants of Australia and New Zealand, Cbus, Australian Financial Advisors, ARITA, Professor Helen Anderson and Australian Restructuring Insolvency and Turnaround Association in their submissions to the Senate Committee.

<sup>20</sup> Analysis based on ATO data on audits and employee notifications.

- 4.69. It is noted by the Working Group that bringing forward the payment date for the payment of superannuation guarantee from quarterly to monthly would be seen as reducing the working capital available to businesses. From a red tape perspective, an employer who is non-compliant for one financial year would need to lodge twelve monthly Superannuation Guarantee Charge Statements rather than just four quarterly statements, tripling the compliance burden.
- 4.70. Bringing forward the payment date, for some businesses potentially close to insolvency, may actually have the effect of bringing forward the identification of a problem and thus be beneficial to creditors and employees owed employment entitlements.
- 4.71. The Working Group recognises that there are valid reasons why superannuation guarantee payment frequency should be increased to better align with when an employee receives their salary. When quarterly superannuation guarantee payments were mandated in 2002, there were far more technological barriers to monthly superannuation guarantee payments than now.<sup>21</sup> Given other employee entitlements, such as wages and PAYG withholding, are paid more frequently there is little to distinguish superannuation guarantee.
- 4.72. In practice, many businesses already make superannuation contributions more frequently than quarterly.<sup>22</sup> However, without changes to reporting requirements that improve the visibility of superannuation guarantee non-compliance, a change to require monthly superannuation guarantee payments would only marginally assist the ATO to detect non-compliance sooner. It may assist employees identify missing contributions faster but only if they are engaged.
- 4.73. For these reasons it is recommended to firstly improve data visibility, preferably through Single Touch Payroll, and then review payment frequency at a later date (ensuring businesses have sufficient time to implement if the frequency were changed).

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<sup>21</sup> The ATO's assessment of the benefits of SuperStream estimate that it reduces the administrative overhead of making contributions by up to 70 per cent.

<sup>22</sup> ISA and Australian Chamber of Commerce and Industry in their submissions to the Senate Committee assert that in practice contributions are often made more often than quarterly. The ATO's report '*Super reforms research: Employers quantitative findings*' shows that 63 per cent of businesses using the ATO administered Small Business Superannuation Clearing House are already making superannuation contribution more frequently than quarterly

# Improving collection and debt recovery by the ATO

## RECOMMENDATION 4

To improve the overall framework for superannuation guarantee compliance and the collection of superannuation guarantee charge debts, enhancements should be made to the Director Penalty Notice regime and to the Security Bonds Regime.

## RECOMMENDATION 5

That the Minister note work being undertaken by other taskforces on deterrents and increasing transparency, with particular reference to recommendations for legislative and administrative reforms to be proposed by the Phoenix Taskforce.

## ATO debt collection strategies

4.74. The superannuation guarantee charge debt is a debt owing to the Commonwealth.

Once received, the ATO pays the superannuation guarantee shortfall and interest component to the relevant employee's superannuation fund. This 'employee-entitlement' aspect distinguishes it from other types of tax debt

**Table: Trend in superannuation guarantee charge debt<sup>23</sup>**

SGC	2011-12		2012-13		2013-14		2014-15		2015-16	
	\$m	Cases	\$m	Cases	\$m	Cases	\$m	Cases	\$m	Cases
Collectable	340.14	11,231	403.35	12,879	461.59	17,389	521.39	25,281	622.62	25,665
Disputed	45.17	358	71.44	483	35.98	380	24.57	212	28.33	247
Insolvent	454.27	6,089	461.17	5,561	517.57	5,774	598.41	6,541	718.34	7,977
<b>Total</b>	<b>839.58</b>	<b>17,678</b>	<b>935.96</b>	<b>18,923</b>	<b>1,015.14</b>	<b>23,543</b>	<b>1,144.37</b>	<b>32,034</b>	<b>1,369.29</b>	<b>33,889</b>

4.75. The top six industries where the highest amount of collectible debt exists are listed below. The small business sector has the highest amount of superannuation guarantee charge collectable debt.

<sup>23</sup> Source- ATO

**Table: SGC collectable debt by industry (top six) at 30 June 2016<sup>24</sup>**

Industry	Debt (\$m)	Proportion
Construction	85.0	14.7%
Accommodation and food services	81.5	14.1%
Manufacturing	53.8	9.3%
Administrative and support services	52.3	9.0%
Other services	50.8	8.8%
Retail trade	48.2	8.3%

- 4.76. Where a debt arises, the ATO's focus is on making it as easy as possible for employers to pay or promptly address the debt. It does this through use of SMS reminders, written communication and online payment options. This support will be improved following the introduction of more frequent superannuation fund reporting of contributions information and Single Touch Payroll as the ATO will have better data to determine support needs and mechanisms. This may mean that the ATO can commence debt collection activities closer to when non-payment has occurred (mitigating, but not overcoming, one of the challenges surrounding collection).
- 4.77. The ATO recognises that employers in viable well-run businesses may occasionally experience short-term cash flow issues. There are benefits in giving people a 'hand up' with payment arrangements tailored to their circumstances. In 2015-16, the ATO granted around 6,000 payment plans worth almost \$250 million for superannuation guarantee charge debts.
- 4.78. For the minority of employers who do not promptly address their superannuation guarantee charge debts, the ATO can and does take stronger action to prevent them from gaining an unfair financial advantage over the majority who pay on time. These can include garnishees, director penalties and legal insolvency proceedings.
- 4.79. There is often a considerable lag between when an employer fails to make a superannuation payment for an employee and when the ATO starts pursuing collection of the resulting superannuation guarantee charge debt. Factors that impact the ATO's ability to collect debt generally include whether the entity holds net assets or is operating such that it continues to have a revenue stream.
- 4.80. Due to the lag, insolvency is a significant issue in the recovery of superannuation guarantee charge debt, with \$113.2 million irrecoverable at law in 2015-16.

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<sup>24</sup> Source- ATO

- 4.81. For the superannuation guarantee charge at 30 June 2016, insolvent debt represents 52 per cent of the total superannuation guarantee charge debt. This compares to 19 per cent for all debt types.
- 4.82. Administrative improvements to the recovery of superannuation guarantee charge potentially could be achieved by improving the systems that support the issuing of Director Penalty Notices.
- 4.83. It appears that a significant reduction in the amount of unpaid superannuation guarantee charge can be achieved by some improvements in the effectiveness of the Commissioner's and insolvency practitioner recovery powers, or by the introduction of measures that would reduce the capacity or further increase the personal disincentives for employers to incur superannuation guarantee charge liabilities.

## Improving legislative mechanisms for collection

- 4.84. Improving collection of superannuation guarantee charge liabilities is important to ensure the intent and integrity of the system. This can be particularly difficult for the ATO where insolvency and bankruptcy are prevalent.
- 4.85. The Working Group commends the work being undertaken by the Phoenix Taskforce. Some of these proposals will have direct benefits for superannuation guarantee compliance and collection.
- 4.86. To avoid duplicating the work of the Phoenix Taskforce, the Working Group has focused on two issues: enhancements to the Director Penalty Notice regime and Security Bond Demand improvements.
- 4.87. Some of the broader measures under consideration by the Phoenix Taskforce have the potential to improve collection of unpaid superannuation guarantee:
- director Identification Numbers;
  - improved director disqualification/qualification rules; and
  - grouping rules to apply to debts (to protect superannuation guarantee and wider employee entitlements) by enabling collection from other arms of a business where the labour hire arm is continually liquidated.

## Enhancements to the Director Penalty Notice regime

- 4.88. The Director Penalty Notice regime, introduced in 2012, has allowed the ATO to hold directors personally liable for their company's unpaid superannuation guarantee.
- 4.89. However, the ATO is not entitled to pursue a director penalty related to the company's unpaid superannuation guarantee charge liability until a Director Penalty Notice conveying the amount of the penalty has been issued.
- 4.90. Experience has shown that the amount of the penalty will not be known to the ATO in circumstances where the company's liability has not been reported or assessed.
- 4.91. Although the ATO has the power to estimate the company's unreported liability, this power does not facilitate recovery of the penalty owed by the directors. With an amendment to the law the ATO relies upon to estimate a liability, the ATO would be able to estimate the director's penalty to enable recovery of the employees' superannuation guarantee entitlements.
- 4.92. The Director Penalty Notice is less effective for the recovery of superannuation guarantee charge liabilities than it is for PAYG withholding liabilities. This is because of the so-called 'lock-down' rules, which prevent Director Penalty Notices from being applied to the most recent debt.
- 4.93. PAYG withholding liabilities are generally reported at least monthly, and with due dates 21 days (or less) after the end of the reporting period. By contrast, superannuation guarantee charge liabilities are reported quarterly, with due dates a full two months after the end of the reporting period.
- 4.94. Directors then have another three months within which they can put the company into liquidation and not have a personal liability, unless the ATO has already issued a Director Penalty Notice, in which case the director must liquidate the company within 21 days or the expiry of the three month period, whichever comes first. Therefore, the liquidation of a non-reporting company will extinguish, at most, three months of PAYG withholding liabilities, but as many as eight months of unpaid superannuation entitlements.
- 4.95. The Working Group consider this could be addressed by 'locking down' Director Penalties related to superannuation guarantee charge as soon as they are incurred. The issue of a Director Penalty Notice would still be a prerequisite to the recovery of the penalty amount. This would still be two months after the last superannuation obligation was incurred in that reporting period, and almost five months after the first

obligation was incurred, it would reduce the amount of superannuation guarantee charge that is irrecoverable due to corporate insolvencies.

4.96. Therefore, proposed enhancements include:

- expanding the application of the estimates power to enable the Commissioner to estimate a Director's Penalty; and
- removing the three-month delay before the lockdown measure applies in respect of superannuation guarantee charge Director Penalties.

### **Enhancements to the Security Bond Demand**

4.97. The Security Bond Demand power requires a taxpayer to provide a bond or security where the Commissioner perceives a superannuation guarantee charge liability is at risk of not being paid.

4.98. However, compliance with the Security Bond Demand is very low due mainly to the relatively modest penalty the employer may face if prosecuted (\$18,000 maximum) when compared with the quantum of the superannuation guarantee charge the ATO is seeking to secure. At the same time any such fine would be extinguished in liquidation.

4.99. The effectiveness of the Security Bond Demand provisions is limited in that it can only be used where the recipient entity actually has the capacity to furnish security.

4.100. The ATO advises that it is a common practice for enterprises to include a separate employment entity which incurs the superannuation guarantee charge liabilities but which have no assets other than the cadre of employees.

4.101. The Working Group considers that the effectiveness of the Security Bond Demand power to secure payment of the corporate employer's superannuation guarantee charge liability would be enhanced if it could be used in respect of assets owned by closely-related entities.

4.102. It also considers that, where the Security Bond Demand is issued in respect of a 'future tax-related liability' (as is permissible under the existing legislation) the entity's failure to comply with the Security Bond Demand should trigger an option for the Commissioner to use his statutory garnishee power as if that future tax-related liability were an existing tax-related liability. The amount recovered via the garnishee would be held as a bond that could later be applied against the unpaid liability or otherwise refunded to the taxpayer in the event that the anticipated liability is actually paid.

4.103. The Working Group considers proposed enhancements could include:

- the introduction of a non-pecuniary penalty for non-compliance with a Security Bond Demand;
- empowering the Commissioner to make an application to the Court for compliance with the Security Bond Demand;
- extending the scope of the Security Bond Demand to assets held by closely-related entities where the corporate employer holds no assets; and
- including within the definition of a tax-related liability the amount of the anticipated superannuation guarantee charge liability which is the subject of the Security Bond Demand which would enable the Commissioner to use his statutory garnishee power to acquire the bond.

## Other proposals not supported by the Working Group

4.104. Three other proposals have been raised in submissions to the Senate Committee that are relevant to collection and debt recovery. Namely:

- more superannuation fund involvement in the recovery of unpaid superannuation guarantee;
- empowering the FWO to recover unpaid superannuation guarantee; and
- expanding the Fair Entitlements Guarantee.

4.105. The Working Group does not support these proposals but for completeness has addressed them below.

## Collection of the superannuation guarantee charge by funds

4.106. Some stakeholders have suggested that superannuation funds should have more involvement in the recovery of unpaid superannuation guarantee.<sup>25</sup>

4.107. The Working Group considers it would be problematic to mandate superannuation guarantee enforcement by superannuation funds.

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<sup>25</sup> Industry Super Australia and Australian Super in their submissions to the Senate Committee.

- 4.108. Superannuation funds do not know their members' ordinary time earnings and they do not know whether or how much superannuation guarantee an employer should contribute. Without this information, superannuation funds' attempts at collection of unpaid superannuation guarantee would be inefficient and prone to error.
- 4.109. Requiring employers to provide this information to funds would raise serious privacy concerns and increase the regulatory burden on employers.
- 4.110. Because the superannuation guarantee charge is a tax debt to the Commonwealth, it would be impractical for superannuation funds to pursue it. This debt can only be pursued by the Commonwealth. Even if it were possible to change this architecture, it would represent a duplication of the ATO's existing compliance activities.
- 4.111. Superannuation funds would face the 'uneconomical-to-pursue' dilemma even more frequently than the ATO, given that they do not enjoy the benefit of the Commissioner's recovery tools, such as the Director Penalty regime, statutory garnishees and compulsory information-gathering powers.
- 4.112. Furthermore, costs associated with superannuation funds undertaking compliance work would ultimately be distributed to all members in the form of increased fees.
- 4.113. Rather than enforcement, superannuation funds could use their observations of employer and employee behaviour (payments and engagement levels respectively) to build enhanced relationship management models, adopt 'nudge' strategies or make referrals to the ATO.

## Empowering the FWO to recover unpaid superannuation guarantee

- 4.114. Some stakeholders have recommended empowering the FWO to recover unpaid superannuation guarantee.<sup>26</sup>
- 4.115. Currently, the FWO enforces superannuation related obligations in industrial instruments, such as modern awards and enterprise agreements. In practice, this means that the ATO enforces compliance by employers to contribute the 9.5 per cent superannuation guarantee contribution under the superannuation laws, whereas the FWO is responsible for making sure employers meet any higher superannuation guarantee contributions in an industrial instrument made under workplace laws.

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<sup>26</sup> ISA, *Overdue: Time for action on unpaid super* (2016) and Professor Helen Anderson, Cbus and the Australian Council of Trade Unions in their submissions to the Senate Committee.

- 4.116. Complaints about superannuation payable under a modern award and enterprise agreement are less than one per cent<sup>27</sup> of total superannuation complaints received by the Government. In most cases, employees who contact the FWO with concerns about superannuation payments are referred to the ATO for assistance.
- 4.117. By empowering the FWO to recover unpaid superannuation guarantee, employees would be able to raise concerns about all unpaid work related entitlements via the same agency.
- 4.118. However, the FWO is not in receipt of sufficient information to be an effective enforcement agency for unpaid superannuation guarantee. The FWO does not have its own information on payments to an employee and therefore has limited ability to proactively monitor superannuation guarantee compliance.<sup>28</sup>
- 4.119. The FWO would require additional funding and access to information for any expanded superannuation compliance role.
- 4.120. The Working Group considers that it would be inefficient and counter-productive if the current roles and responsibilities of the ATO and FWO were disturbed in respect of unpaid superannuation.

## Expanding the Fair Entitlements Guarantee

- 4.121. The Fair Entitlements Guarantee (FEG) is a safety net scheme providing assistance for certain categories of unpaid employment entitlements when employees lose their job through liquidation or bankruptcy of their employer. The intention of FEG is to protect accrued employment entitlements payable on redundancy that would otherwise be lost due to employer insolvency.
- 4.122. The FEG could be extended to include superannuation contributions owing by the employer.<sup>29</sup>
- 4.123. Unpaid employer superannuation guarantee contribution amounts owed by an insolvent employer to employees are not currently covered under FEG, nor have they been covered under any of the predecessor schemes to FEG in existence since 2000.<sup>30</sup>

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<sup>27</sup> In 2015-16, the FWO directly assisted employees to resolve 103 workplace relations disputes that included allegations of non-payment or underpayment of superannuation. In 2015-16, the ATO received approximately 19,000–20,000 employee notifications.

<sup>28</sup> The FWO responds to complaints made by employees by gathering payment information from both the employee and the employer.

<sup>29</sup> As suggested by the Inspector General of Taxation and Industry Super Australia in their submissions to the Senate Committee.

- 4.124. Unpaid employer superannuation guarantee contributions differ from the other categories of entitlements covered under FEG because they are intended to provide for retirement. As such, employer superannuation guarantee contributions are not immediately payable to the employee upon the loss of a job due to the insolvency of an employer.
- 4.125. Expanding FEG to include superannuation guarantee contributions would ensure employees' retirement savings are not improperly diminished in circumstances when their employer goes into liquidation without having met its obligations (as the unpaid entitlement would be met by Government in the event of the employer's insolvency). It may also increase the risk of businesses trading while insolvent.
- 4.126. Expanding the FEG would come at significant cost to government.
- modelling by the Department of Employment in collaboration with Treasury and the ATO shows that the cost of the scheme would increase by up to \$801.2 million over the forward estimates depending on parameters. However, any reforms that enabled the ATO to intervene early with any superannuation guarantee underpayments would reduce the need for FEG claims and therefore the cost.
- 4.127. Extending FEG to include superannuation guarantee may also increase the complexity of administration.<sup>31</sup>
- 4.128. For these reasons the Working Group consider that extending the FEG would not be advisable, and that proposals to improve employer compliance with, and collection of, their superannuation guarantee obligations would be preferable.

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<sup>30</sup> FEG does provide very limited coverage for voluntary superannuation contributions that are made by employees in certain circumstances. When the voluntary contribution is deducted from wages under a formal salary sacrifice arrangement, but not passed on to the superannuation fund within 13 weeks of the end of employment, such payments are treated as unpaid wages and covered under FEG.

<sup>31</sup> This could potentially slow down the approval process for employees (the current average processing time for a FEG claim is 10.5 weeks). Unpaid superannuation guarantee contributions are calculated differently to other entitlements provided for by FEG and are not generally paid directly to the employee. The overlap between the ATO's ongoing role to enforce superannuation guarantee charge compliance and FEG's role as a creditor in liquidation or bankruptcy once payments are made would also add complexity.

# 5. Ensuring the system is fit for purpose and builds community confidence

## Introduction

- 5.1. **Chapter 4** outlined key changes that will boost compliance with superannuation guarantee obligations. These compliance measures will be supported where the superannuation system is perceived to be fair by the community and is easier to engage with for employers and employees.
- 5.2. The existing penalty regime is inflexible. A better-targeted approach would support compliance and build confidence in the system. Key changes involve making sanctions better aligned with the degree of employer culpability and preventing arbitrary outcomes that can arise through the calculation of interest amounts.
- 5.3. The existing superannuation law means employees who make voluntary contributions through salary sacrifice arrangements inadvertently reduce their entitlements to the superannuation guarantee. Amendments to prevent this anomalous outcome would improve confidence in the system.
- 5.4. Finally, the ATO will increase the visibility of its guidance and support to employees and employers to build better awareness of their respective entitlements and obligations.

## Optimising compliance through an effective penalty framework

### **RECOMMENDATION 6**

Ensure the penalty framework surrounding superannuation guarantee is sufficiently flexible to appropriately deal with the spectrum of employer culpability in non-compliance.

### **RECOMMENDATION 7**

Amend the calculation of the nominal interest component in the *Superannuation Guarantee (Administration) Act 1992* so that interest is only payable for the period contributions are outstanding.

## AGENCY ACTION 5

To increase the visibility of the actions the ATO takes to address non-compliance and to highlight its enforcement responses, the ATO will better promote its compliance program and the 'tool kit' to assist employees and improve compliance amongst employers.

- 5.5. Strong penalties are an important deterrent against non-compliance. However, the penalty regime must also be sufficiently flexible to accommodate different degrees of employer behaviour and culpability. It is also important that the penalty regime does not act as a disincentive to rectifying non-compliance by voluntarily disclosing errors and undertaking corrective action.
- 5.6. There are consequences that apply where an employer fails to comply with its superannuation guarantee obligations:
- the employer is subject to the superannuation guarantee charge. This consists of three components: the shortfall amount, which is based on total salary and wages rather than ordinary time earnings; the nominal interest component, which acts as a proxy for earnings the employee would have received had the contribution been made on time; and the administrative component, which is \$20 per employee per quarter;
  - the employer may be subject to an administrative penalty of up to 200 per cent of the superannuation guarantee charge; and
  - the employer is no longer eligible to claim a tax deduction in respect of certain amounts. In contrast to superannuation guarantee payments that are made on time, late superannuation guarantee payments used as an offset and superannuation guarantee charge payments are non-deductible.
- 5.7. Based on anecdotal evidence, the current superannuation guarantee charge and penalty system may discourage some employers from voluntarily disclosing errors and undertaking self-correction. Several submissions to the Senate Committee, including by the Inspector-General of Taxation, Institute of Public Accountants, Financial Services Council, the Tax Institute and the Australian Chamber of Commerce and Industry have recognised the need to balance the deterrence role and consideration of an employer's circumstances and compliance position.<sup>32</sup>

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<sup>32</sup> Based on observations by ATO compliance staff and noted in the Inspector General of Taxation's submission to the Senate Committee.

- 5.8. A defining characteristic of the current penalty framework is the lack of discretion it affords the ATO. The ATO does not have discretion to remit any part of the superannuation guarantee charge.<sup>33</sup> It only has discretion in respect of the administrative penalty. This means non-compliant employers are subject to broadly the same consequences regardless of the circumstances of the breach.
- 5.9. The Working Group considers that strong sanctions are necessary to deter deliberate non-compliance. However, there would be benefits in giving the ATO more flexibility. This would facilitate a differentiated approach that would treat recalcitrant employers more harshly than those employers who accidentally do the wrong thing and come forward to rectify their error.
- 5.10. Irrespective of its effect on compliance, a more differentiated approach would be both fairer and more consistent with the penalty frameworks that apply in relation to non-payment of other taxation related liabilities.<sup>34</sup>
- 5.11. The Working Group has developed two options for Government consideration. These relate to the administrative component of the superannuation guarantee charge and the tax deductibility of late payments.

### **The administrative component of the superannuation guarantee charge**

- 5.12. Currently, there is no discretion to remit the \$20 per quarter per employee administration component, as it is part of the superannuation guarantee charge.
- 5.13. Given the quantum of the administrative component, this is usually not an issue, but can seem unreasonable in cases where, for example, due to a system error an employer has underpaid a tiny amount of superannuation guarantee for a large number of employers for an extended period.
- 5.14. To ensure sufficient flexibility, the Working Group suggests that consideration be given to removing the administration component from the superannuation guarantee charge.

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<sup>33</sup> This is because the superannuation guarantee charge is a tax. Taxes cannot be discretionary or they would be unconstitutional on the grounds of arbitrary taxation.

<sup>34</sup> For example, if an individual is subject to an administrative penalty under the *Taxation Administration Act 1953* because they had a shortfall amount (being the difference between tax related liability that a taxpayer had, and the liability they should have had), the amount of the penalty is increased by 20 per cent if the taxpayer had taken steps to prevent or obstruct the Commissioner from finding out about a shortfall amount (see section 284-220 of Schedule 1 to the *Taxation Administration Act 1953*). Similarly, the penalty amount is decreased by 20 per cent in circumstances where the taxpayer voluntarily discloses that they had made a false or misleading statement that led to the shortfall (see section 284-225 of Schedule 1 to the *Taxation Administration Act 1953*).

Instead administrative penalties should be applied in such a way as to achieve a broadly commensurate and more appropriate outcome for employers.

### **Tax deductibility of late payments**

- 5.15. The second option is to allow deductibility of contributions that an employer has made and claimed as a late payment offset.<sup>35</sup> Such a change would mean that if an employer accidentally paid one day late and was subject to the superannuation guarantee charge, they could still claim the amount they paid late as a tax deduction. This may remove a disincentive for some employers to come forward.
- 5.16. If the ATO advises a non-compliant employer that audit action is about to commence, the employer would be able to contribute late payment amounts to their employees' superannuation funds to ensure they benefit from the deductibility.
- 5.17. In these circumstances the ATO could impose additional administrative penalties necessary to ensure a proportionate punishment.
- 5.18. Treasury and the ATO will provide further advice to Government on the administrative and revenue implications of these options.

### **Amending the nominal interest component of the superannuation guarantee charge**

- 5.19. In addition to making the penalty framework more flexible, the Working Group recommends that the Government amend the methodology for calculating the nominal interest component of the superannuation guarantee charge. This is because the existing methodology produces anomalous and inequitable results.
- 5.20. Nominal interest on superannuation guarantee shortfall amounts is currently calculated from the beginning of the relevant quarter until the employer lodges a superannuation guarantee charge statement or the Commissioner makes a default assessment. This is despite the fact that:
- contributions are not due until 28 days after the end of the quarter; and
  - contributions, albeit paid late, may be paid well before lodgement of the statement or the making of the default assessment.

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<sup>35</sup> Late payment offsets are available to employers to reduce their superannuation guarantee charge liability where the employer has made late contributions to a superannuation fund (before the charge is raised).

- 5.21. This means that employers pay interest in respect of the period before the contribution was even due. If an employer pays superannuation guarantee contributions late but does not lodge a superannuation guarantee statement, it also means that nominal interest accrues indefinitely until an assessment is made.
- 5.22. This results in anomalous and inequitable outcomes for employers. An example of where this arrangement is particularly punitive is where an employer thought it had paid in full and on time but finds out some years later that a payroll system error meant it had inadvertently paid a few days late. In these circumstances, the employer must pay interest on the whole amount for the whole period until the statement is lodged.
- 5.23. The Working Group considers that amending the interest calculation would still be consistent with the policy objective of ensuring employees are adequately compensated for loss of investment earnings due to superannuation guarantee non-compliance.

## Clarifying the law regarding salary sacrifice agreements

### RECOMMENDATION 8

To prevent contributions made under salary sacrifice arrangements from satisfying an employer's superannuation guarantee obligations the *Superannuation Guarantee (Administration) Act 1992* should be amended.

### RECOMMENDATION 9

Amend the *Superannuation Guarantee (Administration) Act 1992* to specifically include in the base for calculating an employer's superannuation guarantee obligations those salary or wages sacrificed to superannuation as part of salary sacrifice arrangements.

## Using salary sacrificed superannuation contributions to satisfy superannuation guarantee obligations

- 5.24. At present, all employer superannuation contributions, including those made under salary sacrifice arrangements, serve to satisfy the employer's superannuation guarantee obligations. For example, an employer's obligation to contribute \$9,500 in superannuation for a person earning \$100,000 could be met in full (and without further

employer contributions) if the employer contributed \$9,500 or more into superannuation under a salary sacrifice arrangement with that person.

- 5.25. There is no clear rationale for this situation, which may reflect the fact that salary sacrifice was not in widespread use when the current legislation was drafted in the early 1990s.
- 5.26. The Australian Government Solicitor has previously provided advice that use of salary sacrifice money to satisfy an employer's superannuation guarantee obligations would likely breach the *Fair Work Act 2009*. The *Fair Work Act 2009* does not permit deductions from wages if they are not 'principally for the employee's benefit' or, if made pursuant to a term of a modern award, enterprise agreement or employment contract, they directly or indirectly benefit the employer and are unreasonable in the circumstances. An employer in breach of the *Fair Work Act 2009* is exposed to civil penalties. However, relying solely on enforcement of this interpretation by the FWO is not likely to be effective as the FWO does not have the specialist expertise to deal with complex superannuation matters.
- 5.27. It is difficult to quantify the prevalence of this practice. The Working Group does not have evidence that it is widespread.<sup>36</sup>
- 5.28. The Working Group considers that this anomaly should be addressed.
- 5.29. This can be done by amending the *Superannuation Guarantee (Administration) Act 1992* to preclude the use of contributions made under salary sacrifice arrangements to satisfy an employer's superannuation guarantee obligations.

## Salary sacrifice and the superannuation guarantee base

- 5.30. In addition to receiving superannuation guarantee contributions, some employees are able to make additional salary sacrifice contributions to superannuation. From 1 July 2017, employees will also be able to make personal deductible contributions to superannuation. This will benefit employees whose employers do not offer salary sacrifice arrangements.
- 5.31. An individual who makes personal deductible contributions to superannuation from their post-tax income will receive their 'full' superannuation guarantee entitlement.

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<sup>36</sup> Treasury receives only a very small number of letters from individuals on this matter and the issue is rarely raised with the ATO during community engagement events.

However, an individual who makes salary sacrifice contributions may receive a reduced superannuation guarantee contribution from their employer.

- 5.32. This is because salary sacrifice reduces the base against which an employer's superannuation guarantee obligations are calculated.
- 5.33. In the example above in paragraph 5.24, the sacrifice of \$9,500 would reduce the employee's salary from \$100,000 to \$90,500. This in turn would reduce the minimum required superannuation guarantee contribution to from \$9,500 to \$8,598.
- 5.34. The Australian Government Solicitor has advised that the practice of employers reducing their employees' superannuation guarantee base by amounts that are salary sacrificed is unlikely to constitute a breach of the *Fair Work Act 2009*.
- 5.35. It is not clear how many employers reduce superannuation guarantee contributions where employees elect to salary sacrifice into superannuation. The volume of complaints to the ATO and Treasury do not indicate that the practice is widespread.
- 5.36. The Working Group considers that the Government should amend the law to include amounts salary sacrificed into superannuation in the base for calculating superannuation guarantee. This will ensure consistency between employees who utilise salary sacrifice to make additional superannuation contributions and those who make personal contributions and claim an income tax deduction.

## Helping employers understand their obligations

### **AGENCY ACTION 6**

To assist employers the ATO will actively promote and make more visible its education and assistance services, tools and calculators, including the recently updated Employee Contractor Decision Tool.

### **AGENCY ACTION 7**

To provide more clarity and administrative ease for employers the ATO will review the useability of the superannuation guarantee charge form, instructions and lodgement processes.

- 5.37. Education and assistance is particularly important for small business employers to help them understand their obligations.
- 5.38. Non-compliance is more likely to occur amongst small business employers, as superannuation guarantee obligations are likely to be outside their area of business expertise. The rules can sometimes be perceived as being costly and time consuming.

- 5.39. The ATO already provides a range of education and support services on its website that assist employers to understand and satisfy their obligations on its website. The ATO has developed and improved online tools such as the Employee Contractor Decision Tool and the Superannuation Guarantee Eligibility Tool that are accessible through the ATO website as well as the ATO app to assist employers to determine if superannuation guarantee is payable.
- 5.40. As part of continual review, the ATO will refine and promote the information available for employers on their obligations in relation to superannuation guarantee.
- 5.41. The ATO will also consider how to improve the instructional material that accompanies the Superannuation Guarantee Charge Form to assist employers. It will also examine how the lodgement process can be streamlined.
- 5.42. The ATO is also currently piloting a Cash Flow Management Education Program to assist small businesses to better understand and identify practical actions they can take to improve cash flow and meet financial obligations including superannuation guarantee. The program has been designed for accountants, bookkeepers and business advisors to deliver to their small business clients. Feedback has been very positive and the program has been recognised to be different to current offerings in the market place.
- 5.43. Educating employers (and those that assist them) can assist in preventing non-compliance and supporting positive behavioural changes. There are roles for the ATO, agents/professionals and the superannuation industry in providing education, and employers themselves need to seek out those services that best meet their needs.

## Helping employees understand their entitlements

### **AGENCY ACTION 8**

To assist employees, the ATO will actively promote and make more visible its education and assistance services, tools and calculators, to provide more certainty to people about their status as a worker (employee or contractor) and work with the FWO and Department of Employment to provide more certainty on their respective websites to employees about their entitlements under salary sacrifice arrangements.

- 5.44. The ATO is making it easier for employees to understand their superannuation guarantee entitlements and how they can seek assistance if they suspect non-compliance.

- 5.45. The ATO will develop contemporary marketing messages to engage employees on the importance of their superannuation guarantee entitlements. It will also highlight the advantages of early detection of potential non-payment and how to take subsequent steps.
- 5.46. The ATO will review and improve its publicly available guidance and tools to better assist workers to determine their employment status. Options are being considered to provide certainty to workers about their status as 'employee' or 'contractor' in their employment relationship. This has important flow-on impacts for their superannuation guarantee entitlements. It will work with other agencies, particularly the FWO to strengthen their marketing and education messages to employees in certain industries where non-compliance is traditionally high.
- 5.47. The ATO will also work with the FWO and Department of Employment to clarify the implications of salary sacrifice arrangements on employers' superannuation guarantee obligations. The ATO, FWO and ASIC will collaborate to improve web based information on their websites, including ASIC's *MoneySmart* website.
- 5.48. The ATO will leverage the work of the Migrant Workers Taskforce to assist vulnerable workers detect and seek assistance for unpaid superannuation guarantee, including improving their understanding of employees' rights, entitlements and avenues for reporting underpayment.

## Exempting high income employees from superannuation guarantee

- 5.49. The Working Group was asked to consider whether high income earners with multiple employers should be able to 'opt-out' of superannuation guarantee so that they avoid exceeding their annual concessional contributions cap. This issue is apparently most acute in relation to people with multiple directorships (as director's fees count as ordinary time earnings).

5.50. Under the *Superannuation Guarantee (Administration) Act 1992*, an employer's superannuation guarantee obligation in respect of each employee is capped at an amount below the concessional contribution cap (currently \$4,896.95 per quarter). However, this cap applies on an employer-by-employer basis. Therefore a person with multiple employers can receive compulsory superannuation guarantee payments that exceed the concessional contributions cap (even if they don't receive excess contributions from a single employer).

- excess concessional contributions and proxy earnings are taxed at the person's marginal tax rate less a 15 per cent offset representing the tax paid by the superannuation fund. They can be released from superannuation or retained as a non-concessional contribution.

5.51. It has been suggested that the law might be amended so high income earners with multiple employers can 'opt-out' of receiving superannuation guarantee payments in excess of their concessional contribution cap. These high income earners would presumably negotiate higher take-home pay in lieu of reduced contributions.

5.52. The *Superannuation Guarantee (Administration) Act 1992* already contains some exemptions from the obligation for an employer to pay superannuation guarantee on behalf of their employees. However, they generally apply on an all or nothing basis. There is no mechanism that would allow exceptions in relation to some employers but not others or a proportionate exception across employers.

5.53. Furthermore, it might not prevent excess amounts being paid where employers' superannuation guarantee obligations are also set out in awards, enterprise agreements and individual contracts.

5.54. For this reason, the Working Group does not support introducing a mechanism to facilitate opt-out by high income employees with multiple employers. It considers that the benefits to a small number of employees would be outweighed by the complexity involved.

5.55. If the Government wants to address this issue, an approach would be to consult on a narrow exemption for particular types of remuneration (for example, fees paid to a non-executive director of a public company).

# Appendix A

## Terms of Reference

### Term of Reference 1

Analyse the information and data available in order to establish 'fact base' and to identify characteristics and detect drivers of superannuation guarantee non-compliance. Also have reference to:

- The extent of non-compliance amongst insolvent employers
- The extent to which salary sacrifice is used to meet superannuation guarantee obligations

### Term of Reference 2

Develop and consider administrative options to improve compliance and foster participation in the superannuation guarantee system by employers. Have reference to:

- Information about superannuation guarantee payments coming to the ATO
- The use of deterrents, such as prosecutions and audits
- Review service offerings to support employers (including understanding the employee/ contractor distinction), such as online forms and tools for employers
- The role of superannuation funds to assist employer compliance.

### Term of Reference 3

Develop and consider policy options to address superannuation guarantee non-compliance, including potential legislative change. Have reference to:

- Potential to improve compliance through collection of more timely and accurate data
- The frequency of employers paying superannuation guarantee
- The appropriateness of penalties and interest rates for non-compliance.

# Appendix B

## Working group agencies

### Australian Taxation Office

The ATO's role is to effectively manage and shape the superannuation system.

The *Superannuation Guarantee (Administration) Act 1992* sets out employer obligations for paying compulsory superannuation for employees. It also sets out the rules under which the ATO administers this legislation. In the main, employers pay the superannuation guarantee entitlements for their employees largely without the intervention of the ATO.

The ATO has a range of responsibilities under the superannuation guarantee legislation including:

- educating employers and employees about their responsibilities for superannuation guarantee
- monitoring employer compliance with their superannuation guarantee obligations
- raising the superannuation guarantee charge where employers do not pay the required minimum (quarterly) payments.

### Treasury

The Treasury has responsibility for superannuation and retirement income policy. This includes superannuation guarantee.

### Department of Employment

The Department of Employment has responsibility for workplace relations and employment policy, including compliance and enforcement of workplace relations laws by the FWO.

The FWO has a limited jurisdiction under the *Fair Work Act 2009* in relation to superannuation. The FWO enforces compliance with:

- terms of modern awards and enterprise agreements which require employers to make superannuation contributions by reference to or in a way that is consistent with the *Superannuation Guarantee (Administration) Act 1992*; and

- record keeping and payslip requirements relating to superannuation contributions and funds as prescribed by the *Fair Work Regulations 2009*.

## Australian Securities and Investment Commission

The Australian Securities and Investment Commission (ASIC) is Australia's corporate, markets and financial services regulator.

As the financial services regulator, ASIC licence and monitor financial services businesses including trustees who operate superannuation funds to ensure they operate efficiently, honestly and fairly. ASIC also regulates disclosure and some aspects of conduct relating to superannuation funds.

ASIC is also responsible for the regulation of registered liquidators. Where applicable a registered liquidator is responsible for dealing with unpaid superannuation entitlements in the context of an external administration of a company to which they are appointed. Registered liquidators lodge reports with ASIC on companies that have gone into liquidation, voluntary administration or have had a receiver or receiver manager appointed. These reports contain information about the assets and liabilities of the company including where applicable amounts owed in unpaid superannuation entitlements. ASIC uses these reports to inform decisions about actions against directors of companies that have gone into administration and broader regulatory activities such as its work on Phoenix activities.

ASIC also plays a role more broadly to promote financial capability through the provision of educational tools and information for consumers on its *MoneySmart* website.

## Australian Prudential Regulation Authority

The Australian Prudential Regulation Authority (APRA) is the prudential regulator of the financial services industry, including banks, insurers and the superannuation industry (except self-managed superannuation funds).

APRA wrote the Superannuation Prudential Standards and Superannuation Practice Guides which detail prudential obligations and standards of best practice for superannuation trustees.

APRA collects data from regulated entities including superannuation funds. It publishes a range of data at industry and fund level, including superannuation guarantee contributions made by employers.

# Cross Agency Working Group Members

## Agency

## Members

Australian Taxation Office

James O’Halloran, Chair

Deputy Commissioner, Superannuation

Debbie Rawlings

Assistant Commissioner, Superannuation

Department of the Treasury

Jenny Wilkinson

Division Head, Retirement Income Policy Division

Robb Preston

Manager, Retirement Income Policy Division

Department of Employment

David Denney

Branch Manager, Workplace Relations Economic Strategy

Australian Prudential Regulation Authority

Sacha Vidler

Head (acting), Industry Team

Australian Securities and Investment  
Commission

Gerard Fitzpatrick

Senior Executive Leader, Investment Managers and  
Superannuation

# Appendix C

## Superannuation guarantee framework and operation

### Legislative framework

Australia's superannuation guarantee system commenced on 1 July 1992 with the enactment of the *Superannuation Guarantee (Administration) Act 1992* (SGAA).

Employers have an obligation to contribute 9.5 per cent of the 'ordinary time earnings' of their eligible employees as a superannuation contribution. In general, ordinary time earnings is salary and wages paid less bonuses, overtime and termination payments related to unused annual leave.

### Superannuation guarantee charge

Employers who do not pay the minimum level of superannuation guarantee contributions to a superannuation fund (in the relevant quarter by the due dates) have a 'superannuation guarantee shortfall' for that quarter and are liable to pay the superannuation guarantee charge. These employers are required to lodge a superannuation guarantee charge statement to the ATO which informs the ATO that the employer has not met their obligations.<sup>37</sup>

The superannuation guarantee charge is a debt that is due and payable to the ATO. It is made up of three components added together:

- superannuation guarantee shortfall (including any choice shortfall)
- nominal interest<sup>38</sup> (currently 10 per cent from the beginning of the period)
- administration component<sup>39</sup> (\$20 per employee, per quarter).

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<sup>37</sup> Employers who pay the required amount of superannuation guarantee do not need to lodge the superannuation guarantee charge statement and do not need to deal with the ATO.

<sup>38</sup> The 'nominal interest component' in relation to an employer for a quarter is the amount that would accrue by way of interest on the total of the employer's superannuation guarantee shortfalls for the quarter (section 31 SGAA). The rate is prescribed by regulation 7A.

<sup>39</sup> The 'administration component' in relation to an employer is made up of a base amount of \$20 per relevant employee per quarter (section 32 SGAA).

Employers become ineligible to claim a tax deduction for the superannuation guarantee charge or any contributions paid late which can offset against the charge (that is, late payment offsets).

Employers may also be subject to an administrative penalty of up to 200 per cent of the superannuation guarantee charge. This penalty can be remitted by the ATO.

The superannuation guarantee shortfall and interest, when collected by the ATO, are distributed to employees' superannuation funds by the ATO.

The ATO is not able to remit any part of the superannuation guarantee charge. Submissions to the Senate Committee considered whether the superannuation guarantee charge and associated penalties are disproportionately applied, especially because they are not tax deductible, and act to discourage employers from voluntarily disclosing non-compliance to the ATO.

If employers do not pay the superannuation guarantee charge, only the ATO can take action to recover it.

If an employer becomes insolvent, priority rules apply to the superannuation guarantee charge. It has the same priority as other employee entitlements. It ranks ahead of unsecured creditors, but behind priority creditors and liquidators' fees (subsection 556(1) of the *Corporations Act 2001*).

The Fair Entitlements Guarantee does not cover superannuation guarantee contributions.

In June 2012 changes were made to the Director Penalty Notice regime to enable the ATO to cover unpaid superannuation guarantee charge against a director of a company personally. In 2015-16, the ATO issued 877 Director Penalty Notices in respect of superannuation guarantee charge debt.

## Identification of non-compliance

The non-payment of superannuation guarantee, however big or small, is taken seriously by the ATO.

The ATO does not have visibility or a timely mechanism by which to monitor employer payment of superannuation guarantee. This is because employers do not have to report payments made to employees' superannuation funds to the ATO.

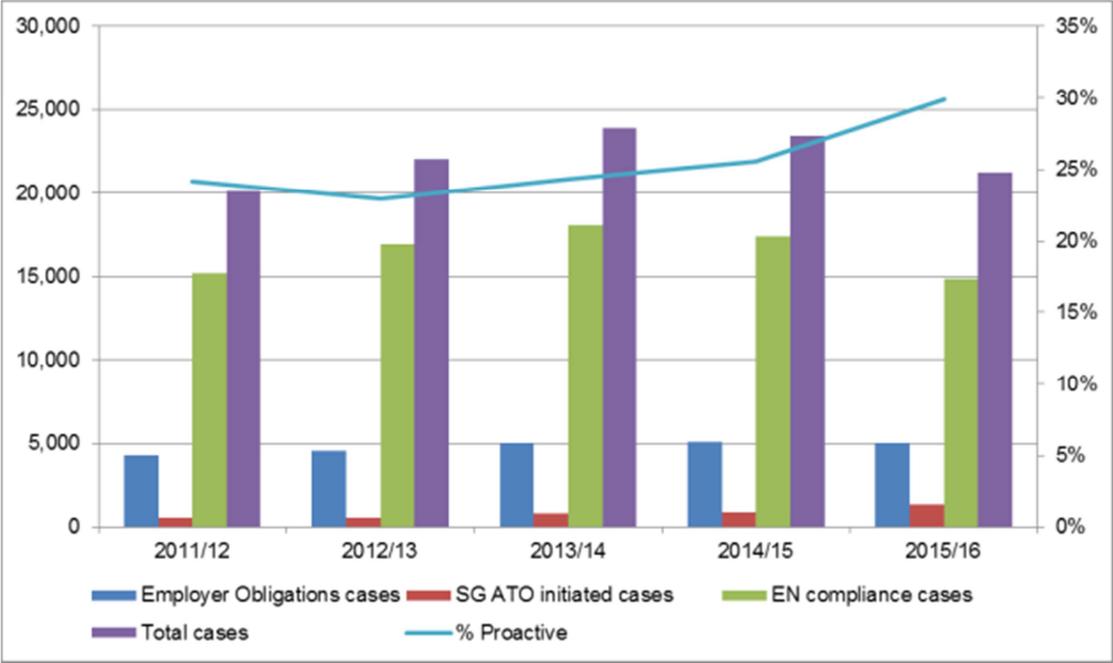
Within the current system design, the ATO generally identifies potential non-compliance through:

- ‘employee notifications’ which are complaints made to the ATO by employees or former employees about the non-payment or under-payment of superannuation guarantee
- referrals of information from third parties and examination of ATO-held data which direct the ATO-initiated reviews and audits on higher risk employers.

Employee notifications are the primary source of ATO reviews and audits. In 2015-16, around 20,000 complaints were received and the subsequent reviews and audits accounted for around 70 per cent of ATO compliance activities. Typically these complaints are made post-employment and there are lengthy periods of time between when the superannuation guarantee contribution was due and when the notification is made to the ATO.

ATO-initiated reviews and audits account for the balance of the ATO’s superannuation guarantee compliance program and in 2015-16 the ATO undertook around 21,000 cases that addressed SG compliance.

**Table: ATO superannuation guarantee compliance cases**



ATO-initiated cases are informed by risk models that identify employers with potential non-compliance; categories of risky employers; and provide a differentiated framework for treating risk. Submissions to the Senate Committee recommended that the ATO's ability to proactively identify high risk cases and take compliance action be improved.

The key inputs are information from:

- ATO-held data, notably annual reporting from superannuation funds and PAYG withholding data from employers.
- referrals of information from third parties, including the FWO and ASIC.

Currently, superannuation funds must give Member Contribution Statements to the ATO providing details of the contributions made to members' (employee) accounts each year. The Member Contribution Statement is provided to the ATO annually whereas employers are required to pay superannuation guarantee contributions quarterly (and some employers pay more frequently, generally monthly).

The ATO received over 33 million Member Contribution Statements in 2015-16. The data is sometimes incomplete and/or inaccurate and does not consistently identify employers who have made the contribution for the member. For example, where an employee has two or more employers during the year and there is a superannuation guarantee shortfall, the ATO cannot identify the non-compliant employer.

The ATO also receives information from employers on PAYG withholding summaries annually. Payment summaries do not include superannuation guarantee payment information and do not show 'ordinary time earnings'.

The ATO's visibility of superannuation guarantee payments is discussed further in **Chapter 3**.

## Dealing with non-compliance

The ATO's administration of the superannuation guarantee system needs to be supported by concerted and sustained whole-of-government and whole-of industry efforts. Going forward, multi-agency strategies and activities need to move beyond current approaches.

The ATO does not have a timely mechanism by which to monitor employer payment of superannuation guarantee. Employers are not obligated under the SGAA to report to the ATO payments made to employees' superannuation funds.

Thus, the key challenge for the ATO as a regulator is lack of visibility of the superannuation guarantee contributions that employers make to their employees' superannuation funds.

There are also lags in time in relation to the reporting it receives from superannuation funds and that reporting does not provide visibility on what an employee is owed. The ordinary time earnings superannuation guarantee is based on is not reported by employers at all. In addition, the 'salary and wage' income information the ATO does have is different and also only available with a significant lag.

Technology and two recommendations outlined by Working Group have the potential to have significant impacts on the ATO's visibility and targeting of its compliance program (see **Chapters 3 and 4**).

# Appendix D

## ISA estimates of superannuation guarantee compliance

In December 2016, ISA released a report *Overdue: Time for action on unpaid super*, which included quantitative estimates of superannuation guarantee compliance. The Working Group addressed ISA's report in January 2017 and the commentary below considers ISA's March 2017 estimates provided in its supplementary submission to the Senate Committee.

The ISA estimated that total superannuation guarantee non-compliance was \$3.6 billion in 2013-14. This consisted of:

- \$2.8 billion in underpayment of 2.15 million employees who received some superannuation guarantee from their employer; and,
- \$800 million in superannuation guarantee not paid to 300,000 employees in the cash economy (based on a report by Tria Investment Partners for CBus.)

Further, the report suggested up to \$1 billion in superannuation guarantee liabilities for 360,000 employees is met by employers using employee salary sacrifice contributions.

The ISA's initial estimate of underpayment used a publically available 'two per cent sample file' of ATO data from personal income tax returns and superannuation funds for 2013-14. It used wage information from individuals' tax returns and employer contributions data report by superannuation funds to estimate unpaid superannuation guarantee. It excluded individuals who did not receive any superannuation contributions from its calculations to avoid double counting when adding its estimates to the Tria cash economy estimate.

In March 2017, in a supplementary submission to the Senate Committee inquiry into superannuation guarantee non-payment, ISA published a revised estimate of non-compliance based on all employees in the ATO sample file, including those who did not have any employer contributions reported. The revised estimate of the dollar value of underpayment was \$5.6 billion. The revised estimate of the number of employees affected was 2.76 million.

While the methodology used by the ISA is broadly appropriate given the limitations in the available data, the Working Group believes ISA's estimates, particularly the revised estimates from March 2017, are likely to significantly overstate the number of people affected by superannuation guarantee non-compliance, and the dollar value of the underpayment.

This is because the ISA's estimates do not fully account for data limitations which would lead to overestimates of unpaid superannuation guarantee. The estimates are also inconsistent with observations concerning known non-compliance from the ATO's compliance program.

## ISA methodology

ISA estimated unpaid superannuation guarantee using the following methodology:

- examines individuals aged 20 and over, with more than 10 per cent of their income from salary and wages; and, no income from partnerships and trusts (as a proxy for self-employment);
- factors in rules affecting superannuation guarantee payments including: the superannuation guarantee minimum wage (\$450 per month); the maximum superannuation guarantee contributions base (\$48,040 per quarter in 2013-14); and accounts for salary sacrifice contributions;
- adjusts the salary reported on the tax return using a gender-based average to remove some remuneration which is not included in ordinary time earnings, such as overtime; and
- assumes that unpaid superannuation guarantee is equal to the difference between: 8.5 per cent of the adjusted salary; and the actual superannuation guarantee payment reported by funds.
  - While the statutory superannuation guarantee rate in 2013-14 was 9.25 per cent, ISA uses the 8.5 per cent figure to account for data reliability issues and remuneration that is not part of the SG base.

The ISA used a similar methodology to estimate the extent to which employers satisfy their superannuation guarantee obligations by including their employees' salary sacrifice contributions.

## ISA estimates do not fully account for data limitations

The administrative data collected by the ATO does not currently allow accurate calculation either of people's superannuation guarantee entitlements or the amounts they actually receive. Any estimate of superannuation guarantee non-compliance based on incomplete data will necessarily be dependent on assumptions. Because of this, there are reasons to be wary of the point estimates of unpaid superannuation guarantee produced by ISA.

Any unpaid superannuation guarantee estimate using the imperfect data available at an individual level will likely falsely show some people as being underpaid and some people

being overpaid. A balanced approach would make allowance for overpayments of superannuation guarantee. However, the ISA methodology simply sums up the number of individuals flagged as underpaid and their total apparent shortfall without an offsetting reduction for overpayments. This is likely to mean there is an upward bias with the estimate of the number of people underpaid, and the dollar value of the shortfall.

While ISA makes allowances for some of the underlying data issues, these allowances are likely to be too small. The following shortcomings are likely to have resulted in ISA substantially overestimating unpaid superannuation guarantee: failure to account for individuals in defined benefit schemes, the adjustment of wages to account for overtime, data limitations that prevent reliable splitting of employer contributions into superannuation guarantee and salary sacrifice, and timing mismatches in the data.

### **Defined benefit pensions**

Some employers offer employees the option of membership in a defined benefit superannuation scheme. Rather than contributing to and accumulating a balance of superannuation for use in retirement, defined benefit schemes pay specified income stream in retirement based on a number of factors, including years of service and final salary.

In these schemes, employers do not make contributions direct to members' accounts. However, an actuarial certificate is required to specify a member's annual 'notional contribution'. For the purposes of meeting an employer's superannuation guarantee obligations, the notional contribution must be at least the employee's minimum superannuation guarantee contribution level.

The value of notional contributions is reported to the ATO by superannuation funds in annual Member Contribution Statements. This information is reported separately from the employer contributions to regular accumulation accounts.<sup>40</sup> Employer contributions to accumulation schemes are included in the publically available ATO sample file, and this is the value ISA has used to calculate its superannuation guarantee gap estimates. However, notional defined benefit contributions are not included in this value.

The sample file does not identify individuals who are members of defined benefit schemes, and ISA does not include any control for these individuals in its analysis. As such, its approach will likely identify a shortfall for employees who are participating in defined benefit schemes.

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<sup>40</sup> Contributions to accumulation accounts are included in label 43: employer-contributed amount, while notional contributions to defined benefit schemes are included at label 45: defined benefit contributions.

Using the complete ATO data from 2013-14 Member Contribution Statements, Treasury has been able to replicate the ISA's superannuation guarantee methodology and results, and examine the extent to which members of defined benefit schemes affect its estimates.

Under the methodology used for ISA's initial December estimate, there were around 260,000 members of defined benefit schemes that also had employer contributions to an accumulation scheme flagged as having a shortfall.<sup>41</sup> These individuals contributed around \$900 million of the total \$2.8 billion shortfall identified in the report. The total notional employer contributions recorded for these employees were around \$1.6 billion; well above the apparent shortfall for these employees in ISA's approach.

Including all individuals with salary and wages regardless of whether they received any employer contributions, as ISA did in its revised March estimate; there are around 520,000 members of defined benefit schemes flagged as having a shortfall. These individuals contributed around \$2.5 billion of the total \$5.6 billion shortfall identified. Total notional employer contributions recorded for these employees were \$3.7 billion; again exceeding the shortfall identified for these employees by ISA.

### **Insufficient data on ordinary time earnings**

Employees receive superannuation guarantee based on their ordinary time earnings. Ordinary time earnings are not presently reported to the ATO. Individuals and employers simply report total wages. As outlined above, ordinary time earnings are lower than total wages as they exclude certain types of remuneration such as bonuses, overtime and termination payments related to unused annual leave.

To estimate ordinary time earnings, the ISA Report makes an average reduction to total wages (for example, about five per cent for men). This adjustment is not big enough. This is especially the case for workers who receive a large share of their income in overtime (for example, men whose overtime exceeds five per cent of their total wage).

The Australian Bureau of Statistics (ABS) Survey of Income and Housing separately identifies ordinary time earnings and total wages. This can be used to guide estimates of the level of superannuation guarantee that people should receive given their wages.<sup>42</sup>

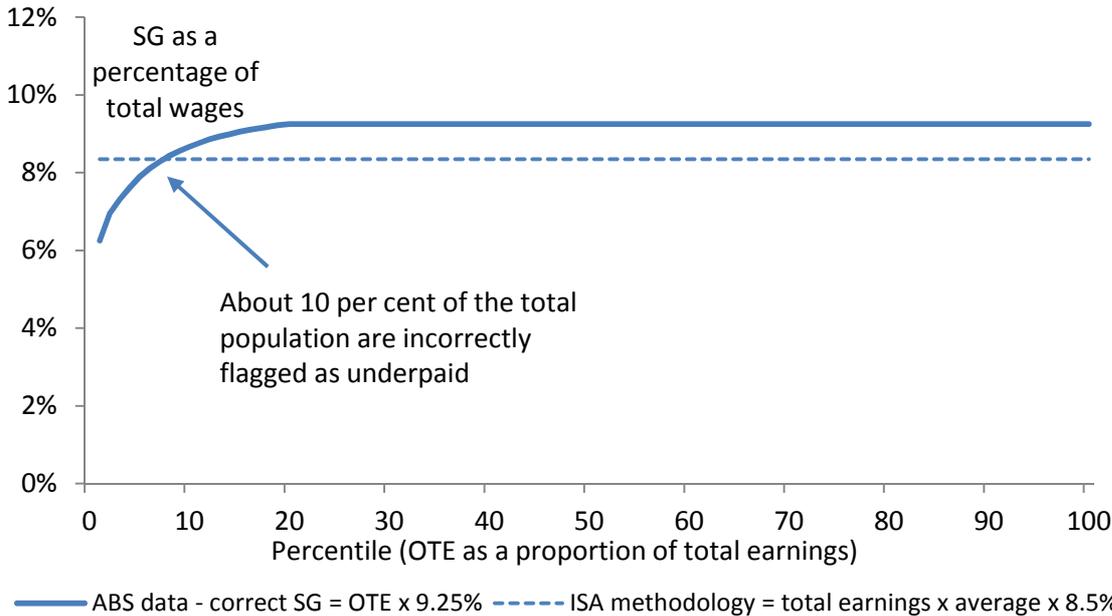
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<sup>41</sup> Individuals may have employer accumulation contributions in addition to their notional contributions if they are members of a hybrid scheme, or are separately choosing to salary sacrifice into an accumulation account.

<sup>42</sup> The ABS survey does not capture superannuation guarantee contributions and therefore cannot be used to estimate superannuation guarantee compliance. Also as a confidential survey of around only 14,000 households, the Survey of Income and Housing cannot drive the ATO's compliance and enforcement program.

Treasury has used ABS data on total wages and ordinary time earnings to construct estimates of the distribution of superannuation guarantee as a proportion of total wages assuming full compliance. This is shown as the solid line in Figure 1 below. It shows that overtime and other payments are only significant for around 20 per cent of the population, but can make up a large share of these people’s incomes. So if an aggregate adjustment is made to the observed data (the 8.5 per cent dashed line represents the ISA methodology) around 10 per cent of the workforce (about one million workers) would be incorrectly flagged as underpaid. These are those for whom the solid line is below the dashed line in the chart.

**Figure 1: Correct Superannuation Guarantee versus ISA methodology**



This misidentification also overstates the total value of unpaid superannuation guarantee, though to a smaller magnitude. This reflects the fact that the estimated underpayment of superannuation guarantee (the distance between the dashed line and the solid line in the chart) will be small for many of the apparently ‘underpaid’ workers.

**Timing of data collections**

A further issue with the ISA methodology is that there is a mismatch in the timing of payment of wages and superannuation contributions. The ISA Report does not account well for the timing mismatch. As a result, it overestimates the number of people with unpaid superannuation guarantee.

A mismatch in timing of payments occurs as employers are legally allowed to pay their employees’ superannuation contributions with a one quarter lag to wages. In the ATO data files for a given year, wages data reflect actual wages paid that year and superannuation

contributions reflect actual contributions paid that year. This means that the superannuation contributions in the data do not necessarily relate to the same wage bill.

Figure 2 demonstrates this issue in more detail. For example, an individual was unemployed in 2012-13 but starts a job earning \$40,000 a year (or \$10,000 a quarter) in 2013-14. Their employer pays the correct superannuation guarantee contributions of \$925 a quarter into the employee's account in the following month. ATO data for 2013-14 will show wages of \$40,000 and superannuation guarantee payments of only \$2,775 in 2013-14. Using the ISA methodology, the apparent superannuation guarantee rate is 6.9 per cent and the individual would appear to have been underpaid superannuation guarantee. Yet in this example the employer is legally making superannuation guarantee contributions in the following quarter and the employee was actually paid \$3,700 at the statutory superannuation guarantee rate of 9.25 per cent.<sup>43</sup>

**Figure 2: Timing of actual superannuation guarantee payments**

	2012-13 financial year: unemployed				2013-14 financial year: earning \$10,000 a quarter				
Salary earned	\$0	\$0	\$0	\$0	\$10,000	\$10,000	\$10,000	\$10,000	Income = \$40,000
SG earned	\$0	\$0	\$0	\$0	\$925	\$925	\$925	\$925	SG earned = \$3,700
Contribution made to fund	\$0	\$0	\$0	\$0	\$0	\$925	\$925	\$925	SG paid = \$2,775

Contribution made in following quarter

**Apparent SG rate = \$2,775/\$40,000 = 6.9%**  
**Actual SG rate = \$3,700/\$40,000 = 9.25%**

Timing mismatches are likely to result in an overstatement of non-compliance for a large proportion of new entrants to the workforce and all people returning to work after a break. As with the ordinary time earnings issue, this issue has a much smaller impact on the aggregate estimate of unpaid superannuation guarantee than the defined benefits issue.

### Errors in self-reported data

The ISA analysis of unpaid superannuation guarantee relies on self-reported data in individuals' tax returns which can have data entry errors.

<sup>43</sup> Note the ISA's report uses data for 2013-14 where the statutory rate of superannuation guarantee was 9.25 per cent (it has been 9.5 per cent from 1 July 2014).

An examination of the unit record tax return, PAYG withholding and member contributions statement data suggests some individuals mistakenly enter all employer contributions – superannuation guarantee plus salary sacrifice contributions – instead of just their salary sacrifice contributions at the '*Reportable employer superannuation contributions*' label in the tax return. This error does not affect taxable income and can have limited impact on tax liabilities for the lodger. However, using the ISA's methodology it could lead to an underestimate of the true amount of superannuation guarantee paid to the employee, and biases upwards ISA's estimate of the extent to which employers are using salary sacrifice to cover their superannuation guarantee obligations.

Reported salary sacrifice contributions in tax returns are about \$300 million larger than in PAYG withholding statements in 2013-14. Further, around 250,000 individuals reported salary sacrifice amounts in their tax return that exceeded the total employer superannuation received for the 2013-14 tax year.

Assuming the \$300 million in salary sacrificed contributions reported in tax returns but not in employer payment summaries is entirely due to data entry errors of this type, ISA would overestimate the extent to which employers are using salary sacrifice to meet their superannuation guarantee obligations by the same amount.

For example, in the hypothetical case presented in the table below, the data leads to the amount of superannuation guarantee paid being underestimated by \$9,500. This would also lead to ISA overestimating the extent to which employers are using salary sacrifice to cover their superannuation guarantee obligations.

**Table : Example of errors in self-reported data affecting unpaid superannuation guarantee estimates**

		<b>Error in reporting</b>	<b>Correct reporting</b>
<b>Actual wages and contributions</b>			
(1)	Wage income – actual	\$90,000	
(2)	Superannuation Guarantee – actual	\$9,500	
(3)	Salary sacrifice contributions – actual	\$10,000	
(4)	Total employer contributions – actual	\$19,500	
<b>Self-reported wages and contributions</b>			
(5)	Wage income – reported on tax return	\$90,000	\$90,000
<b>(6)</b>	<b>Salary sacrifice – reported on tax return</b>	<b>\$19,500</b>	<b>\$10,000</b>
(7)	Employer contributions – MCS	\$19,500	\$19,500
<b>ISA estimates of unpaid superannuation guarantee</b>			
(8)	ISA – estimate of superannuation guarantee = (7) – (6)	\$0	\$9,500
(9)	ISA – unpaid superannuation guarantee = 9.5 per cent x (1) – (8)	\$9,500	\$0

## The ISA estimates are inconsistent with observations from the ATO’s compliance program

The problems above will affect both aggregate and distributional estimates. Inconsistencies between these estimates and the facts observed from ATO compliance highlight the error margins in the ISA approach.

There are three particular areas where the ISA estimates do not accord with external sources:

- they are inconsistent with the number of employee notification cases raised
- case data shows non-payment is more likely than underpayment
- ISA estimates do not match the compliance data on actual groups most significantly affected.

### **ISA estimates are inconsistent with the number of employee notification cases raised**

First, ISA estimates of the number of individuals with unpaid superannuation guarantee are substantially higher than the number of cases reported to the ATO each year. Reports of non-payment of superannuation guarantee from employees made to the ATO involve two per cent of total employers, while employers that are investigated by the ATO for non-compliance represent one per cent of the estimated 880,000 employers.

The ISA supplementary submission to the senate inquiry estimates that around 2.75 million employees have unpaid superannuation guarantee for the 2013-14 year compared to the around 20,000 reports of unpaid superannuation guarantee made to the ATO. While the Working Group accepts that some employees may have poor visibility of superannuation guarantee payments, if the ISA analysis is correct it would mean well under one in a hundred cases of unpaid superannuation guarantee is reported to the ATO. This would appear unlikely.

### **Case data shows non-payment is more likely than underpayment**

Second, ISA estimates of unpaid superannuation guarantee per employee are highly inconsistent with actual unpaid superannuation guarantee per employee raised through compliance activities.

ISA estimates suggest that the majority of instances of unpaid superannuation relate to underpayment, rather than non-payment. This is the opposite of the evidence from the ATO's compliance program. Using employee notification compliance data, the ATO found that employers were twice as likely to not to pay any superannuation guarantee than to not pay enough.

### **ISA estimates do not match actual groups affected**

Third, ISA's results do not match the groups predominantly affected by superannuation guarantee underpayment according to ATO compliance data. This data suggests that superannuation guarantee non-compliance is generally more prevalent amongst employers who are in the accommodation and food services, construction, manufacturing and retail trade industries.

While the ISA analysis in *Overdue: Time for action on unpaid super* identifies labourers and machinery operators as most likely to have unpaid superannuation guarantee, its estimates also find very high levels of unpaid superannuation guarantee among other occupations such as professionals and managers. The ISA analysis states that 20 per cent of both

professionals and managers have unpaid superannuation guarantee. There is little anecdotal evidence or evidence from ATO casework of systematic unpaid superannuation guarantee among these occupations.

In addition, ISA's analysis also indicated that a quarter of employees earning above \$80,000 have unpaid superannuation guarantee. Yet there is no evidence of systemic underpayment of superannuation guarantee among a group with higher incomes. High-income groups tend to have fewer issues with unpaid superannuation guarantee given relatively high levels of financial literacy and stronger wage bargaining power.

# Appendix E

## SuperStream

The Cooper Review in 2010 examined the performance of the superannuation system and proposed a number of recommendations for improvement. The Review examined the government, efficiency, structure and operation of the superannuation system. That review clearly laid out the case for change for streamlining the 'back office' of superannuation. It concluded that members' interests were not being served by widespread inefficiencies in the processing of employer contributions, amongst other things.

The Cooper recommendations were strongly embraced by government and industry and led to the SuperStream program in 2012. SuperStream has been one of the more significant reforms in the superannuation industry. The implementation cost of SuperStream has been significant and its pipeline of benefits is estimated at \$2.4 billion per year in members' savings. Total employer and superannuation fund benefits from SuperStream are estimated to soon reach over \$800 million per year. One of the most tangible indicators is the sharp rise in the volume of contributions being sent electronically.

In summary, the most significant changes for the member (that is, the employee) are:

- time savings and greater ease in rolling over and consolidating superannuation accounts
- stronger protection of retirement savings.

The most significant changes in the employer experience include:

- less processing time for completing contributions – an average of 70 per cent time saving and \$400 million in ongoing efficiencies to employers
- simplification for employers in sending contributions through a single channel – for example, in the case of a typical business with 60 employees eliminating previous interactions with up to 40 funds
- a reduction in re-work – with help in getting data right at source for employers.

While for superannuation funds the most significant changes have been:

- the transition to digital rather than manual transactions
- widespread automation of transitions with use of straight-through processing

- improved quality of key data holdings

SuperStream has been the catalyst for the development of new information and payments 'eco-system' supported by shared data and performance standards.

While it has produced many benefits for employers and funds, and gives the ATO increased visibility on payment flows, SuperStream was not designed to improve SG compliance.

For superannuation guarantee, SuperStream has simplified the way contributions are managed and made, reducing costs and time for funds and employers, and resulting in a more efficient superannuation system (which ultimately means benefits for members).

# Appendix F

## Single Touch Payroll

Single Touch Payroll, announced in December 2014, will simplify taxation and superannuation interactions for employers by aligning the reporting of PAYG withholding and superannuation guarantee with a business’s natural process of paying their employees. One of the benefits of Single Touch Payroll will be greater visibility and timeliness of superannuation guarantee obligation information.

Under Single Touch Payroll, the ATO will receive superannuation information from employers through payroll event reporting of the superannuation guarantee liability and notification of the actual superannuation guarantee payment by the employer when it is made to the employee’s fund. This will enable progressive monitoring and timely follow up by the ATO of an employee’s superannuation guarantee entitlement and contribution made by their employer.

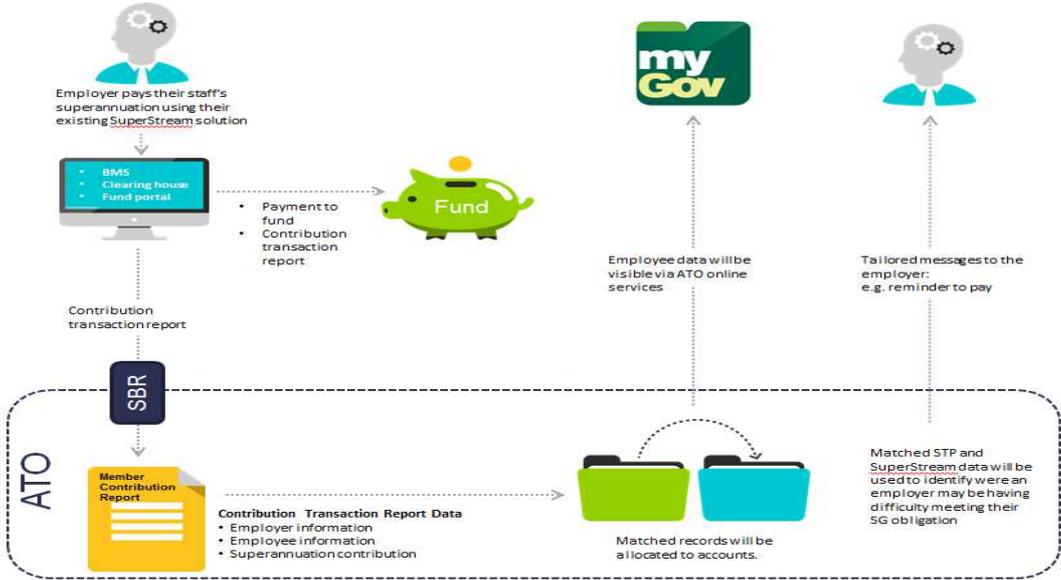
The reporting design is a three step process:

Step 1: As a part of an employer’s STP ‘payday’ report superannuation information will be provided to the ATO to calculate the employer’s SG obligation for each employee.

Step 2: When an employer pays their employees superannuation, this is reported to the ATO. The design is to intercept the SuperStream file at the most appropriate place in the chain e.g. where the file is created by a clearing house or a gateway.

Step 3: The two reports are matched utilising data analytics capability. Potential intervention identified where it appears that an employer has not met their SG obligations.

### How STP works



Use of Single Touch Payroll is mandated for businesses with 20 or more employees from 1 July 2018.

Single Touch Payroll is not mandatory for small businesses (19 employees or less). A pilot on the potential to extend it to small business is expected to be in a position to report interim findings to government in April 2017. Government will subsequently consider how and when small businesses will participate in Single Touch Payroll.

Under the current design, Single Touch Payroll will provide the transactional visibility that is currently missing, thereby enabling the regulator to assess compliance risks and undertake remedial action in a timely manner. In short, it will provide near to real time visibility of superannuation guarantee liabilities and payments at the employer and employee level without government involvement in the transaction.

# Appendix G

## Key related initiatives across government

The Commonwealth Government has established a number of multi-agency reviews and taskforces that focus on a broad range of topics, of which superannuation guarantee is one.

This Working Group has consulted with two current taskforces in particular that are examining behaviour identified as a risk to the superannuation guarantee system – the black (cash) economy and phoenix activity.

The behaviours that manifest in other areas impact compliance with superannuation guarantee obligations. For this reason, any overlap in recommendations from the Working Group is deliberate and seeks to reinforce the importance of particular actions or solutions to combat.

In examining the common characteristics and reasons for non-compliance it is important to have complementary approaches which focus on causes, behavioural change, early identification of risk and leverage existing and emerging technology.

Name	Purpose
Black Economy Taskforce	<p>The Taskforce will provide an overarching whole of government policy framework and detailed proposals for action to counter the black economy</p> <p>It will release a public consultation paper in April 2017 and submit a final report in October 2017.</p> <p>Black economy activities undermine the community's trust in the tax system by creating an unfair commercial environment which penalizes those businesses and individuals doing the right thing, facilitating the exploitation of foreign workers, undermining tax revenue and in the long term inflating welfare costs.</p> <p>The Working Group observed that the Taskforce is facing similar challenges, particularly because the behaviours of businesses that manifest in the black economy are similar to those in the superannuation guarantee system. For example the use of cash offers anonymity to people and whole-of-government strategies, including use of technology and data analytics, offers the ability to counter the risk.</p> <p>The superannuation guarantee Cross Agency Working Group acknowledges the risk the cash economy poses to the superannuation guarantee system and broadly supports the mitigation initiatives being</p>

developed by the Black Economy Taskforce. The cash economy risk has not otherwise been considered and the superannuation guarantee Cross Agency Working Group proposes to leave specific cash economy mitigation strategies for the Taskforce to develop.

Phoenix Taskforce	<p>The Phoenix Taskforce is a key component of the Australian Government's commitment to addressing phoenix activity. It was established to bring together government agencies to share intelligence, and identify, design and implement cross-agency strategies to reduce and deter phoenix activity.</p> <p>A number of phoenix related initiatives, although not strictly superannuation specific, have been discussed as a broad suite of potential legislative amendments that would, if legislated, directly or indirectly influence compliance in the superannuation guarantee system.</p>
Migrant Worker Taskforce	<p>The cross-agency Taskforce will identify further proposals for improvements in law, law enforcement and investigation, and other practical measures to more quickly identify and rectify cases of migrant worker exploitation.</p>
Transparency of tax debt	<p>Under this proposal the ATO will disclose to Credit Reporting Bureaus (CRBs) tax debt information of businesses that have not effectively engaged with the ATO to manage these debts. The purpose of this measure is to improve taxpayer compliance in meeting payment obligations. It will also better inform the credit decisions businesses make when dealing with their suppliers and customers.</p>

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# Appendix H

## Previous independent reviews

The Australian National Audit Office (in 2015) and the Inspector General of Taxation (in 2010) have reviewed aspects of the superannuation guarantee system and the ATO's administration, including its ability to identify non-compliance, its response to employee complaints and its deterrence and enforcement approaches.

The ANAO's performance audit and the Inspector General of Taxation's reviews made a series of recommendations and ultimately found that the superannuation guarantee system is working well and the ATO's administration is sound

## Australian National Audit Office

In 2015, the Australian National Audit Office conducted a performance audit into the ATO's promotion of compliance with superannuation guarantee obligations. The following four recommendations were accepted by the ATO:

- providing greater assurance of the level and nature of non-compliance
- encouraging compliance by increasing the emphasis in marketing activities on the ATO's role in enforcing superannuation guarantee obligations
- better aligning the compliance strategy with compliance activities of other areas in the ATO
- improving the ATO's evaluation of compliance effectiveness measures.

The Australian National Audit Office found that the work being undertaking to improve superannuation guarantee compliance complemented their recommendations. This included:

- applying differentiated treatments to employers based upon their compliance history so that those with a good compliance history or where genuine errors or oversights had been made received a 'light touch' approach
- defining the superannuation guarantee gap to better understand non-compliance and use this information to develop targeted strategies
- utilising data collected from a number of sources to inform a high risk industry strategy to target non-compliance more effectively amongst the repeat high risk employers/industries.

## Inspector General of Taxation

In 2010, the Inspector General of Taxation reviewed the ATO's administration of the superannuation guarantee charge. The Inspector General's recommendations covered the early identification of superannuation guarantee shortfall, the timely handling of employee complaints and the prompt collection of outstanding superannuation guarantee charge. The recommendations were directed to the ATO and to the Government.

In brief, the recommendations directed toward the ATO included:

- undertaking greater analysis to ascertain a more complete picture of non-compliance
- use of third party data sharing to allow real-time monitoring of high-risk employers
- improvement of employee communications in relation to employee complaints
- measuring the time it takes for an employee to receive their superannuation guarantee entitlement
- improving superannuation guarantee administration and performance reporting
- imposition of penalties at a more meaningful level
- improving risk identification to better target high risk employers.

A further recommendation to expand proactive superannuation guarantee audit work was not agreed to as the ATO had publicly committed to follow-up every employee complaint and had already allocated a high percentage of resources to proactive activities.