



Australian Government

# Cross Agency Superannuation Guarantee Working Group

**Interim Report**

January 2017

# Contents

<b>Executive Summary</b>	<b>3</b>
<b>1. Interim report</b>	<b>6</b>
Cross Agency Working Group	6
Scope	6
<b>2. Superannuation Guarantee System</b>	<b>7</b>
Superannuation Guarantee	7
Observations about non-compliance	7
Dealing with non-compliance	9
Systemic challenges and reforms	11
<b>3. Analysis of ISA's estimates</b>	<b>14</b>
ISA Report estimates of unpaid superannuation guarantee	14
ISA estimates do not fully account for data limitations	15
ISA estimates are inconsistent with more reliable data	20
<b>4. Analysis: ISA's recommendations</b>	<b>22</b>
<b>ISA Recommendation 1:</b> Requiring real time payment and reporting of superannuation guarantee payments and requiring superannuation guarantee contributions to be paid monthly	22
<b>ISA Recommendation 2:</b> Amending the <i>Superannuation Guarantee Administration Act 1992</i> (SGAA) so that employers cannot count salary sacrifice amounts towards compliance with their obligation to pay superannuation guarantee	25
<b>ISA Recommendation 3:</b> Facilitating collection of unpaid superannuation guarantee by superannuation funds directly	27
<b>ISA Recommendation 4:</b> Measuring and reporting on the extent of the problem	29
<b>ISA Recommendation 5:</b> Increase ability of regulators to recover unpaid superannuation guarantee	29
<b>ISA Recommendation 6:</b> Retaining and using strong penalties	32
<b>ISA Recommendation 7:</b> Extending the safety net for unpaid entitlements in the event of employer insolvency	33
<b>Appendix 1</b>	<b>36</b>
Terms of Reference	36
<b>Appendix 2</b>	<b>37</b>
Cross Agency Working Group Members	37

# Executive Summary

In December 2016 the Minister for Revenue and Financial Services requested that a Cross Agency Working Group be formed to report on the incidence and nature of non-compliance for superannuation guarantee.

The terms of reference for the Working Group sought advice on matters including: the 'fact base'; the characteristics of superannuation guarantee non-compliance; views on administrative options to improve compliance and possible policy and legislative options to address non-compliance. The Working Group has not consulted with industry or other stakeholders at this stage.

This interim report provides information on the operation of the superannuation guarantee system and observations on the characteristics and behaviours of those involved in the non-payment of superannuation guarantee. This report also provides comments on the policy recommendations raised in the report by Industry Super Australia (ISA) and CBUS titled *Overdue: Time for Action on Unpaid Super* ('the ISA Report') released in December 2016. The final Working Group report will provide further information and specific advice across the full terms of reference.

The ISA Report stated that around 2.1 million Australians missed out on \$2.8 billion of superannuation a year.<sup>1</sup> While of course noting the individual concern this information raises, it does need to be considered in the context of \$85.7 billion superannuation payments paid by approximately 880,000 employers on behalf of 11.7 million employees in 2014-15.<sup>2</sup> If taken at face value, the ISA estimates imply that compliance with the superannuation guarantee system amounts to over 96 per cent of total contributions made into the superannuation system 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.

Our preliminary analysis suggests that the ISA Report, by not properly accounting for limitations in the data used, is likely to have significantly overestimated the number of Australians affected by employers not paying their superannuation guarantee entitlements. In

---

<sup>1</sup> The ISA Report estimates that there is superannuation guarantee underpayment of \$2.4 billion with a further \$0.8 billion identified in the CBUS commissioned report by Tria Investment Partners which included the cash economy.

<sup>2</sup> June 2015 (reissued August 2016) APRA annual superannuation bulletins (includes contributions to SMSFs and salary sacrifice).

particular, modelling contained in this interim report highlights that around 10 per cent of the workforce, that is one million workers, would be incorrectly flagged as underpaid. The dollar value of unpaid superannuation guarantee contributions is also likely to be overestimated.

ISA's estimates of the extent to which employers are meeting obligations through salary sacrifice amounts are affected by the same problems and are not evidenced in ATO data. ISA's views are framed around an ethical position, though such employer behaviour is not excluded under the current superannuation law. However there may be value in clarifying the policy intent and the application of the law.

By and large, the current superannuation guarantee reporting system is based on employee and employer relationships and related reporting obligations. The largest employee data set the ATO receives on superannuation contributions is provided through an annual statement from an employee's superannuation fund. This Member Contribution Statement reports on employee contributions for the previous financial year. The current reporting arrangements do have an impact on the visibility and monitoring of patterns of any non-payment of superannuation guarantee due to data limitations and the annual receipt of data.

The ATO is committed to estimating a 'gap' for superannuation guarantee to assist in monitoring, over time, the effectiveness of its compliance programs, as part of its broader analysis of gaps across the taxation system. However, the absence of a specific estimate has not affected the ATO undertaking ongoing compliance action. This is evidenced by the approximately \$2 billion that has been transferred to employees' superannuation funds since 2010-11 as a result of ATO actions. A range of compliance actions are also taken to collect outstanding superannuation guarantee payments however, the incidence of insolvency is a significant barrier to debt collection. Indeed some 50 per cent of all superannuation debt owed to the ATO is subject to insolvency, compared to 19 per cent across other ATO debts.

The ISA Report makes a wide range of recommendations, some of which overlap, require more clarification or further work. However, the Working Group notes that to enable the better identification of non-compliance at the individual level requires more accurate and timely reporting of key information to assist the earlier identification of non-payment. Increasing reporting obligations would increase compliance costs and would need to be more fully examined. While the introduction of Single Touch Payroll will achieve a greatly enhanced visibility and reporting of payments, any expansion would need to be considered in light of the impost on small business. There is currently a pilot evaluation being conducted by the ATO with small businesses due to report interim findings in April 2017.

The ISA Report recommends making employers pay superannuation guarantee payments monthly. While this would align more closely with wage entitlements, this may provide only

limited compliance improvements as cash flow for small business remains a significant reason given for the non-payment of employees superannuation contributions.

The ISA Report has made a number of recommendations to expand enforcement responsibilities for superannuation guarantee contributions beyond the ATO. Each of these recommendations raises a number of issues to do with the effectiveness and feasibility of duplicating the ATO's compliance and enforcement role. While increased resourcing may enable the ATO to do more proactive compliance work and enhance data analytical approaches to predict likely non-compliance, the current reporting and data collection mechanisms make it difficult to identify employers who are not paying their employees superannuation contributions.

Strong deterrents and penalties are an important part of any compliance system. There are concerns, however, that the current Superannuation Guarantee Charge (SG Charge) and penalty regime may prevent some employers from coming forward and addressing non-compliance at an early stage. A more holistic and differentiated approach to recognise the individual circumstances of employers and to apply deterrents could therefore be explored. Consideration could also be given to strengthening legislative aspects of the current Director Penalty Notice regime which may assist the ATO recover unpaid superannuation guarantee by being able to take action earlier to secure outstanding debts and assets.

Extending the Fair Entitlements Guarantee to cover superannuation guarantee payments, as suggested by the ISA, would involve significant fiscal costs and raises a range of policy issues. Careful consideration would need to be given to any expansion of the Fair Entitlements Guarantee arrangements.

The Cross Agency Working Group will provide a full report to Government in March 2017 following further examination of the issues raised in this report and in accordance with the terms of reference.

**James O'Halloran**

Deputy Commissioner, Superannuation, Australian Taxation Office

Chair of the Cross Agency Working Group on Superannuation Guarantee

# 1. Interim report

## Cross Agency Working Group

- 1.1 The Minister for Revenue and Financial Services established a Cross Agency Working Group in December 2016 to bring together key federal agencies to consider and develop options to address superannuation guarantee non-compliance.
- 1.2 Terms of reference were agreed to and cover data analysis and administrative and policy options (see **Appendix 1**).
- 1.3 Member agencies that have substantially contributed to and supported the preparation of this report are:
  - Australian Taxation Office
  - Treasury
  - Department of Employment
  - Australian Securities and Investment Commission
  - Australian Prudential Regulation Authority.
- 1.4 Members of the Working Group are listed at **Appendix 2**.

## Scope

- 1.5 The Working Group has examined the analysis, commentary and policy recommendations raised in the report by Industry Super Australia (ISA) and CBUS titled *Overdue: Time for Action on Unpaid Super* ('the ISA Report') released in December 2016.
- 1.6 This interim report does not include any specific recommendations from the Working Group.
- 1.7 The Working Group will provide a final report on its terms of reference in March 2017.

## 2. Superannuation Guarantee System

### Superannuation Guarantee

- 2.1. The superannuation framework obliges employers to contribute 9.5 per cent of the 'ordinary time earnings' (OTE) of their eligible employees as a superannuation contribution. In general, OTE is salary and wages paid less bonuses, overtime and termination payments related to unused annual leave.
- 2.2. Where employers fail to pay compulsory superannuation contributions on time they are liable to pay the SG Charge. They do this by lodging a SG Charge statement which effectively informs the ATO that the employer has not met their obligations.
- 2.3. The SG Charge is the mechanism to require employers to pay superannuation guarantee contributions direct to an employee's superannuation fund. The SG Charge is a deterrent for employers not paying superannuation guarantee as it is not tax deductible and includes additional administration fees.
- 2.4. If employers do not voluntarily comply with the obligation to lodge a SG Charge statement, the ATO can raise a default assessment. This can trigger significant penalties (up to 200 per cent of the SG Charge).

### Observations about non-compliance

#### Employer characteristics and behaviours

- 2.5. The ATO collects data from its case work – responding to unpaid superannuation and from ATO-initiated cases.
- 2.6. ATO compliance data indicates there are a range of reasons that employers do not meet their superannuation guarantee obligations. Cash flow and poor record keeping account for the majority of non-compliance, with 70 per cent of ATO compliance cases related to cash flow issues and 20 per cent to poor record keeping.
- 2.7. In cases where cash flow was cited as the reason for non-compliance, this generally leads to employers not paying at all (rather than under-paying).
- 2.8. Although ATO data suggests that employers have a very high level of awareness of their obligation to pay superannuation guarantee, some employers do cite a lack of understanding or misunderstanding of their obligations as reason for non-payment.

2.9. Superannuation guarantee non-compliance is generally more prevalent amongst employers who:

- run small businesses (four employees or less), with 97 per cent of reports of unpaid superannuation guarantee made to the ATO being in respect of small business employers
- are directors of their own companies, who may prefer to retain cash in their business rather than pay themselves superannuation guarantee or may be unaware that they are required to pay
- are in the accommodation and food services, construction, manufacturing and retail trade industries
- operate businesses where a large number of cash transactions and contracting arrangements occur
- do not prioritise superannuation guarantee payment, but tend to pay or catch up once contacted by an employee or the ATO
- engage in phoenix behaviour or intentionally disregard their obligations.

2.10. Employer behaviour can also be influenced by their employee's attitude to superannuation.

## Employee characteristics and behaviours

2.11. The ATO's dealings with employees (and ex-employees) who raise concerns about non-compliance shows that some:

- are uncertain as to their status as a worker (that is, whether they are a contractor or an employee)
- appear to have accepted cash in lieu of superannuation guarantee contributions
- do not actively monitor their payslips or superannuation fund account balance
- are concerned with their job security and so delay reporting their employer to the ATO until after cessation of employment.<sup>3</sup>

---

<sup>3</sup> ATO compliance data shows around 70 per cent of people who report non-compliance to the ATO are ex-employees.

2.12. These factors can contribute to the employee either not notifying the ATO where they suspect they have not been paid superannuation guarantee, or not doing so in a timely way.

## Dealing with non-compliance

2.13. The ATO is supportive of employers who do the right thing and is also committed to dealing with those intentionally and dishonestly choose to avoid their superannuation guarantee obligations.

2.14. There are two main ways the ATO addresses non-compliance by employers:

- responding to reports of unpaid superannuation (or 'employee notifications')
- ATO initiated reviews and audit work.

2.15. The ATO is committed to securing employees' superannuation guarantee entitlements, reducing costs of compliance for employers and the incidence of subsequent non-compliance. The intensity of the ATO's interaction with an employer increases with the compliance risk.

## Reports of unpaid superannuation

2.16. The ATO receives reports from employees who believe they have not been paid the correct amount of superannuation guarantee. The number of reports has remained relatively stable since 2009-10 at around 19,000 a year.

2.17. Approximately 15,000 employers are subsequently investigated by the ATO each year. The 15,000 employers are approximately two per cent of an estimated 880,000 employers.

2.18. There is usually a considerable time between when a superannuation guarantee shortfall arises (i.e. from the due date for when an employer should have paid the superannuation guarantee) and when the employee lodges a report with the ATO. On average, reports are received about 23 months after the due date of the first period about which the notice is received, with most of these reports being made about 13 months after the due date.

2.19. In 30 per cent of these cases the ATO finds that the employers have in fact paid the required superannuation guarantee. In the remaining 70 per cent, a superannuation guarantee shortfall is found, representing approximately one per cent of Australian employers.

2.20. The ATO has improved the time it takes to finalise these cases, from 50 per cent within four months to 76 per cent in four months.

## ATO initiated superannuation guarantee cases

2.21. Another component of the ATO's compliance program is reviewing employers where the ATO suspects they have not met their superannuation guarantee obligation, even if there have been no employee complaints. ATO data is used to identify employers who, based on analysis of the data, are considered at high risk of not having met their obligations.

2.22. By comparing salary and wage data from individuals income tax returns with superannuation guarantee payments as reported by funds in Member Contribution Statements (MCS), a general assessment can be made as to whether an employee may have received the superannuation guarantee they were entitled to. This information is then aggregated to an employer level. This assessment is by no means definitive, but can highlight employers who have a higher probability of under paying superannuation guarantee.

2.23. The ATO refers to this as 'proactive' case work. It accounts for about 30 per cent of the ATO's compliance work.

2.24. The ATO's risk assessments and models used to identify employers for this part of the program show that is largely in the same industries as those where 'employee notifications' are generated from that the problems lie – accommodation and food services, construction, manufacturing and retail.

2.25. These ATO initiated cases identify non-payment of superannuation guarantee in 82 per cent of cases, and result in higher adjustments to the SG Charge with an average adjustment of \$68,000 per employer compared with \$25,000 resulting from employee notification cases.

2.26. The ATO has previously explored using a similar approach to the ISA (outlined below in section 3) to test whether observations at the individual level could improve compliance. Even with access to the complete data file, there is not sufficient client level information to construct a targeted audit program, without the risk of auditing in excess of 50 per cent of employers, who are likely to be compliant.

## Debt management and recovery

- 2.27. The ISA's report raised concerns that only 51 per cent of unpaid superannuation guarantee identified by the ATO is actually recovered for employees.
- 2.28. Employer insolvency is a major impediment to recovery. As at 30 June 2016, 52 per cent of the total SG Charge debt was on insolvent entities. This is much higher than for other tax debts to the ATO, of which only 19 per cent was on insolvent entities. Due to the lag in reporting non-payment of superannuation guarantee, insolvency is a significant issue in the recovery of SG Charge debt with \$113.2 million irrecoverable at law in 2015-16.<sup>4</sup>
- 2.29. Another barrier to recovery is superannuation guarantee debts being costly to pursue, largely reflecting their relatively small size. Only five per cent of cases were for amounts larger than \$100,000 and 75 per cent were for amounts less than \$15,000. 35 per cent of cases, about 8,000 employers, have a debt below \$2,500, with an average debt of \$273. To enable repayment, the ATO granted around 6,000 payment plans worth almost \$250 million for SG Charge debts in 2015-16.
- 2.30. The ATO's ability to issue Director Penalty Notices since June 2012 means that company directors can be made personally liable for unpaid superannuation guarantee amounts. In 2015-16 the ATO issued almost 900 Director Penalty Notices for over \$130 million in company SG Charge debt.

## Systemic challenges and reforms

### Data limitations for compliance

- 2.31. The design of the superannuation guarantee system – one with employees, employers and superannuation funds at its core, and where only non-compliant employers are required to report to the ATO – means that the ATO has limited timely data with which to monitor compliance.
- 2.32. Information about employer contributions comes through annual reporting from the employee's superannuation fund's MCS, received by the ATO in the October after the income year. These reports focus on members (i.e. employees), reporting the total

---

<sup>4</sup> Debts that are irrecoverable-at-law are mainly limited to circumstances associated with insolvency. The Tax Office has little control over write-offs in this category, which simply reflect the outcome of insolvency action.

superannuation contributions members receive. These reports do not consistently identify the employer who makes the superannuation guarantee contribution. This limitation reduces the ATO's abilities to identify employers who do not comply with their superannuation guarantee obligations. If an employee has multiple employers and there is a superannuation guarantee shortfall, the ATO cannot readily identify which employer is non-compliant at the end of the year. Similarly, this is an issue where employees have multiple superannuation fund accounts.

2.33. Salary or wage information for an individual can be obtained from an employee's income tax return or pay as you go (PAYG) withholding payment summaries. This does not include superannuation guarantee payment information and reports 'gross' payments (salary or wages), rather than 'OTE', which is the base upon which superannuation guarantee is paid.

2.34. Both sets of data have time lags and other limitations which impact the ATO's ability to accurately estimate the superannuation guarantee amounts that should have been paid and to identify employers who have underpaid. The issue of data visibility and timeliness has been highlighted in previous independent reviews since 2010 into the ATO's administration of superannuation guarantee, by both the Australian National Audit Office and the Inspector-General of Taxation.

### **ATO Tax 'gap' program**

2.35. The ISA called for government to investigate the estimates made in its report, including at an industry level. In 2014, the Commissioner of Taxation committed to estimating gaps for all taxes and programs the ATO administers.

2.36. The approach that the ATO is developing for estimating the superannuation guarantee gap differs from the approach used by the ISA. The ATO approach would give a 'top down' estimate of aggregate non-compliance. It would not be able to identify nor estimate the number of employees underpaid. It would not provide sufficient employee or employer-level information to construct a targeted audit or compliance program.

2.37. The ATO is currently considering the methodology for the superannuation guarantee gap, seeking as robust an estimate as possible. Based on advice from the ATO 'Tax

Gap' Expert Panel<sup>5</sup> steps are being taken to find ways to increase the confidence level in the approach.

## Reforms

### Single Touch Payroll

2.38. Visibility of superannuation guarantee compliance will be greatly improved with the implementation of Single Touch Payroll. Single Touch Payroll 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. Use of Single Touch Payroll is mandated for businesses with 20 or more employees from 1 July 2018.

2.39. 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.

### Taskforces

2.40. Two Taskforces may be of relevance to, and indirectly improve, superannuation guarantee non-compliance.

2.41. The Black Economy Taskforce, announced by the Government in December 2016, will submit a final report in October 2017 which will include an overarching whole of government policy framework and detailed proposals for action to counter the black economy.

2.42. 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.

---

<sup>5</sup> Members of the ATO's expert panel are Chris Richardson (Deloitte Access Economics), Professor Neil Warren (University of New South Wales), and Richard Highfield (former advisor to the Organisation for Economic Co-operation and Development and internationally recognised tax gap expert).

## 3. Analysis of ISA's estimates

### Key Points<sup>6</sup>

- Limitations in the underlying data mean that ISA's approach is likely to result in a significant overestimation of the number of people affected by superannuation guarantee underpayment. The dollar value of unpaid superannuation guarantee is also likely overestimated, though to a lesser extent.
- A range of ISA's results are inconsistent with facts observed from ATO compliance data. In particular, the ISA estimate of the extent to which employers are meeting superannuation guarantee obligations with salary sacrifice amounts is not substantiated.
- These inconsistencies suggest the ISA approach has a high error margin, reflecting its reliance on data poorly suited to measuring superannuation guarantee compliance.

### ISA Report estimates of unpaid superannuation guarantee

- 3.1. The main finding of the ISA analysis is that 2.15 million individual (or approximately 30 per cent of all employees) have unpaid superannuation guarantee totalling \$2.8 billion per annum.
- 3.2. The ISA estimate is in addition to estimates in the CBUS-commissioned report by Tria Investment Partners, *Superannuation Guarantee non-compliance*, which estimated that the cash economy reduces the superannuation guarantee payments of approximately 300,000 employees by a total of \$800 million per annum.
- 3.3. Further, the ISA Report suggests up to \$1 billion in superannuation guarantee for 360,000 employees is met by employers using employee salary sacrifice contributions.
- 3.4. The ISA Report uses a publically available 'two per cent sample file' of ATO data from personal income tax returns and superannuation funds for 2013-14. The report uses wage information from individuals' tax returns and employer contributions data report by superannuation funds to estimate unpaid superannuation guarantee.
- 3.5. While the methodology in the ISA Report is broadly appropriate, the ISA's estimates significantly overstate the number of people affected by unpaid superannuation guarantee. The ISA estimates:

---

<sup>6</sup> The main contributors to this chapter are the ATO and Treasury (on behalf of the Working Group).

- do not fully account for data limitations which would lead to overestimates of unpaid superannuation guarantee
- are inconsistent with some other reliable data sources, such as compliance data.

## ISA methodology

3.6. ISA estimates unpaid superannuation guarantee using the following methodology:

- examines individuals: with salary and wage income; with contributions from their employer; aged 20 and over; and, with no self-employment income
- 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 liable for superannuation guarantee, such as overtime
- 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
  - The statutory superannuation guarantee rate in 2013-14 is 9.25 per cent, but ISA uses the 8.5 per cent figure to account for data reliability issues and the remuneration which is not subject to superannuation guarantee.

3.7. The ISA Report also estimates the extent to which employers satisfy their superannuation guarantee obligations through counting their employees' salary sacrifice contributions using a similar methodology.

## ISA estimates do not fully account for data limitations

3.8. The methodology used by ISA to estimate unpaid superannuation guarantee would not produce an accurate estimate of unpaid superannuation guarantee. Imperfections in the data do not allow accurate calculation either of people's superannuation guarantee entitlements or the amounts they actually receive.

3.9. Any unpaid superannuation guarantee estimate using the imperfect data available at an individual level will 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 the estimate of the number of people underpaid, and the dollar value of the shortfall.

3.10. While ISA make allowances for some of the underlying data issues, these allowances are likely to be too small. Shortcomings likely to result in ISA substantially overestimating unpaid superannuation guarantee include: 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.

### **Insufficient data on Ordinary Time Earnings**

3.11. Employees receive superannuation guarantee based on their ordinary time earnings (OTE). However, there is no reporting of employees' OTE to the ATO; instead individuals and employers report total wages. As outlined above, OTE is lower than total wages as it excludes certain types of remuneration such as bonuses, overtime and termination payments related to unused annual leave.

3.12. To estimate OTE, 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, for men whose overtime exceeds five per cent of their total wage).

3.13. The Australian Bureau of Statistics (ABS) Survey of Income and Housing separately identifies OTE and total wages so can identify the level of superannuation guarantee that people should receive given their wages.<sup>7</sup>

3.14. To illustrate the extent of this overestimate, using this ABS data on total wages and OTE, Treasury has constructed 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

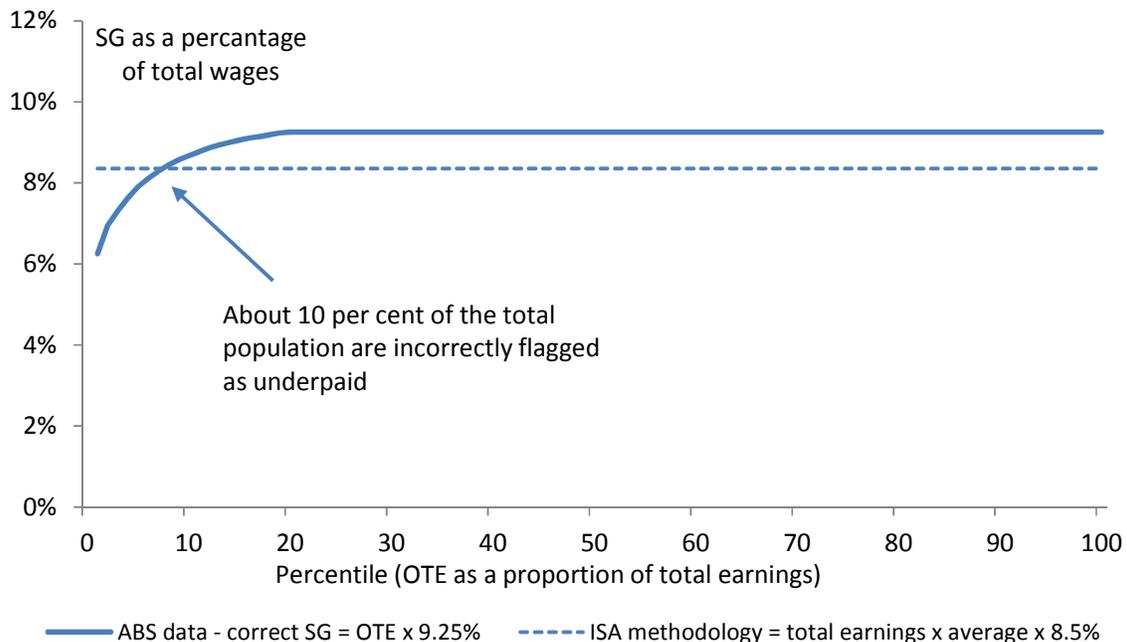
---

<sup>7</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.

(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.

3.15. 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.

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



### Timing of data collections

3.16. 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 so it overestimates the numbers of people with unpaid superannuation guarantee.

3.17. 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 relate to the same wage bill.

3.18. 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 employees 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 ISA methodology, the apparent superannuation guarantee rate is 6.9 per cent and the individual would appear to be have been unpaid 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>8</sup>

3.19. This issue probably incorrectly shows non-compliance for all new entrants to the workforce and all people returning to work after a break. As such, it leads to an overestimate of people with unpaid superannuation guarantee. Similar to the OTE issue, this timing issue has a much smaller impact on the aggregate estimate of unpaid superannuation guarantee.

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

### Errors in self-reported data

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

3.21. For example, reported salary sacrifice contributions in tax returns are about \$300 million larger than in PAYG statements in 2013-14.

<sup>8</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).

- 3.22. An examination of the unit record tax return, PAYG 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.
- 3.23. For example, in the hypothetical case presented in Table 1 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.
- 3.24. Assuming the \$300 million excess in tax returns is entirely due to data entry errors of this type, ISA would overestimate the superannuation guarantee shortfall by the same amount. This is around 10 per cent of ISA’s total estimate of unpaid superannuation guarantee.

**Table 1: Example of errors in self-reported data affecting unpaid superannuation guarantee estimates**

		Error in reporting	Correct reporting
<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
(6)	<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 SG</b>			
(8)	ISA – estimate of SG = (7) – (6)	\$0	\$9,500
(9)	ISA – unpaid SG = 9.5 per cent x (1) – (8)	\$9,500	\$0

## ISA estimates are inconsistent with more reliable data

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

3.26. There are three particular examples where the ISA estimates do not accord with external sources:

- ISA estimates 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

3.27. 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.

3.28. The ISA Report estimates that 2.15 million employees have unpaid superannuation guarantee for the 2013-14 year compared to the around 19,000-20,000 reports of unpaid superannuation guarantee made to the ATO. If the ISA analysis is correct that would mean just one in a hundred cases of unpaid superannuation guarantee is reported to the ATO, which would appear unlikely.

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

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

3.30. ISA estimates that the average amount of unpaid superannuation is about \$1,300, mainly relating to small underpayments for many individuals. Using employee

notification compliance data, the ATO found that employers were twice more likely not to pay any superannuation guarantee than not pay enough.

## ISA estimates do not match actual groups affected

- 3.31. Third, ISA results do not match the groups predominantly affected by superannuation guarantee underpayment according to ATO compliance data superannuation guarantee non-compliance is generally more prevalent amongst employers who are in the accommodation and food services, construction, manufacturing and retail trade industries.
- 3.32. While the ISA analysis does identify labourers and machinery operators are the most likely to have unpaid superannuation guarantee, their 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.
- 3.33. In addition, the ISA Report also states 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.

## 4. Analysis: ISA's recommendations

4.1. The ISA Report lists policy responses to address superannuation guarantee non-compliance. These are:

1. requiring real time payment and reporting of superannuation guarantee payments and requiring superannuation guarantee contributions to be paid monthly
2. amending the *Superannuation Guarantee Administration Act 1992* so that employers cannot count salary sacrifice amounts towards compliance with their obligation to pay superannuation guarantee
3. facilitating collection of unpaid superannuation guarantee by superannuation funds directly
4. measuring and reporting on the extent of the problem
5. increase ability of regulators to recover unpaid superannuation guarantee
6. retaining and using strong penalties
7. extending the safety net for unpaid entitlements in the event of employer insolvency.

4.2. The analysis below considers these recommendations individually. Further work, together with targeted consultation, should be undertaken to consider these and other options in the context of a coherent package to improve compliance with the superannuation system.

### ISA Recommendation 1: Requiring real time payment and reporting of superannuation guarantee payments and requiring superannuation guarantee contributions to be paid monthly

Key Points
<ul style="list-style-type: none"><li>• As superannuation guarantee non-compliance is not readily observable by the ATO, employees or superannuation funds, mandating monthly superannuation guarantee payments may provide only limited compliance improvements. Increasing the frequency of superannuation guarantee payments could create cash flow issues for some business, particularly small business.</li><li>• Timelier reporting of superannuation data is critical for the ATO to better identify and respond to non-compliance. Single Touch Payroll will provide this data, depending on final decisions about coverage.</li><li>• Requiring payslip reporting is not a cost effective way to provide employees with more timely information.</li></ul>

- Requiring funds to report contributions data more regularly could improve visibility for employees and the ATO, but will impose additional compliance costs on funds.

## Increased superannuation guarantee payment frequency

- 4.3. The ISA Report proposes that employers be required to pay their employees' superannuation guarantee every month.
- 4.4. Currently, employers are required to make superannuation guarantee contributions quarterly (within 28 days after the end of the quarter). The ISA Report claims that this increases the risk of superannuation guarantee non-compliance because it can take many months before employees can identify unpaid superannuation guarantee.
- 4.5. Compared to when quarterly superannuation guarantee payments were mandated in 2002, there are far less technological barriers to monthly superannuation guarantee payments now, although requiring more frequent payments would increase compliance costs and require employers who use payroll software to update it.
- 4.6. The ATO has identified cash flow as the single biggest issue preventing employers from complying with their superannuation guarantee obligations. Mandating monthly superannuation guarantee payments could encourage businesses to manage their cash flows better, potentially improving compliance. Conversely, where firms face pressing cash flow issues they may become non-compliant sooner. As mandating monthly superannuation guarantee payments reduces the working capital available, business, particularly small business, is likely to strongly oppose this change.
- 4.7. This proposal may also have other flow-on effects on employers and the ATO. For instance, where an employer is non-compliant for one financial year, they would need to lodge twelve monthly SG Charge statements rather than just four quarterly statements, tripling the compliance burden.
- 4.8. Without changes to reporting requirements that improve the visibility of superannuation guarantee non-compliance, a change to require monthly superannuation guarantee payments would not assist the ATO detect non-compliance sooner. It may assist employees identify missing contributions faster but only if they are engaged.

## Real-time reporting of superannuation guarantee payments to the ATO

- 4.9. The ISA Report argues for real-time superannuation guarantee payment reporting to the ATO to improve visibility of superannuation guarantee non-compliance and, thereby, reduce incidence.
- 4.10. The ATO has limited visibility of whether employers are meeting their superannuation guarantee obligations, as discussed above.
- 4.11. Through Single Touch Payroll, 'substantial' employers will provide data on real-time wages (including ordinary times earnings) and actual superannuation contributions to the ATO. Real time visibility of superannuation guarantee liabilities and payments will enable the ATO to better monitor superannuation guarantee shortfalls at the employer and employee level and engage early before non-compliance becomes entrenched.
- 4.12. Improving superannuation guarantee reporting is critical to the ATO's ability to monitor superannuation guarantee compliance. Extending Single Touch Payroll such that all businesses must use it would be the most effective approach to better identifying superannuation guarantee non-compliance. While it would be highly beneficial to require small businesses to comply with Single Touch Payroll from a superannuation guarantee compliance perspective, this needs to be balanced against the compliance costs for employers. A pilot on the potential to extend Single Touch Payroll to small business is expected to report interim findings to government in April 2017. Government will subsequently consider how and when small business will participate in Single Touch Payroll.
- 4.13. An alternative to Single Touch Payroll (employer to ATO), would be more regular reports (monthly or quarterly) from funds to the ATO on superannuation payments. While this would represent an improvement on the status quo, this reporting would not include the superannuation guarantee amounts from payroll, nor data that would help determine the liability (such as ordinary time earnings), and it would impose additional compliance costs on funds.

## More accurate payslip information

- 4.14. The ISA Report proposes that employers be required to report actual superannuation guarantee amounts paid on payslips so that employees can more easily monitor whether superannuation guarantee is being paid. Currently, payslips are required to

include either the actual superannuation contribution amount paid during the pay period or the amount that is payable by the employer.

- 4.15. The ISA proposal reflects concerns that employees have limited visibility over superannuation guarantee payment. Currently, individuals can only detect underpayment by either looking at their fund's annual statement or by directly checking with their fund more frequently (for example, through an online portal), though few employees are sufficiently engaged to do so.
- 4.16. There is a risk that changing the payslip reporting arrangements may confuse or mislead employees. Under current quarterly payment requirements, and with implementation of the ISA recommendation, compliant employers would report on payslips a positive figure the four times a year payments are made and zero otherwise. Requiring payslip reporting would only make a difference if superannuation payments were aligned with payslip issuance.
- 4.17. The compliance costs of this proposal would involve updating payroll software for all employers.
- 4.18. An alternative to the ISA proposal may be requiring funds to notify members whether or not they have received a payment in a quarter.<sup>9</sup> This measure was proposed in 2012 but not proceeded with. Using payment information held by funds may be more reliable than relying on employer data, though any such proposal would need to consider compliance costs for funds.

## **ISA Recommendation 2: Amending the *Superannuation Guarantee Administration Act 1992* (SGAA) so that employers cannot count salary sacrifice amounts towards compliance with their obligation to pay superannuation guarantee**

<b>Key Points</b>
<ul style="list-style-type: none"><li>• A small number of employers are using their employees' salary sacrifice arrangements to satisfy their superannuation guarantee obligation. ATO compliance data does not indicate the practice is widespread.</li></ul>



---

<sup>9</sup> Currently, funds are only required to contact members yearly to provide an annual statement, and employees can be unaware that their employer has not made superannuation contributions for up to eighteen months due to time lags. The detail in the annual statement might not be sufficient to identify which employer has failed to pay (if the employee has multiple employers).

- Some employers also calculate their superannuation guarantee obligation on the lower, post salary sacrifice, earnings.
- Both problems can be resolved with straightforward legislation that would address anomalies.

## Using salary sacrifice arrangements to satisfy superannuation guarantee obligations

4.19. Under the SGAA, all employer contributions (including salary sacrifice contributions) currently serve to satisfy the employer's superannuation guarantee obligation. 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 employee salary sacrificed \$9,500 or more. There is no clear policy rationale for this, and it is largely an artefact of salary sacrifice not being in widespread use in 1992 when the SGAA was drafted.

4.20. Furthermore, the Australian Government Solicitor has provided advice that the practice of employers using their employees' salary sacrifice money to satisfy their own superannuation guarantee obligation is likely to contravene the *Fair Work Act 2009* (the Fair Work Act). The Fair Work Act 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, if they directly or indirectly benefit the employer and are unreasonable in the circumstances. An employer in breach of the Fair Work Act is exposed to civil penalties. However, relying solely on enforcement of this interpretation by the Fair Work Ombudsman (FWO) is unlikely to be particularly effective as in practice; it does not have the specialist expertise to deal with complex superannuation matters.<sup>10</sup>

4.21. The ISA Report suggests this issue costs employees \$1 billion a year. However, this is likely to be a very large overestimate. While the ATO's superannuation guarantee compliance program does not specifically target salary sacrifice arrangements, available evidence suggests that the practice is not widespread. 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.

---

<sup>10</sup> The Fair Work Ombudsman (FWO) has a limited jurisdiction under the *Fair Work Act 2009* (FW Act) relating to superannuation entitlements, which is confined to providing advice about, and enforcing compliance with: terms of modern awards and enterprise agreements which require employers to make superannuation contributions by reference to or in 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*

4.22. Recent superannuation reforms may reduce the practice as salary sacrifice arrangements will no longer be the only way employees can make concessional contributions. From 1 July 2017, individuals will be able to claim a deduction for personal superannuation contributions (where certain conditions are met), removing the need for them to salary sacrifice through their employer.

4.23. This issue could be addressed by amending the SGAA to preclude the use of contributions made under salary sacrifice arrangements to satisfy the employer's superannuation guarantee obligation. This amendment would mean that the SG Charge would not be reduced if superannuation guarantee contributions come from salary sacrifice amounts.

### Reducing the superannuation guarantee base

4.24. Though not raised in the ISA Report, salary sacrifice also reduces the base on which superannuation guarantee contributions are calculated. In the example above in paragraph 4.19, salary sacrifice reduces the superannuation guarantee base to \$90,500 and the required superannuation guarantee contribution to \$8,598. Complaints to the ATO and Treasury show that this practice occurs, albeit in small numbers. If legislative changes were made to remedy the primary issue (the use of sacrificed amounts to satisfy an employer's superannuation guarantee obligation), it would be straightforward to extend this to address this base issue simultaneously.

4.25. Essentially, both practices are inconsistent with the policy intention of the tax concession which is to encourage employees to save for their retirement, and resolving these issues would reduce uncertainty and improve alignment between the SGAA and Fair Work Act.

## ISA Recommendation 3: Facilitating collection of unpaid superannuation guarantee by superannuation funds directly

Key Points
<ul style="list-style-type: none"><li>Funds do not have sufficient information to identify, monitor and recover unpaid superannuation guarantee.</li><li>However, funds may be well-placed to provide information to the ATO if employer contributions become irregular or cease.</li></ul>

- 4.26. The ISA Report asserts that superannuation funds are best placed to recover unpaid superannuation guarantee on behalf of their members but do not currently have a mechanism for doing so. Some industry funds have contractual agreements with employers that enable them to recover unpaid superannuation. The proposal suggests that all funds should adopt an enforcement role, though it is not clear from the ISA report how this would operate in practice or who would ultimately bear the cost of collection activities.
- 4.27. Mandating superannuation guarantee enforcement by superannuation funds is problematic because the SG Charge is a tax debt to the Commonwealth. 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.<sup>11</sup>
- 4.28. Further, as superannuation funds do not know their member's ordinary time earnings (OTE), they do not know whether or how much superannuation guarantee an employer should contribute. Without this information, funds' attempts at collection of unpaid superannuation guarantee would be inefficient and fraught with error. Alternatively, requiring employers to provide funds this information would raise serious privacy concerns and increase the regulatory burden on employers.
- 4.29. The ISA position reflects the fact that funds are the first to become aware when employers have not made payments. 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. Currently, the ATO receives very few referrals of this nature from superannuation funds.
- 4.30. Further work is needed to examine this recommendation further, considering what, if any, obligations are appropriate to give to funds and the compliance costs they involve. It is likely such a proposal would be opposed by a number of funds, particularly from the retail sector.

---

<sup>11</sup> Additional note: some superannuation funds will pay closer attention to the payment of superannuation guarantee as the funds' insurance offerings are connected to whether the member is (or is not) with a particular employer, but this is not universal.

## ISA Recommendation 4: Measuring and reporting on the extent of the problem

### Key Points

- The ATO is committed to developing its 'top down' estimate of the superannuation guarantee 'gap'. It is working with a panel of experts to improve its credibility and reliability to ensure it contributes constructively to public discourse.

4.31. The ISA Report recommends improved measuring and reporting on the extent of superannuation guarantee non-compliance. Measurement and public reporting of unpaid superannuation guarantee would increase transparency, arguably contributing constructively to public discourse.

4.32. As noted throughout this report, currently the ATO only collects reliable data on total wages and not OTE; the earnings on which superannuation guarantee is payable. Improved reporting on unpaid superannuation guarantee would require more comprehensive data collection than is currently available.

4.33. Information about the ATO's Tax Gap Research Program can be found above. Such 'top down' estimates of aggregate superannuation guarantee non-compliance do not directly contribute to a compliance program. The ATO already conducts extensive data and risk analysis for this purpose.

## ISA Recommendation 5: Increase ability of regulators to recover unpaid superannuation guarantee

### Key Points

- The ATO has around 500 staff working on superannuation guarantee compliance. Increased ATO staffing would need to be considered in parallel with systemic changes (such as timeliness of data and collection mechanisms).
- Many superannuation guarantee debts are not collected as they are irrecoverable due to insolvency or highly costly to pursue.
- Expanding the role of the FWO in superannuation guarantee compliance could duplicate work conducted by the ATO. For example, providing the FWO with equivalent powers as the ATO's Director's Penalty Notices will not address superannuation guarantee non-compliance. Instead, enhancing certain aspects of the Director Penalty Notice regime may better assist the ATO with proactively identifying and recovering unpaid superannuation guarantee.

4.34. The ISA Report called for an increase in the ability of regulators to recover unpaid superannuation guarantee. The roles of the ATO and FWO have been considered below.

## ATO-initiated compliance

4.35. The ISA Report recommends allocating significant resources to recovering unpaid superannuation guarantee regardless of whether an employee lodges a complaint.

4.36. The ATO could take further steps to identify and recovering unpaid superannuation guarantee by:

- increasing the number of employers investigated
- investing in the ATO's IT systems and data matching
- increasing investment in debt recovery activities.

4.37. Doing so would require additional resources.

4.38. Currently, data limitations discussed in Recommendation 1 reduce the effectiveness of such resource investments. Also, by allocating more resources to its self-initiated case work, the ATO will go deeper into the 'case pool' and this will mean lower adjustments to the SG Charge per case.

## Collecting unpaid superannuation guarantee

4.39. The ISA Report also raises concern that only 51 per cent of debts identified by the ATO result in payment of superannuation guarantee.

4.40. The ATO's approach to debt management as outlined earlier identifies two critical challenges to its ability to collect outstanding superannuation guarantee:

- the economic viability of collecting relatively small debts
- the high instances of insolvency.

4.41. The ATO could consider reallocating existing debt collection resources to recover SG Charge debts, however, without additional resources this would be at the expense of recovering much larger (tax) debts.

4.42. Given the high level of insolvency in this area more work needs to be done to consider improvements to the recovery of SG Charge.

- 4.43. One area of potential change is enhancing the Commissioner's current powers which require a taxpayer to provide a bond/security where the Commissioner perceives an SG Charge liability is at risk of not being paid.
- 4.44. Another area is to consider enhancing certain operational aspects of the Director Penalty Notice regime (which holds directors personally liable for their company's unpaid superannuation guarantee).

## Empowering the FWO to recover unpaid superannuation guarantee

- 4.45. The ISA Report recommends empowering the FWO to recover unpaid superannuation guarantee.
- 4.46. 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.
- 4.47. Complaints about superannuation payable under a modern award and enterprise agreement are a very small proportion 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. 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.
- 4.48. By empowering the FWO to recover unpaid superannuation guarantee, employees would be able to raise concerns with all unpaid work related entitlements via the same agency.
- 4.49. The FWO is not in receipt of sufficient information to be an effective enforcement agency for unpaid superannuation guarantee. The FWO responds to complaints made by employees by gathering payment information from both the employee and the employer. The FWO does not have its own information on payments to an employee and therefore has limited ability to proactively monitor superannuation guarantee compliance.

4.50. The FWO would require additional funding and access to information for any expanded superannuation compliance role.

## ISA Recommendation 6: Retaining and using strong penalties

Key Points
<ul style="list-style-type: none"><li>The current SG Charge and penalty regime may prevent employers from coming forward. Consequently, a more holistic and differentiated approach to the implications of superannuation guarantee non-compliance for an employer should be explored.</li></ul>

### Penalties to promote compliance

4.51. The ISA Report opposes the changes to right size the penalty regime in the superannuation guarantee legislation in the Treasury Legislation Amendment (Repeal Day) Bill 2016.<sup>12</sup>

4.52. The presence and imposition of strong penalties is an important aspect of dissuading employers who choose not to comply and encouraging willing participation.

4.53. Currently, where an employer is non-compliant with their SG obligations the consequences are that:

- they are subject to the SG Charge (including an interest component, administrative component and a shortfall based on salary or wages rather than ordinary time earnings)
- they lose tax deductibility of certain amounts (late payments and SG Charge are both non-deductible in contrast to superannuation guarantee payments)
- the employer may be subject to a penalty of up to 200 per cent of the SG Charge.

4.54. Based on anecdotal evidence, the current SG Charge and penalty system may discourage some employers from voluntarily disclosing errors and undertaking self-correction.

---

<sup>12</sup> The Repeal Day Bill changes were to:

- align the earnings base for calculating the SG charge (currently salary or wages) with the earnings base for calculating superannuation guarantee contributions (ordinary time earnings)
- align the nominal interest on unpaid or late superannuation guarantee contributions with the period over which they are actually outstanding, and
- align the penalties imposed under the SG charge regime (potentially up to 200 per cent of the liability) with the tax admin penalties (up to 75 per cent of the liability).

4.55. A differentiated compliance approach where employer behaviour is appropriately taken into account may help to improve superannuation guarantee compliance compared to a uniform approach. For example, this would treat recalcitrant employers more harshly than those employers who accidentally did the wrong thing and came forward.

4.56. More work needs to be undertaken to increase the effectiveness of penalties and sanctions to improve employer compliance with superannuation guarantee obligations.

## Director Penalty Notices

4.57. The ISA's sixth recommendation noted that the FWO be given equivalent powers as those of the ATO. Potential changes to the Director Penalty Notice regime are discussed in the above section.

## ISA Recommendation 7: Extending the safety net for unpaid entitlements in the event of employer insolvency

Key Points
<ul style="list-style-type: none"><li>• There are significant costs and risks associated with the expansion of the Fair Entitlements Guarantee (FEG) to include unpaid superannuation guarantee contributions.</li><li>• Extending FEG may exacerbate the existing moral hazard in FEG, creating a disincentive for employers to meet their superannuation obligations and rely on FEG to meet entitlements.</li></ul>

4.58. The ISA Report recommends extending the Government funded safety net for unpaid entitlements in the event of employer insolvency to include superannuation contributions owing by the employer.

4.59. 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.

4.60. 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 which have operated since 2000. 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.

4.61. 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.

4.62. 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. However, this could incentivise employers in financial difficulty to not make provision to pay superannuation guarantee contributions and would come at a significant cost to Government.

4.63. FEG already acts as a disincentive for employers in financial distress to set aside employee entitlements. This is because the employer knows the unpaid entitlements will be met by the Government in the event of their insolvency. Expanding the entitlements covered by FEG would further incentivise employers to not make provisions for superannuation guarantee obligations and increased a reliance on FEG. It may also increase the risk of businesses trading while insolvent.

4.64. A substantial increase in Administered Funding and departmental resources would be required to expand FEG as proposed in the ISA Report. 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 (this figure could be reduced by capping the amount of unpaid superannuation guarantee contributions recoverable under FEG).<sup>13</sup>

4.65. With the continued rollout of Single Touch Payroll, the estimated figures for the expansion of FEG may be overstated. This is because the ATO will have more real-time data, enabling them to intervene early with any superannuation guarantee underpayments, reducing the need for FEG claims.

---

<sup>13</sup> Based on this modelling, this would represent approximately a 70 per cent expansion of FEG funding. The increased cost would be driven by a nearly 50 per cent increase in the number of FEG applications. This is based on the Australian Securities and Investments Commission's insolvency data which demonstrate significantly more insolvent entities have unpaid superannuation than other unpaid employment entitlements. To process the additional applications and quantify superannuation guarantee liabilities owed by insolvent employers, additional departmental staff would be required at an estimated cost of around \$45 million.

- 4.66. The ISA recommendation would increase the complexity of administering FEG, potentially slowing down the approval process (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.
- 4.67. Legislative changes to include superannuation in the FEG would create significant complexity in managing overlap between the ATO's ongoing role to enforce SG Charge compliance and FEG's role as a creditor in liquidation or bankruptcy once payments are made.

# Appendix 1

## 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:

- a. The extent of non-compliance amongst insolvent employers,
- b. 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:

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

### Term of Reference 1

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

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

# Appendix 2

## Cross Agency Working Group Members

<b>Agency</b>	<b>Members</b>
Australian Taxation Office	<b>James O'Halloran, Chair</b> Deputy Commissioner, Superannuation <b>Debbie Rawlings</b> Assistant Commissioner, Superannuation
Department of the Treasury	<b>Jenny Wilkinson</b> Division Head, Retirement Income Policy Division <b>Robb Preston</b> Manager, Retirement Income Policy Division
Department of Employment	<b>David Denney</b> Branch Manager, Workplace Relations Economic Strategy
Australian Prudential Regulation Authority	<b>Sacha Vidler</b> Head (acting), Industry Team
Australian Securities and Investment Commission	<b>Gerard Fitzpatrick</b> Senior Executive Leader, Investment Managers and Superannuation

