



**Australian Government**  
**Inspector-General of Taxation**

# Inquiry into Superannuation Guarantee non-payment

A submission to the Senate  
Economics References Committee

Inspector-General of Taxation

February 2017



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# 1. INTRODUCTION

1.1 The Inspector-General of Taxation (IGT) welcomes the opportunity to make a submission to the Senate Economics References Committee's (the Committee) *Inquiry into the impact of non-payment of the Superannuation Guarantee* (Inquiry).

1.2 The Superannuation Guarantee (SG) system is one of the key components of Australia's retirement income policy and complements the age pension and voluntary superannuation contributions. It relies upon the effective interaction and information flows between employers, employees and superannuation funds who all have a role to play.

1.3 In this tripartite relationship, employers are required to make SG payments into their employees' complying superannuation fund, which is generally 9.5 per cent of employees' ordinary time earnings.<sup>1</sup> The ATO is largely on the periphery of these interactions and only intervenes where the SG system has not operated as intended.

1.4 The IGT has previously examined a number of aspects of the SG system in his role as an independent scrutineer of the administration of the tax and superannuation systems. Scrutineers, such as the IGT, play a critical role in identifying required improvements through their dual role of complaint handling and conducting broader reviews. The complaints handling function provides real-time insight into emerging issues and provides a 'health check' on the way tax and superannuation systems are being administered.<sup>2</sup> Broader reviews allow a more in-depth analysis of problems or challenges that are being faced and exploration of potential solutions with a view to delivering improvements.

1.5 The IGT completed a *Review into the ATO's administration of the Superannuation Guarantee Charge* (2010 SGC Review)<sup>3</sup> in March 2010. The Superannuation Guarantee Charge (SGC) is a charge paid by employers where there has been insufficient SG payment. The SG system was found to work well for the majority of Australians. However, employees most at risk in the SG system were amongst the most vulnerable in our society and were the least empowered to seek redress.

1.6 Seven recommendations were made by the IGT which were aimed at better supporting the underlying SG policy intent and improving compliance with relevant obligations through greater detection and deterrence mechanisms. The Government and the ATO have implemented a number of these recommendations and it has resulted in some alleviation of the difficulties faced.

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<sup>1</sup> Australian Taxation Office (ATO), *Super Guarantee* (14 December 2016) <<https://www.ato.gov.au>>.

<sup>2</sup> *Inspector-General of Taxation Act 2003*.

<sup>3</sup> Inspector-General of Taxation (IGT), *Review into the ATO's administration of the Superannuation Guarantee Charge* (2010).

1.7 The IGT has also recently completed a *Review into the ATO's employer obligations compliance activities*<sup>4</sup> which included examination of opportunities to reduce employers' costs in complying with SG obligations whilst improving voluntary compliance with those obligations. The report of this review is yet to be released by the Minister and its content cannot be discussed until it is publicly released. The Committee may wish to consider the recommendations in both of the above IGT reviews as part of the Inquiry.

1.8 Challenges still exist in the administration of the SG system as evidenced by ongoing complaints that the IGT receives in this regard. The majority of these complaints are raised by employees who have not been paid their SG entitlements and experience frustrations in recovering these amounts. Whilst the IGT believes that there are further improvement opportunities, such options should be examined against other considerations such as an increase in compliance cost for small businesses, superannuation funds and the ATO.

1.9 This submission explores some of the challenges and potential solutions whilst the above IGT reviews provide more detailed discussion and analysis.

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<sup>4</sup> IGT, *Review into the ATO's employer obligations compliance activities* (2016).

## 2. ECONOMIC IMPACT OF UNPAID SG

2.1 It is widely recognised that unpaid SG, if left undetected and not addressed, has adverse economic impacts on affected employees, businesses and government revenue in the long term. First, affected employees miss out on superannuation entitlements which may lower their standard of living in retirement and may increase their reliance on the age pension. Those most at risk are lower to middle income individuals, the very people who are most reliant upon compulsory superannuation contributions and less able to make voluntary contributions to supplement their retirement savings.<sup>5</sup>

2.2 Secondly, Government revenue in the form of tax may be lower due to superannuation funds' earnings being based on a lesser amount of SG payments having been made. There are also ATO costs in investigating and recovering unpaid SG. More importantly, in the long term, the Government will have to fund the retirement of those who do not have adequate retirement savings.<sup>6</sup> Effectively, future generations will have to bear such costs.

2.3 Thirdly, employers who do not pay SG entitlements may gain a competitive advantage over compliant employers as they may be able to profitably operate on lower overheads. An 'uneven playing field' is, hence, created which may lead to a domino effect in terms of propagating non-compliance. For example, if a business is not paying SG, similar businesses may be forced to follow suit to remain competitive.

2.4 Fourthly, the ATO has observed that in 70 per cent of cases where it investigated non-payment of SG entitlements, the reason for non-compliance was 'cash flow issues'.<sup>7</sup> Indeed, non-payment of SG entitlements is an indication of financial difficulties<sup>8</sup> that a business may be experiencing and may expose its creditors to financial risk of which they may be unaware.

2.5 There are difficulties in accurately quantifying the amount of unpaid SG without knowing the number of employees, their average weekly earnings, and whether SG contributions have actually been remitted to the employees' superannuation funds. As observed in the IGT's 2010 SGC Review,<sup>9</sup> ATO-reported figures of non-payment only relate to 'detected' non-compliance and do not include undetected amounts.<sup>10</sup> We note that the ATO is continuing its work to measure the SG gap but it has experienced some challenges with the integrity of the data and the non-inclusion of the cash economy.<sup>11</sup>

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<sup>5</sup> IGT, *SGC Review*, above n 3, pp 17-8.

<sup>6</sup> *Ibid.*

<sup>7</sup> ATO, Submission 6 to the Senate Economics References Committee, *Inquiry into the impact of the non-payment of the Superannuation Guarantee*, January 2017, p 13.

<sup>8</sup> IGT, *Debt collection* (2015) pp 68-73.

<sup>9</sup> IGT, *SGC Review*, above n 3, p 4.

<sup>10</sup> Commissioner of Taxation, *Annual Report 2015-16*, Vol 1 (October 2016) p 76.

<sup>11</sup> ATO, *Submission to unpaid SG Inquiry*, above n 7, p 11.



## 3. ACCURACY AND ADEQUACY OF DATA COLLECTED ON UNPAID SG

### INFORMATION AND DATA COLLECTED BY THE ATO ON SG NON-PAYMENT

3.1 It is important to note that employers are not required to report SG payments to the ATO. SG entitlements are not a 'tax' and only become recoverable by the ATO when an SGC is raised on the unpaid amounts. SGC is raised by the ATO if it proactively identifies non-compliance or if an employer voluntarily self-reports their non-compliance to the ATO.

3.2 To ascertain whether the correct amount of SG has been paid on a timely basis by an employer, the ATO must obtain information about the employment relationship, hours worked as well as any remittances to superannuation funds. Such information is not routinely obtained by the ATO and to do so with current technology may impose a disproportionate compliance burden on compliant employers.

3.3 It is also important to note that the longer the gap between non-payment and the ATO becoming aware of such non-payment, the more difficult it is to recover unpaid SG amounts. For example, the ATO has identified that due to the lag in reporting non-payment of superannuation contributions, insolvency is a significant issue in the recovery of SGC debts.<sup>12</sup>

3.4 One of the main sources of information used by the ATO to detect non-payment are Member Contribution Statements (MCS) which are submitted to the ATO by Australian Prudential Regulation Authority (APRA) regulated superannuation funds. However, as the lodgement date for MCS is 31 October each year, there may be significant delays, up to 15 months, before the data is received by the ATO, and even longer before it is ready for use in the ATO's risk assessment processes.<sup>13</sup>

3.5 The other main source of data used by the ATO is Pay As You Go Withholding (PAYGW) information<sup>14</sup> that employers provide in their activity statements and PAYGW annual reports. Where the risk of non-compliance with PAYGW obligations is identified, the ATO will also investigate whether other employer obligations such as SG have been met. Breaches of PAYGW obligations serves as an early indicator of non-compliance with SG. For example, if PAYGW non-compliance is due to an employee being incorrectly classified as a contractor, the employer may have also not complied with its SG obligations as the definition of

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<sup>12</sup> ATO, *Submission to unpaid SG Inquiry*, above n 7, p 33.

<sup>13</sup> *Ibid* p 8.

<sup>14</sup> *Ibid* p 9.

'employee' for SG purposes is an expanded definition of the employee definition for PAYGW purposes.<sup>15</sup>

3.6 In addition to information reported by superannuation funds and employers, the ATO receives relevant information from other government agencies such as the Fair Work Ombudsman.<sup>16</sup> While this information is reliable, there is often a significant passage of time between the employer not paying the SG entitlement and the relevant government agency completing their own investigation before that information is shared with the ATO.

3.7 The ATO also receives information voluntarily from superannuation funds in the form of proactive referrals.<sup>17</sup> Superannuation funds are a valuable source of data as they are the ultimate destination for SG data and payments. The ATO has acknowledged that such third party sources 'can provide timely information about potential underpayments' and the referrals complement 'other information held by the ATO or assist with cases already underway'.<sup>18</sup>

3.8 The Committee may wish to consider how third party sources, which provide the most reliable data, could be encouraged to provide more relevant and timely information to the ATO. Such encouragement may include the ATO's collaboration with trusted third parties, such as APRA or superannuation industry bodies. For example, they could issue joint letters to the trustees of superannuation funds, highlighting the importance of the provision of such information for maintaining the integrity of the system.

3.9 Alternatively, trustees of superannuation funds could be required to report suspected non-compliance to the ATO as part of their fiduciary duties to act in the best interest of their members.<sup>19</sup> A legislative change to this effect may positively influence the compliance of employers as well as addressing the potential reluctance of superannuation funds to provide such information voluntarily due to the negative impact it may have on their relationship with employers. However, such a legislative change would place an additional burden on superannuation funds and potentially expose more cases which the ATO may need to investigate. Accordingly, the Committee may wish to explore these factors in considering this option.

## **OTHER POTENTIAL DATA SOURCES**

3.10 In his 2010 SGC Review, the IGT had explored a number of options to improve the timeliness, accuracy and completeness of SG information provided to the ATO. One of the options was for the ATO to act as an SG clearing house for employers that fall into high risk categories. Since that review, the Government has established the Small Business Superannuation Clearing House (SBSCH),<sup>20</sup> which is operated by

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<sup>15</sup> ATO, *Income tax: Pay As You Go – withholding from payments to employees*, TR 2005/16 (2005); *Superannuation guarantee: who is an employee*, SGR 2005/1, 23 February 2005.

<sup>16</sup> ATO, *Submission to unpaid SG Inquiry*, above n 7, p 10.

<sup>17</sup> *Ibid* pp 9-10.

<sup>18</sup> *Ibid* p 10.

<sup>19</sup> *Superannuation Industry (Supervision) Act 1993*, s 52.

<sup>20</sup> The Commonwealth of Australia, 'Mid-Year Economic and Fiscal Outlook 2013-14' (December 2013) p 192.

the ATO and may be voluntarily used by employers with fewer than 20 employees or an aggregated turnover of \$2 million or less.<sup>21</sup>

3.11 Naturally, if all employers were required to use the ATO as a clearing house for SG payments, the ATO would have all the necessary information. However, the ATO would need significant additional resources to operate such a clearing house in addition to conducting compliance activities to recover identified underpayment of SG. It may be more realistic to limit the compulsory use of such a clearing house to employers in the higher risk categories. However, compliant employers in these categories may be unnecessarily exposed to increased costs because of the need to change systems that they already have in place.

3.12 The Committee may wish to consider the extent to which the ATO should act as a compulsory clearing house for employers or categories of employers in order to obtain timely information. A balance has to be struck so as not to impose disproportionate costs on the Government, in terms of additional ATO funding, and any additional burden on employers who are already compliant.

3.13 It should be noted that if the Government's recent initiative, Single Touch Payroll (STP), achieves its objective,<sup>22</sup> there may be a less critical need for a compulsory clearing house. Employers who are required to comply with STP will need to report PAYGW and SG information to the ATO every payroll cycle.<sup>23</sup> Importantly, STP would provide the ATO with greater access to the data needed to estimate employees' SG entitlements.

3.14 STP, in its current form, will apply to employers with 20 or more employees from 1 July 2018.<sup>24</sup> Due to the costs of adopting STP, employers with fewer than 20 employees are not required to use STP but may do so voluntarily.<sup>25</sup> However, by the end of the 2017 calendar year, the Government may decide to make the use of STP compulsory for such employers.<sup>26</sup>

3.15 As approximately 97 per cent of reported instances of unpaid SG are found in the small business market segment,<sup>27</sup> STP will have limited success in combatting non-payment of SG if it is not used by small or micro businesses. Accordingly, it would be beneficial to remove or reduce the barriers to the adoption of STP by small or micro businesses even before they may be required to do so. For example, the ATO could consider a no or low cost solution for these categories of employers or, in the case of those in remote areas, an alternative to direct digital access could be explored.

3.16 While STP data will provide the ATO with greater access to information about the payment of SG, it does not confirm amounts received by superannuation funds and the ATO will need to await payment information in the form of MCS before it can fully

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<sup>21</sup> ATO, *Small Business Superannuation Clearing House* (16 December 2016) <<https://www.ato.gov.au>>.

<sup>22</sup> The Treasury, *Regulation Impact Statement (RIS), Single Touch Payroll* (October 2015).

<sup>23</sup> ATO, *Simpler reporting with Single Touch Payroll* (1 December 2016) <<https://www.ato.gov.au>>.

<sup>24</sup> *Taxation Administration Act 1953* (TAA) sch 1 s 389-5.

<sup>25</sup> TAA sch 1 s 389-15.

<sup>26</sup> Treasury, *RIS, Single Touch Payroll*, above n 22, p 39.

<sup>27</sup> ATO, *Submission to unpaid SG Inquiry*, above n 7, p 27.

verify compliance. However, as mentioned earlier, there is significant time gap before such reconciliation can be conducted, increasing the risk of non-recovery of unpaid SG.

3.17 Another option would be for the ATO to leverage off SuperStream data that employers are already providing to superannuation funds. SuperStream was a Government initiative that requires all employers to conform to a standard electronic format when sending SG payments and data to superannuation funds. If the ATO could obtain SuperStream data directly from superannuation funds on a regular basis, it would be able to confirm whether correct SG payments were made on time. SuperStream data can also be used in conjunction with PAYGW data to estimate potential underpayment of SG.

## **COMPLAINTS FROM AFFECTED EMPLOYEES**

3.18 The key source of information used by the ATO to investigate SG non-compliance is complaints made by affected employees. Indeed, it triggers approximately 70 per cent of the ATO's compliance activities in this area.<sup>28</sup> However, such heavy reliance presents a number of challenges.

3.19 First, employees are not always aware of the non-payment of SG. Whilst this may be addressed by alerting employees to the non-payment at an earlier point in time so that follow up action can be taken,<sup>29</sup> it would also impose an additional compliance burden on employers, particularly small businesses.

3.20 Secondly, even if employees are alerted to the non-payment at an earlier point in time, they may not always take any action. The reason is that they are usually amongst the most vulnerable in our society and may be too afraid of potential repercussions such as loss of employment. This is evidenced by the fact that approximately 70 per cent of employees only notify the ATO of non-payment of their SG after the relevant employment has ended.<sup>30</sup> The result is that, generally, there is a significant time lag between the non-payment of SG and when the ATO is made aware of it, by which time the offending employer may no longer be a going concern and it may not be possible to recover any such amounts.

3.21 Thirdly, assuming that employees are promptly informed and are willing to take action, there are limited avenues for them to directly pursue the matter. Generally, they can inform the ATO who is empowered to take action. The question then becomes whether the law should change so that employees have better direct access to avenues of redress. However, this is also problematic as they often do not have the resources or funds to pursue the matter themselves.

3.22 Once again, there are multiple factors with no clear solution. The Committee may wish to explore these factors further in determining the appropriate way forward.

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<sup>28</sup> ATO, *Submission to unpaid SG Inquiry*, above n 7, p 23.

<sup>29</sup> IGT, *SGC Review*, above n 3, p 46.

<sup>30</sup> ATO, *Submission to unpaid SG Inquiry*, above n 7, p 26.

## 4. ROLE AND EFFECTIVENESS

### THE ATO'S MONITORING, INVESTIGATION AND RECOVERY OF UNPAID SG

4.1 The effectiveness of the ATO's ability to detect unpaid SG is very much dependent on the timeliness and reliability of data that it is able to obtain or is otherwise available to it. The challenges in this regard were explored in the previous section and potential solutions were outlined.

4.2 Turning to the ATO's investigation and recovery actions, over 70 per cent of them are in response to employee complaints as mentioned earlier and in previous IGT reviews.<sup>31</sup>

4.3 The ATO's responsiveness to employee complaints was examined in the IGT's 2010 SGC Review. It was found that there were improvements in the ATO's ability to meet their target of completing 50 per cent of their investigations within 4 months. This overall timeframe improved from 24 per cent in the 2007-08 financial year to 33 per cent in the 2008-09 financial year.<sup>32</sup> It was also found that the ATO was not able to meet its commitment to commence all employee complaint investigations within 28 days of being made aware of the non-compliance by the employee. In the 2008-09 financial year, the ATO was only able to commence their investigation within 28 days of being notified by the employee for 15 per cent of the complaints received.<sup>33</sup> The IGT had recommended improvements to the ATO's measurement of its performance in investigating and recovering SG, including a recommendation for the ATO to publicly report their results.<sup>34</sup> The ATO has since improved its overall responsiveness and is now completing 76 per cent of employee complaint investigations within 4 months.<sup>35</sup>

4.4 The remaining 30 per cent of the ATO compliance activities consist of those targeted at employers in industries or categories identified as high risk for SG purposes as well as those triggered by SG risk being uncovered during broader employer obligations audits or reviews.<sup>36</sup>

4.5 It is clear that the ATO heavily relies on employee complaints to uncover non-compliance with SG. However, as stated earlier such complaints are not typically made promptly and result in unpaid SG often not being recoverable. Accordingly, it is crucial that the ATO considers other proactive approaches in addressing SG risks at the earliest possible stage.

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<sup>31</sup> ATO, *Submission to unpaid SG Inquiry*, above n 7, p 23; IGT, *SGC Review*, above n 3, p 51.

<sup>32</sup> IGT, *SGC Review*, above n 3, p 66.

<sup>33</sup> *Ibid* p 63.

<sup>34</sup> *Ibid* pp 71-2.

<sup>35</sup> ATO, *Submission to unpaid SG Inquiry*, above n 7, p 27.

<sup>36</sup> *Ibid* pp 28-9.

4.6 One option would be to conduct more SG specific audits based on risks identified by the ATO's risk assessment mechanism. Alternatively, or in the absence of further risks being determined with sufficient certainty, random audits, as outlined in another IGT review<sup>37</sup>, could be considered. The ATO has previously rejected such an option.<sup>38</sup> Whilst carrying out random audits may expose some compliant employers to unnecessary compliance costs, these costs and inconveniences may be minimised by the manner in which the ATO conducts these audits. The IGT noted in a previous review that such costs may also be mitigated by the ATO reimbursing compliant taxpayers for any additional compliance cost incurred.<sup>39</sup> Furthermore, in light of the earlier discussion on the economic impact of unpaid SG, such costs and inconveniences should be weighed against the potential disadvantage that the very same compliant employers face if their competitors do not pay SG and remain undetected.

4.7 It should be noted that, in the long term, random audits may also lead to better targeting of non-compliant employers. Certain common characteristics of non-compliant employers may be exposed and they could be used to improve the ATO's current risk assessment tools. As the ATO's current risk assessment processes largely rely on reported data, these audits may be the only way that the most non-compliant employers can be detected. Furthermore, conducting random audits would allow the SG gap to be more accurately measured.

4.8 The Committee may wish to assess whether there are any other proactive compliance actions that the ATO should adopt including the use of deterrents, such as random audits, to detect non-compliance as well as curtailing its propagation along with whether compliant employers should be reimbursed for any resulting costs.

## **RESOURCES AND COORDINATION BETWEEN GOVERNMENT AGENCIES**

4.9 While the ATO is the agency tasked with the recovery of unpaid SG, other government agencies such as the Australian Securities and Investments Commission (ASIC) and APRA hold intelligence about the operations and viability of the stakeholders in the SG system. Improved coordination between government agencies would assist the detection of non-payment of SG. In that regard, the Government has established a new multi-agency working group in December 2016 to identify the drivers for non-compliance and policy options to ensure that the legislative framework allows regulators to effectively deal with SG non-compliance.<sup>40</sup>

4.10 Furthermore, the proposed legislative change to simplify the process by which ASIC shares information with the ATO<sup>41</sup> should also help in fostering timely exchange of information and enable respective agencies to address key risk areas, such as unpaid SG, as they arise.

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<sup>37</sup> IGT, *Review into aspects of the Australian Taxation Office's use of compliance risk assessment tools* (2013) pp 126, 145-7.

<sup>38</sup> IGT, *SGC Review*, above n 3, p 8.

<sup>39</sup> IGT, *Compliance risk assessment tools review*, above n 37, p 146.

<sup>40</sup> Kelly O'Dwyer, 'Government acting on Super Guarantee non-compliance' (Media release, 25 January 2017).

<sup>41</sup> Explanatory Memorandum, House of Representatives, Treasury Laws Amendment (2017 measures No.1) Bill 2017, p 16-7.

## **DETECTION AND RECOVERY OF UNPAID SG BY SUPERANNUATION FUNDS**

4.11 The IGT noted in his 2010 SGC Review that in addition to superannuation funds and employees referring potential non-compliance to the ATO, some superannuation funds play an active role in enforcing the payment of SG. For example, the Industry Funds Credit Control (IFCC), a body owned by a group of industry funds, actively manages arrears for a wide range of industry superannuation funds.<sup>42</sup> The IFCC is better placed to comment on their experience in recovering unpaid SG. The Committee may wish to examine their experience and consider whether superannuation funds should play a further role in recovering unpaid SG.

## **EMPLOYMENT AND CONTRACTING ARRANGEMENTS AND UNPAID SG**

4.12 As noted earlier, one of the contributing factors to non-compliance with SG is the misclassification of workers in employment or contracting arrangements. Where a worker is classified as an employee, the employer has the liability to pay SG amounts. This obligation does not extend to circumstances where the worker is classified as a contractor. There are inherent difficulties associated with the employee/contractor distinction which stems from its common law definition of 'employee' with no determinative factor. There are a number of factors which have to be considered relative to each other, making a determination very much reliant on the facts of each case.<sup>43</sup>

4.13 The above difficulties or uncertainty gives rise to potential misclassification of workers which may result in SG entitlements not being paid. The IGT believes that businesses and workers could benefit from further assistance to determine the status of workers at an early point in their relationship so that they are fully informed of their rights and obligations at the outset. In this regard, the existing ATO online tool, the Employee/Contractor Decision tool (ECD tool), which currently assists businesses to determine whether they have SG liability, could be expanded to allow use by workers as well. Such expansion, along with early promotion and integration with other ATO tools will better inform all parties of potential superannuation obligations and entitlements.

4.14 A higher degree of certainty can be provided to workers through a Voluntary Certification System (VCS). The ATO's current private binding advice and administratively binding advice framework is only available to businesses but not to workers.<sup>44</sup> The VCS would, in effect, be an extension of the existing ruling and advice framework but would be based on information provided independently by each party. Similar systems exist in the United States (US) and Canada where either the worker or

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<sup>42</sup> IGT, *SGC Review*, above n 3, p 43.

<sup>43</sup> ATO, *TR 2005/16*; *SGR 2005/1*, above n 15.

<sup>44</sup> ATO, *Provision of advice and guidance by the ATO*, *PS LA 2008/3*, 28 February 2008, para [190].

business may request a binding determination from the Internal Revenue Service<sup>45</sup> or the Canada Revenue Agency<sup>46</sup> respectively.

4.15 The VCS would be expected to overcome the inability of workers to obtain relevant binding advice on their status and for both parties to independently submit their facts for consideration. Similar to the expanded ECD tool, all parties could be encouraged to use it as soon as possible so that, from the outset, employers are clear when they have to pay the SG amounts and employees are aware of their entitlements.

4.16 The Committee may wish to consider the above options in deliberating on ways to provide employers and workers alike with more certainty as early as possible.

## **LEGISLATION AND PENALTIES TO ENSURE TIMELY AND FAIR PAYMENT OF SG**

4.17 The legislative framework imposes an automatic obligation for employers to lodge an SG statement and pay the SGC to the ATO where there has been a SG shortfall. Additional penalties may also apply.

4.18 In submissions to the IGT's 2010 SGC Review, stakeholders raised concerns that the ATO is significantly reducing failure to lodge penalties where an employer fails to lodge an SG Statement. Some believed that this indicates that the ATO does not treat SG non-compliance as strictly as it deals with tax obligations.<sup>47</sup> There are others who believed that the SGC and associated penalties, especially because of their non-deductibility, are disproportionate to the level of non-compliance<sup>48</sup> in question and may discourage employers from self-reporting any breaches.

4.19 The IGT had previously identified the need to strike a balance between the deterrent aspects of the SGC in discouraging non-compliance and appropriate consideration of the employer's circumstances.<sup>49</sup> In this regard, the ATO has recently adopted a differentiated approach to the imposition of the SGC and associated penalties.<sup>50</sup> In the absence of legislative change, this administrative approach aims to differentiate between employers who are generally compliant but unintentionally miss a payment and those who are consistently non-compliant.<sup>51</sup>

4.20 Furthermore, in January 2015, there were proposed changes to the *Superannuation Guarantee (Administration) Act 1992* (SGAA) to align the penalties under the SGAA with the administrative penalties under the TAA, as well as to amend the basis for calculating the SGC. These changes were intended to simplify and reduce the

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<sup>45</sup> Internal Revenue Service (IRS), *Independent Contractor (Self-Employed) or Employee?* (7 June 2016) <<https://www.irs.gov>>.

<sup>46</sup> Canada Revenue Agency (CRA), *RC4110 Employee or Self-employed?* (29 July 2016) p 6-10 <<http://www.cra-arc.gc.ca>>.

<sup>47</sup> IGT, *SGC Review*, above n 3, p 73.

<sup>48</sup> *Ibid* p 78.

<sup>49</sup> *Ibid* p 77.

<sup>50</sup> ATO, *Submission to unpaid SG Inquiry*, above n 7, p 25.

<sup>51</sup> ATO, *Super for employers - Our compliance approach* (28 October 2015) <[www.ato.gov.au](http://www.ato.gov.au)>.

harshness of the SGC for employers who pay their SG contributions late or in part. However, these changes lapsed on 17 April 2016 when Parliament was prorogued.<sup>52</sup>

4.21 The Committee may wish to consider whether the current legislative framework and/or ATO approach to the imposition of the SGC and penalties are adequate or should be revisited.

## **REMEDIES IN EVENT OF COMPANY COLLAPSE, INSOLVENCY AND LAST RESORT EMPLOYEE ENTITLEMENT SCHEMES**

4.22 Employees, who lose their jobs and are unable to recover their entitlements due to the liquidation or bankruptcy of their employer, can apply for financial assistance under the Government's General Employee Entitlements and Redundancy Scheme (GEERS) if the relevant events occurred before 5 December 2012 or under the Fair Entitlements Guarantee (FEG)<sup>53</sup> if they occurred thereafter.

4.23 While unpaid employee entitlements such as unpaid wages and leave entitlements are covered by GEERS or FEG, unpaid SG is specifically excluded. Accordingly, the IGT recommended, in his 2010 SGC Review, that the Government should consider expanding GEERS to cover unpaid SGC liabilities. The IGT noted that such an expansion would also allow the Government to quantify higher future age pension outlays and act as a driver for improvements in the SG system to minimise employers defaulting on their SG obligations.<sup>54</sup>

4.24 Another means of recovering unpaid SG amounts is the expansion of the Director Penalty Notices (DPN) regime to include unpaid SGC liabilities. The Government enacted this measure following the IGT's 2010 SGC Review<sup>55</sup> and it became effective from 29 June 2012.<sup>56</sup> Its implications are that if a company fails while owing superannuation to employees, directors of that company may become liable for any unpaid superannuation entitlements. The policy intent was to establish a deterrent against non-compliance, discouraging phoenix practices, and enhancing the ATO's ability to recover SGC debt even after a company has been wound up.<sup>57</sup>

4.25 The IGT had explained in his 2010 SGC Review that the expansion of both DPNs and GEERS to cover unpaid SGC is complementary. Where a company has not met their SG obligations, the ATO should have the ability to recover unpaid SGC amounts from the directors of the company personally. Only when the ATO has not been able to recover unpaid SGC liabilities from the company and the directors should GEERS, now FEG, cover unpaid SG.<sup>58</sup>

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<sup>52</sup> Parliament of Australia, *Treasury Legislation Amendment (Repeal Day 2015) Bill 2016*, (17 April 2016) <<http://parlinfo.aph.gov.au>>.

<sup>53</sup> *Fair Entitlements Guarantee Act 2012*

<sup>54</sup> IGT, *SGC Review*, above n 3, p 92.

<sup>55</sup> *Ibid* p 93.

<sup>56</sup> *Tax Laws Amendment (2012 Measures No. 2) Bill 2012*.

<sup>57</sup> Senate, Revised Explanatory Memorandum, *Tax Laws Amendment (2012 Measures No. 2) Bill 2012*, p 4.

<sup>58</sup> IGT, *SGC Review*, above n 3, p 93.

4.26 The Committee may wish to consider whether the scope of FEG should be extended to cover unpaid SG entitlements.

## **MEASURES TO IMPROVE COMPLIANCE WITH PAYMENT OF SG**

4.27 A robust detection and recovery framework should also be complemented with measures to improve voluntary compliance.

4.28 Education programs, aimed at raising awareness of employers and employees of their respective obligations and entitlements, are useful tools for fostering voluntary compliance. In particular, employers could be informed of how they may remedy any previous breaches. For example, they could be made aware of the ATO's differentiated compliance approach pursuant to which otherwise complaint taxpayers may not be as severely punished for missing a SG payment as mentioned earlier. The IGT notes that the ATO has published materials on its 'practical compliance approach'<sup>59</sup> although its further promotion would be desirable.

4.29 Another way to improve voluntary compliance is by reducing employers' cost of compliance which can act as a barrier to the fulfilment of their SG obligations. For example, the ATO could consider developing a capability for its SBSCH to receive electronic files such as Microsoft Excel and standardised files from commercial payroll software. By developing the capability to accept standardised files, it would remove the need for employers to manually input data quarterly for every employee as well as encourage the use of electronic record keeping which some employers, particularly small business, may not have already adopted.

4.30 The Committee may wish to consider the above examples in forming its views on improving and enhancing voluntary compliance.

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<sup>59</sup> ATO, *Super for employers - Our compliance approach* (28 October 2015) <[www.ato.gov.au](http://www.ato.gov.au)>.

## 5. APPROPRIATENESS OF RESPONSES

5.1 The ATO's performance in managing employee complaints has already been discussed. Concerns about unpaid SG have also been raised with the IGT since its inception and particularly during his 2010 SGC Review. Since the transfer of the tax complaints handling function to the IGT in May 2015, the IGT has been receiving formal complaints about unpaid SG from both employees and employers. Some of these complaints have been referred to the IGT by Members of Parliament and Senators.

5.2 A common theme in complaints received by the IGT about unpaid SG is that the employee experiences difficulties in getting specific details from the ATO about the progress of the investigation into their complaint, for example, the specific debt recovery action taken to recover the unpaid SG. However, secrecy and privacy laws prevent both the IGT and the ATO from disclosing details pertaining to the tax affairs of the employer to the affected employee. This often leads to frustration for the employee who feel they are left in the dark.

5.3 Whilst the IGT is not permitted to disclose specific details of the investigation to the employee, the IGT can and does examine the ATO's handling of the complaint. The IGT ensures and provides independent assurance to the employee that the ATO has investigated the complaint in accordance with relevant policies and procedures. Nevertheless, some affected employees would prefer more detailed information.

5.4 The Committee may wish to consider the right of the employer to privacy and the desire of the employees to be kept informed in seeking to determine an appropriate balance between these competing factors.



## 6. CONCLUSION

6.1 In summary, there seems to be no clear and simple solutions to address the problem of unpaid SG. This submission has sought to outline the challenges in the administration of SG and offer potential solutions for the Committee's consideration. However, each potential solution requires a balance to be struck between competing factors impacting the various parties involved.

6.2 Notwithstanding the challenges, the early detection and management of unpaid SG is an imperative in order to minimise its wide ranging and long term adverse impacts. The IGT would be pleased to offer further assistance should the Committee have additional lines of enquiry or would like details in relation to any of the matters raised above or in relevant IGT reviews.