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Superannuation guarantee contributions as a tax: the case for reincarnation over reform

Helen Anderson* and Tess Hardy**

Abstract

The superannuation guarantee charge, which aims to ensure that employers pay compulsory superannuation for their employees, is collected as a tax. This method of collection has advantages because it covers a range of workplaces and types of businesses, including where the workers are outside of the conventional notion of employment. However, despite this, unpaid superannuation guarantee obligations remain a significant concern for government, superannuation funds, trade unions and workers themselves. Attempts to improve recovery — both legislative and procedural — have arguably been tinkering around the edges of a fundamentally misconceptualised scheme. This article suggests an alternative approach which utilises the collection mechanisms of the Fair Work Act 2009 (Cth) and the worker-focused Fair Work Ombudsman as the primary agency overseeing superannuation collection. This would see superannuation recast as "deferred wages", recoverable in the same way as other employee entitlements. While a further referral of powers from the states to the federal government would be required — or perhaps a constitutional amendment — the article argues that reincarnating the superannuation guarantee in this way could significantly improve recovery for the benefit of workers.

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1. Introduction

Compulsory superannuation, enforceable as a tax, is largely based on perceived constitutional limitations and historical antecedents.[1] One significant advantage of characterising the superannuation guarantee (SG) as a tax is that it is binding on a range of businesses — largely regardless of their location or corporate status. The SG scheme is also ambitious in scope in that it covers a broad range of firms and workers that fall outside the conventional conceptions of employment. The constitutional underpinnings of the SG scheme, together with the extended definition of employer and employee, means that it has some important advantages over superannuation entitlements derived from the workplace relations system and governed by the machinery of the *Fair Work Act 2009* (Cth) (Fair Work Act). The constitutional scope of this latter statutory regime is more complicated, and the coverage provisions are more confined.

The Coalition Government has recently sought to confirm that the main aim of Australia's superannuation's system is to provide a retirement income as a substitute for, or supplement to, the aged pension.[2] Achieving this aim depends not only on coverage being as wide as possible, but also on compliance with legislative requirements being as high as possible. However, as a tax administered by the Australian Taxation Office (ATO), the superannuation guarantee suffers from some major shortcomings that serve to jeopardise the achievement of that aim. This is because of significant non-payment of superannuation and subsequent non-compliance with the superannuation guarantee charge (SGC).

There have been a number of recent investigations into superannuation non-compliance.[3] One of the latest is the 2017 inquiry by Senate Economic References

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1 For a comprehensive history of superannuation in Australia, H Bateman, "Regulation of Australian superannuation" (2003) 36(1) *Australian Economic Review* 118, 121-122; G Nicoll, "Corporate ownership and control in the financial markets" (2011) 10(1) *Canberra Law Review* 36, 46-47; D Ralston and J Feng, "Towards a self-funded retirement: will superannuation substitute for the age pension?" (2017) 32 *Australian Tax Forum* 607.

2 Item 5(1) of the Superannuation (Objective) Bill 2016 (Cth). The background to this Bill is discussed in section 2.

3 Treasury, *Superannuation guarantee non-compliance* (final report of the Superannuation Guarantee Cross-Agency Working Group, 14 July 2017); Australian National Audit Office, "Promoting compliance with superannuation guarantee obligations", the Auditor-General ANAO report no. 39 2014-15 Performance audit; Inspector-General of Taxation, *Review into the ATO's employer obligations compliance activities*, December 2016. Prior to that came the Inspector-General of Taxation, "Review into the ATO's administration of the superannuation guarantee charge: a report to the Assistant Treasurer". See further K Streckfuss, "The regulation of unpaid superannuation contributions: the Inspector-General of Taxation's review into the ATO's administration of the superannuation guarantee charge" (2011) 24 Australian Journal of Labour Law 281.

Committee (Senate ERC),[4] which came up with some recommendations for improvement within the current framework. However, these inquiries largely amount to tinkering around the edges of what is arguably a misconceptualised scheme. While there are considerable improvements that could be made to the present regime,[5] this article identifies some major problems with superannuation as a tax and attempts to make the case for a reincarnation of superannuation as "deferred wages"[6] — a workplace right to be treated in a similar way to wages and other employee-related entitlements. Legislating for superannuation in this way and empowering an agency such as the Fair Work Ombudsman (FWO) to oversee payment of superannuation could be achieved in a number of ways: a further referral of legislative powers from states to the federal government; federal legislation relying on the existing pensions power in the Australian Constitution; or a change to the Constitution to give the federal government express power to legislate for superannuation. Perhaps more significantly, a shift of powers and enforcement responsibility from the ATO to the FWO would entail a change of mind-set and of some of the practical arrangements that currently exist to record superannuation liabilities and collect them. However, such drastic action could be justified by the size and importance of superannuation to the government, the economy and to workers themselves.

The primary difficulty with superannuation non-compliance as a tax liability is that it is built on the traditional bilateral conception of a tax between two parties — the ATO as revenue collector and the employer as the taxpayer. In reality, the relationship is multilateral. The "revenue", if collected, ends up in the hands of the superannuation fund, not the government.[7] Other parties have an interest in superannuation and can be involved in the detection of non-payment and recovery. In addition to the ATO and employer, there is the employee — the primary and ultimate beneficiary of the superannuation entitlement. There is the superannuation fund as trustee and fiduciary, and the Australian Prudential Regulation Authority which oversees most members of the superannuation industry. In some instances, there is a superannuation fund collection agency, and perhaps a trade union may be present as a representative and advocate of the worker and their collective interests. Where complaints are made or a workplace audit is conducted, the FWO might become involved, and in the case of the employer's insolvency, there is often a liquidator or bankruptcy trustee as well. Where

4 Senate Economics References Committee (Senate ERC), "Impact of non-payment of the superannuation guarantee" (Senate ERC superannuation guarantee inquiry). The committee's report is entitled *Superbad – wage theft and non-compliance with the superannuation guarantee* (Superbad), May 2017. This built on earlier research undertaken by Industry and Cbus (ISA/Cbus report).

5 In addition to the recommendations made by the Senate ERC and those outlined in this article, see the suggestions made in B Freudenberg and S Sargent, "Not so guaranteed; superannuation guarantee and Australian small business" (2015) 30 *Australian Tax Forum* 89, 121-133.

6 It was the view of the Senate ERC that superannuation is deferred wages: Superbad, above n 4 at para 4.26 and 6.142.

7 Pt 8 of the *Superannuation Guarantee (Administration) Act 1992* (Cth).

the employer is a company, the Australian Securities and Investments Commission (ASIC) becomes relevant. Yet the present arrangements for superannuation non-compliance enforcement largely exclude these additional stakeholders.

The current Coalition Government continues to propose amendments to superannuation legislation, but much of the reform activity has been directed at ensuring fairness and expanding choice of funds within the existing framework of superannuation as a tax liability.[8] There are, however, a number of notable exceptions in this regard. First, and most generally, the government has put forward a Bill to identify the objectives of superannuation and to ensure that superannuation legislation, wherever it is located, is consistent with those objectives.[9] Second, there was a private member's Bill from then Nick Xenophon Team, now Centre Alliance MP Rebekha Sharkie, entitled the Fair Work Amendment (Recovering Unpaid Superannuation) Bill 2017 (Cth). This Bill has now lapsed. The third, and most significant, development is the release in January 2018 of an explanatory memorandum and an exposure draft of the Treasury Laws Amendment (Taxation and Superannuation Guarantee Integrity Measures) Bill 2018 (Cth) (SG Integrity Bill), followed in March 2018 by the Treasury Laws Amendment (2018 Measures No. 4) Bill 2018 (TLA 2018 No. 4 Bill) which subsumed the provisions of the SG Integrity Bill. These various reform initiatives are explored later in this article.

Even without legislative amendment, much could be done within the current constraints of superannuation as a tax. For example, there could be significantly more action by ASIC as the corporate regulator responsible for dealing with wrongdoing by directors and officers of corporate employers where those people engage in deliberate conduct to thwart superannuation compliance. ASIC could also contribute substantially to ATO enforcement through referrals of non-compliance complaints and the provision of the specific insolvency information that it holds. The FWO could do more with its own considerable jurisdiction over superannuation entitlements contained in modern awards, enterprise agreements and employment contracts. However, the reality at present is that neither of these agencies, together or individually, make up for the deficiencies of superannuation as a tax and solve the superannuation non-compliance problem.

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8 Many of the Bills introduced by the Coalition Government involve changes to the concessional tax treatment of superannuation contributions and choice in terms of funds and voluntary contributions: see Treasury Laws Amendment (Fair and Sustainable Superannuation) Bill 2016 (Cth) and Superannuation (Excess Transfer Balance Tax) Imposition Bill 2016 (Cth). The *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Act 2017* (Cth) contains a mix of reforms, including one that is directed towards improving SG compliance with respect to salary sacrifice amounts. This is discussed further below.

9 Superannuation (Objective) Bill 2016 (Cth).

Nor will the largely procedural recommendations made by the Senate ERC, or the amendments set out in the TLA 2018 No. 4 Bill, transform the present situation to such an extent that no further action is required. While the TLA 2018 No. 4 Bill proposes a number of important changes to the administration of SG, and the compliance and enforcement powers of the ATO, there still seems to be little appetite for substantial change. Many of the recommendations made by the Senate ERC have not been adopted or have been put forward in a reduced form in this Bill. Further, the successful passage of the TLA 2018 No. 4 Bill through parliament is far from certain.[10]

In consequence, this article argues that a more substantial change should be considered. An expansion of the FWO's jurisdiction to cover all those presently entitled to superannuation under the SG regime, with the necessary injection of personnel, resources and publicity, could significantly improve the government's chances of achieving its superannuation objectives. This would involve nothing less than a reincarnation of superannuation.

Section 2 provides the necessary background to the discussion that follows, including the objectives of superannuation, the size of the current losses through non-compliance, and the constitutional foundations of the existing framework. Section 3 examines calculation, detection and collection issues, including the SGC mechanism based on employer self-declarations and employee notifications. Section 4 considers the reluctance of ASIC and the FWO to use their own powers to intervene, either to punish wrongdoers or to recover superannuation on behalf of workers. Section 5 examines legislative and administrative attempts to improve superannuation non-compliance since 1992. Section 6 provides the analysis of the previous discussions, arguing that reincarnating superannuation as a workplace entitlement for "workers", broadly defined, has the capacity to improve its recovery and to achieve the government's superannuation objectives. Section 7 concludes that while there are further avenues for improvements to superannuation compliance within the existing tax framework, the short-term expense and difficulties of more substantial change would easily be offset by the long-term benefits both to workers and the government.

2. Background

Australia's compulsory superannuation system, introduced in 1992,[11] is one pillar of the federal government's "three pillars" policy,[12] the other two being the aged pension and personal savings, including voluntary superannuation contributions. It was

10 The Treasury Laws Amendment (2018 Measures No. 4) Bill 2018 (Cth) had its second reading in the House of Representatives on 28 March 2018. At the time of writing, the Bill had not progressed further.

11 The background is noted in Ralston and Feng, above n 1, 611.

12 Commonwealth of Australia, 2004, *A more flexible and adaptable retirement income system*, Canberra.

a recommendation of the 2014 Financial System Inquiry[13] that the government "[s]eek broad political agreement for, and enshrine in legislation, the objectives of the superannuation system and report publicly on how policy proposals are consistent with achieving these objectives over the long term". In response, the Coalition Government introduced the Superannuation (Objective) Bill 2016 (Cth) to establish "a legislative framework to guide the development of future superannuation policy",[14] and to enshrine primary and subsidiary objectives of the superannuation system in legislation.[15] As the Senate Economics Legislation Committee report into the Superannuation (Objective) Bill noted,[16] defining superannuation as a substitute for, or supplement to, the age pension was a specific recommendation of the Financial Systems Inquiry.[17] The adoption of this primary objective:[18]

> "… prioritises the provision of retirement incomes and precludes the pursuit of other objectives at the expense of retirement incomes. It will help reorient the community mindset around superannuation, away from account balances and towards the provision of retirement incomes."

More specifically, the explanatory memorandum had made it clear that the overarching role of the superannuation system is not to provide a concessionally taxed investment vehicle used for the purpose of tax minimisation and estate planning,[19] and that subsidiary objectives of the superannuation system, to be prescribed by regulation, should include: the management of risks in retirement; alleviation of fiscal pressures on government from the retirement income system; and being simple and efficient and providing safeguards.[20] It is likely that these relatively uncontroversial objectives will in due course be enacted, and this article proceeds on that basis.

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13 Financial System Inquiry Committee, *Financial System Inquiry: final report* (2014), recommendation 9.

14 Page 25 of the explanatory memorandum to the Superannuation (Objective) Bill 2016 (Cth).

15 S 6 of the Superannuation (Objective) Bill 2016 (Cth) further requires that any new Bills and Regulations relating to superannuation must be accompanied by a statement of compatibility with the stated objectives. The explanatory memorandum clarifies that a "Bill or regulation will relate to superannuation if it amends law that is relevant to superannuation, irrespective of whether the relevant instrument being amended predominantly relates to superannuation (such as the *Superannuation Guarantee (Administration) Act 1992)* or merely contains some provisions that deal with superannuation (such as the *Taxation Administration Regulations 1976* or the *Fair Work Act 2009*)". Page 30 of the explanatory memorandum to the Superannuation (Objective) Bill 2016.

16 The Senate Economics Legislation Committee, Superannuation (Objective) Bill 2016 (Provisions), February 2017, para 1.12.

17 Financial System Inquiry Committee, *Financial System Inquiry: final report*, 2014, 95. See also s 5(1) of the Superannuation (Objective) Bill 2016 (Cth).

18 Ibid 98, quoted in the Senate Economics Legislation Committee report, at para 1.14.

19 Page 27 of the explanatory memorandum to the Superannuation (Objective) Bill 2016 (Cth).

20 Ibid at para 1.18.

There was some dispute before the Senate ERC in 2017 about the size of unpaid superannuation. The ATO disagreed[21] with the estimate of Industry Super Australia (ISA) of $5.6b,[22] but could not offer a different figure.[23] Later in 2017, the ATO published a super tax gap figure of $2.854b for the year 2014-15.[24] The exact amount is immaterial for the purposes of this article; what matters is that the sum is sufficiently large, based on even the lower of these figures, to justify consideration of a radical overhaul of the superannuation system. It is also important to remember the compounding effect of unremitted superannuation. Stanford has estimated that a present loss of $10,000 will result in $57,000 less superannuation in 30 years' time.[25]

One of the underlying factors contributing to the current compliance crisis is the characterisation of the SGC as a tax overseen by the ATO. Administering the SGC via the tax system resolves many of the constitutional problems presented by the absence of any express provision empowering the Commonwealth Parliament to directly legislate in relation to superannuation. Relying on the taxation power of the Commonwealth Constitution[26] effectively allowed the federal government to design a statutory superannuation system that is far-reaching, flexible and markedly different from its industrial predecessors.[27] For instance, the SG scheme effectively extends superannuation entitlements to various categories of workers that ordinarily fall outside mainstream employment regulation and would typically be excluded from work-related entitlements.[28] The constitutional basis of the SG system is relatively straightforward when compared with the Fair Work Act, which relies on a combination of the corporations power, the referrals power and the external affairs power of the Constitution.[29]

In 2011, the constitutional bases of the SG scheme were challenged by Roy Morgan Research in the High Court. The appellant argued that the SG charge could not be properly characterised as a "tax" within the meaning of s 51(ii) of the Constitution,[30] because provisions relating to the charge confer a "private and direct benefit" on the employees of those employers who pay the charge. In consequence, the charge could not be said to be imposed for "public purposes" and therefore could not properly

21 Superbad, above n 4, para 3.11.

22 Ibid at paras 3.7 and 4.23.

23 Ibid at para 3.14.

24 ATO, "Super guarantee system". Available at www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Superannuation-guarantee-gap/?anchor=Trends_and_latest_findings.

25 J Stanford, "The consequences of wage suppression for Australia's superannuation system", Centre for Future Work, Australia Institute, September 2017, fig 2, 10.

26 S 51(ii) of the Australian Constitution.

27 Treasury, "Towards a higher retirement incomes for Australians: a history of the Australian retirement income system since Federation" (Commonwealth, 2001); Bateman, above n 1, Nicoll, above n 1.

28 S 12 of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (SGAA).

29 S 51(xx), (xxxvii) and (xxix) of the Australian Constitution, respectively.

30 *Roy Morgan Research Pty Ltd v FCT* (2011) 244 CLR 97.

be characterised and collected as a "tax".[31] The High Court unanimously rejected this argument, holding that the SG charge is a tax imposed for public purposes. The plurality[32] found that while the raising of revenue may be "secondary to the attainment of some other legislative purpose",[33] in other words, encouraging employers to pay compulsory superannuation to meet the needs of the aged or infirm employees and reduce the pension burdens of government, this of itself does not mean that the charge is not a tax.[34]

While the *Roy Morgan* decision confirmed the constitutional validity of the superannuation legislation under the taxation power, it did not rule out the Commonwealth's ability to legislate for superannuation under other existing powers. Indeed, in relation to the same matter, the Full Court of the Federal Court had held that Pt 8 of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (SGAA) was supported by the provision in s 51(xxiii) of the Constitution empowering the parliament to make laws with respect to "invalid and old-age pensions".[35] This finding was not challenged in the appeal to the High Court.[36] In addition, just as most states have referred their inherent powers to make workplace laws[37] and their workplace health and safety powers[38] to the federal government, so too could they refer their inherent powers to make laws for superannuation. This would allow the federal government to legislate for superannuation in any manner it wished, including through amendments to the Fair Work Act or more directly. The capacity for the federal government to reincarnate superannuation under the invalid and old-age pensions power or through a further referral of power will be considered further in section 6.

Nonetheless, when compulsory superannuation was introduced in 1992, there were practical reasons to place it within the tax sphere, rather than elsewhere.[39] It was the

31 Ibid at [11].

32 A joint judgment was delivered by French CJ, Gummow, Hayne, Kiefel and Bell JJ. Heydon J delivered a separate judgment.

33 *Roy Morgan Research Pty Ltd v FCT* (2011) 244 CLR 97 at [48].

34 Ibid. The plurality further concluded that payment of the charge into the consolidated revenue fund supported its characterisation as a tax, particularly as this meant that it was no longer possible to earmark them as particular employers' contributions. Ibid at [49]–[51].

35 Pt 8 SGAA; *Roy Morgan Research Pty Ltd v FCT* (2010) 184 FCR 448.

36 *Roy Morgan Research Pty Ltd v FCT* (2011) 244 CLR 97 at [10].

37 See A Stewart, *Stewart's guide to employment law*, (5th ed, 2015, Federation Press), ch 2. An exception is Western Australia, which has not referred its powers. In that state, the federal government can only legislate for constitutional corporations, hence the Fair Work Act coverage in WA is more limited than elsewhere: ibid at para 2.23.

38 Victoria is the exception here: Stewart, above n 37 at para 15.2.

39 See Nicoll, above n 1.

cautious approach.[40] Occupational superannuation had received special taxation treatment[41] in its pre-1992 forms as industrial entitlements.[42] Prudential regulation of super funds depended in part on the taxation power in the Constitution.[43] At the time, the SGAA was introduced, the ATO was seen as a well-resourced regulator with formidable powers and enforcement machinery at its disposal. In contrast, the federal and state labour inspectorates were generally seen as weak and largely ineffectual.[44] Indeed, the lack of widespread employer compliance with award superannuation entitlements was one of the triggers for the introduction of a statutory scheme via the existing tax apparatus.[45]

Yet a great deal has changed since 1992. The entire workplace relations system has been overhauled in the intervening period, more than once.[46] The constitutional basis for the regulation of employment in Australia has shifted entirely. Moreover, and in stark contrast to the regulatory landscape of the 1990s, the Office of the Fair Work Ombudsman is now a prominent player in relation to mainstream employment entitlements, such as minimum wages. Indeed, in the decade since its initial rise to prominence in 2006, the federal labour inspectorate has proven itself to be a highly

40 Australian Law Reform Commission, "Collective investments: superannuation" (report no. 59, 1992) at paras 7.13–7.14. Available at www.alrc.gov.au/inquiries/collective-investments. "Section 51(xxiii) would probably support legislation regulating old age and invalid pensions provided by bodies other than the Commonwealth, in particular by private employers to their employees, or by life insurance companies and fund managers who promote personal superannuation schemes. There are, however, a number of problems associated with the use of s 5l(xxiii). … A more serious problem is whether the power would authorise the regulation of schemes other than those which provide for the payment of a pension or annuity. … Until the matter is settled it would be wise to regard s 51(xxiii) as authorising legislation only with respect to schemes the primary purpose of which is to provide old-age pensions and which provide for the payment of lump sums only where that is incidental to the main purpose."

41 Australia's Future Tax System, *Retirement income consultation paper*, Appendix B: a history of superannuation. Available at https://taxreview.treasury.gov.au/content/ConsultationPaper.aspx?doc=html/publications/Papers/Retirement_Income_Consultation_Paper/Appendix_B.htm.

42 D Paatsch and G Smith, "The regulation of Australian superannuation: an industrial relations law perspective" (1992) 5 *Corporate and Business Law Journal* 131; K Wood and R McCallum, "Crafting the law: the High Court and superannuation as an industrial matter" (1995) 8 *Australian Journal of Labour Law* 121.

43 The Australian Prudential Regulation Authority is a part of Treasury, formed by *Australian Prudential Regulation Authority Act 1998* (Cth). The other sources of its powers are the *Banking Act 1959* (Cth), *the Insurance Act 1973* (Cth), *the Life Insurance Act 1995* (Cth) and the *Superannuation Industry (Supervision) Act 1993* (Cth).

44 M Goodwin and G Maconachie, "Unpaid entitlement recovery in the federal industrial relations system: strategy and outcomes 1952–95" (2007) 49 *Journal of Industrial Relations* 523, 523.

45 H Bateman and J Piggott, "Private pensions in OECD countries – Australia" (1997) 23 *OECD Labour Market and Social Policy Occasional Papers*, 10.

46 Significant changes include WorkChoices, the Fair Work Act and the creation of the Fair Work Commission and Fair Work Ombudsman.

active agency with a relatively consistent track record in relation to wages and other entitlements.[47] However, it has a patchy record of bringing actions to obtain recovery for superannuation non-compliance, apparently because it defers to the broader jurisdiction of the ATO and what it perceives to be its superior powers.[48] Whether this is true or not is considered in the next part of this article.

3. The superannuation entitlement and its collection

This part considers the calculation of the statutory superannuation entitlement and how it is collected, both voluntarily and following non-compliance. It looks particularly at detection, where the power to collect sits with the ATO but the information on which the ATO's actions are based is located elsewhere.

3.1 Calculation of the superannuation entitlement

Under the SG regime, the current superannuation entitlement is calculated as 9.5%[49] of the employee's "ordinary time earnings", or OTE.[50] However, compliance with this obligation can be compromised in two ways. First, while OTE includes over-award payments, allowances, bonuses and commissions, it generally excludes overtime payments and lump sum payments made on termination in lieu of unused leave entitlements.[51] It is often unclear as to whether certain amounts count towards OTE, such as regularly worked overtime or paid parental leave, giving rise to confusion and disputes.[52] The calculation of OTE is complicated for casual and part-time workers whose working hours vary from week to week where the amount of OTE may bear little relationship to a worker's actual earnings.[53]

Second, in relation to salary sacrifice arrangements, the current SG scheme allows employers to potentially "double dip" to the detriment of the relevant employee. Under the current SG scheme, it is permissible for an employee's voluntary salary sacrifice contributions to count towards the employer's SG payment obligations. In addition, salary sacrifice amounts reduce the employee's OTE base on which SG is calculated. As a result, employees may be receiving less than the compulsory 9.5% from their employers. Because superannuation is a tax-related obligation, it is

47 See, for example, https://www.fairwork.gov.au/about-us/our-role/enforcing-the-legislation/litigation/2017-2018-litigation-outcomes.

48 See below n 129 and accompanying text.

49 ATO, "Super guarantee percentage". Available at www.ato.gov.au/Rates/Key-superannuation-rates-and-thresholds/?anchor=Superguaranteepercentage#Superguaranteepercentage.

50 S 6(1) SGAA defines OTE as "earnings in respect of ordinary hours of work".

51 For further information on what counts as OTE, see SGR 2009/2.

52 Construction, Forestry, Mining and Energy Union, *Submission 54*, Senate ERC Superannuation Guarantee Inquiry, 14–15.

53 Ibid.

arguably legitimate and acceptable for the employer to use all lawful mechanisms for reducing this liability, and this was recognised in a 2006 ATO ruling on this issue.[54] Further, the ATO's website cites employer savings on meeting their SG obligations as a clear benefit arising from salary sacrifice arrangements of this type.[55]

Employees are directly disadvantaged where unscrupulous employers take advantage of this regulatory gap. If superannuation were treated as the deferred wages of employees, this justification would be more difficult to sustain. Salary sacrifice arrangements can be a tax effective way for employees to increase their superannuation balance, but employees would generally believe that the amounts they contribute are in addition to the statutory amount, not in partial or total substitution for it. Analysis undertaken by ISA suggested that employers were reducing the compulsory SG contributions of 36% of employees who had entered into salary sacrifice arrangements for their voluntary superannuation contributions.[56] The vast majority of those affected earned below full-time average earnings and the average reduction on compulsory employer contributions was almost $4,000.[57] In late 2017, the Coalition Government introduced legislation to change this treatment of salary sacrifice superannuation.[58] In addition, the provisions of the TLA 2018 No. 4 Bill, if enacted, will further improve the situation by requiring reporting of salary sacrifice amounts.[59]

3.2 Collection of superannuation

While the payment regime for superannuation has evolved over the past few decades, it was originally, and remains, a "payment in arrears" process.[60] Initially, employer SG contributions had to be made annually in arrears in order to avoid an SGC liability, but from the 2002-03 financial year, they were required to be paid quarterly in

54 SGD 2006/2.

55 ATO, "Salary sacrificing super – information for employers". Available at www.ato.gov.au/Business/Super-for-employers/In-detail/Salary-sacrifice/Salary-sacrificing-super---information-for-employers/.

56 Industry Super Australia, *Submission 7.1*, Senate ERC Superannuation Guarantee Inquiry, 8.

57 Ibid.

58 The *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Act 2017* proposed the following amendments to the SGAA: (i) salary sacrifice integrity – employers will be prevented from using an employee's salary sacrifice contributions to reduce the employer's own minimum 9.5% super guarantee (SG) contributions. This was also a change contained in the Sharkie Bill, the Fair Work Amendment (Recovering Unpaid Superannuation) Bill 2017 (Cth), item 5. This change was a recommendation of the Superannuation Guarantee Cross-Agency Working Group (rec 8) and of Superbad, above n 4, 37-38, recommendation 4.

59 Para 3.12 of the explanatory memorandum to the TLA 2018 No. 4 Bill.

60 ACTU, *Submission 51*, Senate ERC Superannuation Guarantee Inquiry, 16.

arrears.[61] Traditionally, more frequent payment regimes were imposed via the award system. However, under the modern award system, the majority of awards adopt the SG entitlement as their superannuation provision.[62] As a result, most employers, regardless of whether the superannuation entitlement is derived from the SG system or under the Fair Work regime, are now required to make contributions three months in arrears.[63]

The superannuation system allows for three outcomes. First, and most preferred, the employer remits the contribution to the employee's nominated fund within the specified time period. Second, and least preferred, the employer pays nothing to the fund or the ATO, because it is insolvent or bankrupt, or because the controllers of the business have vanished or are otherwise beyond the reach of the ATO. Third, and of most interest to this article, the non-compliant employer is made to pay, possibly with penalties, as the result of their default being detected and acted on.

The manner of detection contemplated by the SG regime is that the employer self-identifies and self-reports, via an SGC statement, their failure to pay, makes the appropriate disclosures and pays the required amount to the ATO. The SGC statement automatically generates the SGC liability, as a debt due to the Commonwealth payable to the Commissioner of Taxation.[64] The liability is more than the contribution that the employer was meant to pay in a timely manner to the fund. It comprises the shortfall amount, a nominal interest of 10% payable on the shortfall amount and an administration charge of $20 per employee per quarter.[65] The shortfall amount is calculated on the employee's "salary and wages", not just OTE.[66]

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61 *Superannuation Guarantee Charge Amendment Act 2002* (Cth), amending ss 5 to 6 of the *Superannuation Guarantee Charge Act 1992* (Cth). This followed the report of the Senate Select Committee on Superannuation and Financial Services, Parliament of Australia, *Enforcement of the superannuation guarantee charge* (2001).

62 See Fair Work Ombudsman, Answer to question on notice, Senate ERC, 15 March 2017. Only eight modern awards do not contain the model superannuation guarantee provisions and one award – the *Miscellaneous Award 2010* – contains only part of the model superannuation guarantee provisions. By way of example, the provision dealing with "employer contributions" in the General Retail Industry Award 2010 reads: "An employer must make such superannuation contributions to a superannuation fund for the benefit of an employee as will avoid the employer being required to pay superannuation guarantee charge under superannuation legislation with respect to that employee".

63 Individual fund trust deeds can, and frequently do, specify that a more regular payment must be made. However, failure to adhere to these terms does not constitute a breach of SG payment obligations under the SGAA.

64 Ss 255-5 of Sch 1 to the *Taxation Administration Act 1953* (Cth) (TAA).

65 Pts 6 and 7 SGAA.

66 In addition, under Pt 7 SGAA, if the SGC statement is lodged late, or the taxpayer fails to provide a statement or information when the ATO asks for it during an audit, the taxpayer is liable for a maximum penalty of 200% of the amount of the charge payable.

However, the imposition of an SGC through the employer's voluntary disclosure is by no means guaranteed, nor is it the only way that employers can be made to pay the unremitted superannuation. Necessarily, the other avenues of recovery will depend first on the detection of non-payment or underpayment, and second, on action being undertaken by a party with the requisite authority. The vexed issue of detection is now considered.

3.3 Detection of superannuation guarantee non-compliance

If the employer does not lodge an SGC statement, the ATO can raise an SGC assessment independently — but to do so, it must first find out about the employer's failure to pay the SG obligation on time and in full. Apart from the employer itself, those in a position to detect non-compliance include the affected employees, their superannuation fund and a range of third parties, such as unions and other regulators, such as the FWO and ASIC.

Although employees have the most at stake, where they detect non-compliance, they cannot force the employer to comply with the SG laws, nor can they force the ATO to take action on their behalf.[67] Because the SG is a tax, the employee must simply make a complaint to the ATO via an employee notification (EN) and rely on the ATO to take action. In the absence of an SGC statement from the employer, the ATO's main source of non-compliance information comes from ENs,[68] yet the EN process is by no means straightforward.

The ATO's webpage in response to a search for "complaint about unpaid superannuation" is not encouraging, with the page headed by the statement "[i]f you think your employer is not paying your superannuation (super), we have a step-by-step process *to help you investigate*".[69] The process for lodging an EN depends on employees undertaking the process, requiring the employee first, to confirm that they are eligible for super; second, to calculate the amount that should have been paid using an online tool; third, to talk to their employer about perceived discrepancies; fourth, to check with the super fund as to whether the amounts have in fact been received, or do so through their MyGov account; all before finally lodging an inquiry and reporting their employer's failure to remit the full SG amount. At no stage does the webpage specifically mention recovering the superannuation for the employee through the efforts of the ATO. The "[s]ee also" link at the bottom of the page — "[o]ther ways to obtain your unpaid super" — directs the hapless employee to the FWO and state industrial systems for possible recovery.

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67 *Kronen v FCT* [2012] FCA 1463; *Kronen v FCT* [2013] FCA 416.

68 The ATO submission to the inquiry reported that 70% of its reports of superannuation non-compliance comes from employee complaints: ATO, *Submission 6*, Senate ERC Superannuation Guarantee Inquiry, 3.

69 ATO, "Unpaid super". Available at www.ato.gov.au/Individuals/Super/In-detail/Growing/Unpaid-super/ (emphasis added).

The ATO's dependence on ENs assumes that employees have a sound understanding of their superannuation entitlements and the resources and capacity to effectively monitor superannuation contributions. This assumption may be misplaced.[70] Those most vulnerable to non-payment of superannuation — casual, non-English speaking background, or poorly educated — are the least likely to monitor employer compliance.[71] This situation is exacerbated by the fact that unions are precluded from raising an EN on behalf of individual employees or groups of employees.[72] Many employees lack the confidence to bring a complaint against their employer, particularly where they are in precarious circumstances or engaged in insecure work. This has meant that approximately 70% of employees wait until after their employment ends to lodge an EN, which can have adverse implications for the likelihood of recovery, particularly in relation to financially precarious firms.[73]

Even before lodging an EN, the employee must themselves discover that their superannuation has not been paid in part or in full. For employees covered by the Fair Work Act, employers are required to issue them with payslips, and make and keep employment records, which include the superannuation contributions that the employer has made or is liable to make.[74] However, to avoid detection of non-payment, the payslip may give misleading information. It could show the correct amount payable, where in fact no payment may have been made.[75] Alternatively, it could show a lesser amount payable because the superannuation has been calculated on the wrong base amount due to an underpayment of the employee's salary or wages.[76] As the ACTU notes, this approach means that it is "conceivable that what the

70 See further K Streckfuss, "Superannuation accountability – the regulation of reporting of superannuation contributions for employees" (2012) *Australian Superannuation Law Bulletin* 163; H Anderson and T Hardy, "Who should be the super police? Recovery of unremitted superannuation in insolvency", (2014) 37(1) *University of New South Wales Law Journal* 162, 168, 182.

71 The Textile Clothing and Footwear Union of Australia (TCFUA) submission, quoted in Superbad, above n 4, para 6.10.

72 TCFUA, *Submission 50*, Senate ERC Superannuation Guarantee Inquiry, 13–14.

73 Inspector-General of Taxation, *Submission 21*, Senate ERC Superannuation Guarantee Inquiry, 8.

74 Ss 535 and 536 of the *Fair Work Act 2009* (Cth); regs 3.37 and 3.46(5) of the *Fair Work Regulations 2009* (Cth).

75 This was pointed out by Rebekha Sharkie in the second reading speech to her Bill: "In all too many cases, employees quite reasonably assume that when superannuation amounts are listed on their pay slips that they have been paid their entitlements. However, this is just how much superannuation employers owe for a particular period and not necessarily what they have been paid. To avoid this ambiguity the superannuation that has been paid into employees' superannuation funds should be reported on pay slips".

76 This happened to employees of 7-Eleven franchisees: see Fair Work Ombudsman, "A report of the Fair Work Ombudsman's Inquiry into 7-Eleven – identifying and addressing the drivers of non-compliance in the 7-Eleven network" (Commonwealth of Australia, April 2016).

ATO achieves in many cases is merely partial recovery of what an employee may in fact be entitled to".[77]

The information available to workers who fall outside the coverage of the Fair Work Act, but are within the scope of the superannuation guarantee system, that is, the so-called "deemed employees", is even more sparse. As these workers are not employees at common law, the record-keeping and payslip obligations of the Fair Work Act do not apply. While there is a general obligation under the SGAA to make and keep records, including any documents, that are "relevant to ascertaining the individual superannuation guarantee shortfalls of the employer for the quarter",[78] there is no legal obligation to make these records available to the worker. As such, this extended group of workers remain largely in the dark on whether, and how much, superannuation has been paid. This places "deemed employees" in a compromised position which further weakens their ability to identify and pursue unpaid superannuation.

In addition, an employee may not be in a position to detect any underpayment until up to 12 months after the payment was due, if funds only advise their members of contributions received on an annual basis.[79] To add to the confusion, the only amount appearing on individual payment summaries provided to employees, with a copy sent to the ATO at the end of the financial year, is the amount *over* the SG amount that the employer has paid.[80]

3.4 The ATO's response to ENs

Where an EN leads to action by the ATO, it is likely to lead to an investigation which is confined to the issues affecting the individual complainant, rather than systemic problems affecting employees across that workplace or working within the broader industry.[81] The ATO's investigations commonly involve significant delays and poor communication about progress of the claim.[82] Even where the ATO recovers superannuation for employees, it is not always remitted promptly to the employees'

77 ACTU, *Submission 51*, Senate ERC Superannuation Guarantee Inquiry, 13-14.

78 S 79 SGAA.

79 While payments to the ATO must be made at least quarterly, there is no legal obligation to report to members on that basis.

80 Fair Work Ombudsman, "Payslips". Available at www.fairwork.gov.au/pay/pay-slips-and-record-keeping/pay-slips.

81 Anderson and Hardy, above n 70, 180-181. Evidence before the Senate ERC suggested that if an EN is lodged with the ATO, the regulator will only carry out an audit of all the SG payments by that employer where an employee is able to establish that the employer has engaged in a "pattern of non-payment". Community and Public Sector Union, *Submission 20*, Senate ERC Superannuation Guarantee Inquiry, 1.

82 Cbus, *Submission 48*, Senate ERC Superannuation Guarantee Inquiry, 5. Ms V Wiles, National Industrial Officer, Textile, Clothing and Footwear Union of Australia, *Proof Committee Hansard*, 14 March 2017, 46.

funds.[83] This can have an adverse effect on superannuation-related insurance, where it is dependent on the receipt of the payment.[84]

Further, in seeking to address ENs, it is common for the ATO to enter into payment plans with the non-compliant employer. The Textile, Clothing and Footwear Union of Australia (TCFUA) submitted that this often leads to compliance "churning" which is "time and resource intensive and rarely leads to final or full resolution".[85] Repeat non-payers may pay less than the full amount owing over a longer period of time and with little or no punishment for doing so.[86] While the TLA 2018 No. 4 Bill proposed to introduce an offence for failing to comply with a direction to pay superannuation, its explanatory memorandum made it clear that directions will only be given to those "whose actions are consistent with an ongoing and intentional disregard of those obligations".[87] Presumably, those entering payment plans would not be considered as such. Employees are not asked for their approval of payment plans, nor in many cases, even informed that a payment plan had been entered into, despite it relating to their own entitlement to superannuation.[88] Perhaps this is because non-compliance is considered by the ATO as a revenue collection exercise on behalf of the government, rather than the ATO recovering on behalf of the employees. This issue was addressed by the Senate ERC by recommending that "before entering into a payment plan to recover SG from a non-compliant employer, the ATO be required to notify the affected employee and gain their consent to the course of action".[89]

In the wake of various recommendations regarding the EN detection strategy of the ATO, the tax regulator has recently acknowledged that it has made a concerted effort to select cases for review and audit from a broader array of sources other than ENs, including proactive audits.[90] These are considered in the next section.

3.5 Superannuation funds as detectors of superannuation guarantee non-compliance

There are two ways that information held by superannuation funds can assist the ATO to collect amounts for employees. First, they may make a referral to the ATO in relation to a particular case of non-payment. In 2015-16, there were such 73 referrals.[91]

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83 Superbad, above n 4, paras 4.11–4.13.

84 How this commonly occurs was outlined in Superbad, ibid.

85 TCFUA, *Submission 50*, Senate ERC Superannuation Guarantee Inquiry, 6. See also ACTU, *Submission 51*, Senate ERC Superannuation Guarantee Inquiry, 4.

86 TCFUA, *Submission 50*, Senate ERC Superannuation Guarantee Inquiry, 6.

87 Para 1.39 of the explanatory memorandum to TLA 2018 No. 4 Bill.

88 Superbad, above n 4 at paras 6.22 and 6.41.

89 Ibid, recommendation 11.

90 ATO, *Submission 6*, Senate ERC Superannuation Guarantee Inquiry, 24–25.

91 Ibid 10.

The second way is by providing data to the ATO on which the ATO can base a decision to conduct a proactive audit which target these high risk employers.[92] To assess the relevant risk profile of employers, the ATO compares the salary and wage data from individual income tax returns with the SG payments set out on member contribution statements (MCSs) provided to the ATO by superannuation funds regulated by APRA.[93] While this strategy has proved more constructive than simply relying on ENs,[94] there are a number of shortcomings with the current process which relies heavily on reported data.

First, MCSs are lodged on or before 31 October following the end of the financial year for which the superannuation fund is reporting. This means that the ATO may only become aware of a non-remittance more than 15 months after it was due to be paid. Second, the fund simply advises the ATO of the total amount received for a certain employee during that year, not which employer made the payment.[95] This complicates detection for the ATO where employees have had multiple employers during the year, which is especially common for employees engaged in insecure or intermittent work, such as casual employees. The Senate ERC recommended a revision to the MCS to "include a breakdown of each category of superannuation payment an employee has received, as well as the employer it was received from".[96] It made no recommendation relating to the timing issue. However, as the Senate ERC observes, given that ATO-initiated detection methods are used in only 30% of cases of SG non-compliance, "it could be reasonably concluded that an employer who does not lodge an SGC Statement does not face a high risk of being detected by the ATO".[97] The suggested changes to fund reporting contained in the TLA 2018 No. 4 Bill are discussed in section 5 below.

In conclusion, the various difficulties in the calculation and collection of superannuation as a tax suggest that another approach might be warranted. Presently, both ASIC and the FWO have powers in certain circumstances against non-compliant employers which can allow for both punishment and recovery of unpaid superannuation. The next section will consider these and why, despite these powers, a reincarnated superannuation regime may be justified.

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92 Superbad, above n 4 at para 6.4.

93 ATO, "Member contributions". Available at www.ato.gov.au/super/apra-regulated-funds/reporting-and-administrative-obligations/member-contributions/. APRA is the Australian Prudential Regulation Authority.

94 In its submission, the ATO noted that reviews and audits undertaken on the basis of a comparison of the individual income tax returns with member contributions statements "have consistently produced stronger results in terms of adjustments raised per audit than is achieved by our Employee Notification driven work". ATO, *Submission 6*, Senate ERC Superannuation Guarantee Inquiry, 28.

95 Ibid 9.

96 Superbad, above n 4 at para 7.11, recommendation 25.

97 Ibid 66.

4. Involvement by ASIC and the FWO

Under the existing regime where compulsory superannuation is enforced as a tax liability, there is still a relevant role to play for ASIC as the corporate regulator and the FWO as the labour regulator. Many employers are companies, regulated by ASIC,[98] and according to the ATO submission to the Senate ERC Inquiry, "[a]pproximately 80 per cent of employers who incur SGC liabilities are corporate entities".[99] This discussion considers what ASIC and the FWO are or could be doing, either on their own initiative or to assist the ATO in discharging its functions.

4.1 The Australian Securities and Investments Commission

The SGC, like most other sanctions imposed by the ATO for taxation non-compliance, is issued against the taxpayer, here the direct employer. Where the employer is a company, its status as a separate legal entity has two effects that negatively impact superannuation recovery: first, shielding the entity's owners — its shareholders — from personal liability for the entity's debts; and second, protecting the misbehaving controllers of the entity from the reach of the SGC.

On registration of a company, a separate legal person is created[100] with power to enter contracts with employees.[101] Even in a one director/one shareholder company, the employment contract is between the company, not the director, and the employee. Therefore, liability for wages and other entitlements such as superannuation falls on the company, which may have little capacity to pay. There are no provisions of the *Corporations Act 2001* (Cth) (Corporations Act) mandating that the company commences with, still less continues to hold, any share capital beyond a token $1. As a result, the company can be completely "cash poor", jeopardising its capacity to pay employee entitlements including superannuation. The company's shareholders are not liable for corporate debts beyond any amounts unpaid on their shares.[102] Where the company's shares are held by another company, it enjoys the same protection as individuals do as shareholders with very limited exceptions.[103]

98 ASIC has no role to play in relation to sole traders, partnerships and unincorporated trusts. However, these sorts of business structures do not form separate legal entities and thus, the sole trader, partner or trustee will be personally liable for debts of the business, unlike the shareholders and directors of companies.

99 ATO, *Submission 6*, Senate ERC Superannuation Guarantee Inquiry, para 180.

100 S 119 of the *Corporations Act 2001* (Cth) (Corporations Act); *Salomon v A Salomon & Company Ltd* [1897] AC 22.

101 S 124 Corporations Act.

102 S 516 Corporations Act.

103 The main exception is s 558V Corporations Act where the holding company may be liable for the insolvent trading of its subsidiary.

As a result of these circumstances — the company as separate legal entity, holding little capital and the liability of its shareholders limited — the corporate form can be used to take business risks, often funded by debt. These risks expose creditors to the possibility of loss but allow the owners of the company to benefit if the entrepreneurial gamble pays off.[104] Not surprisingly, unpaid employee entitlements and superannuation are often casualties of excessively risky, or even deliberate, behaviour that sees a company become insolvent. Non-payment of a debt when it is due and payable renders the employer insolvent, so the ATO must contend with those corporate employers who, "in plain sight", do not pay and are therefore in the hands of an insolvency practitioner, as well as those who do not pay and evade the ATO's efforts to enforce the SG.

In the case of an insolvent corporate employer, the ATO can prove its debt in the company's liquidation. The liquidator gathers the assets of the company and distributes their proceeds among creditors according to legislated priorities.[105] First comes secured creditors holding non-circulating security interests such as mortgages over land,[106] followed by priority creditors. Of these, the costs of the liquidation are paid in full before the claims of employees are met. Employment entitlements are prioritised into categories with wages and superannuation, including the SG, coming next,[107] followed by work-related injury compensation, leave entitlements and retrenchment entitlements, each paid in full before the next category is considered. Despite this priority, large amounts remain unrecovered. In its submission to the Senate ERC, the ATO reported that:[108,109]

> "[d]ue to the lag in reporting non-payment of superannuation contributions, insolvency is a significant issue in the recovery of SGC debt, with $113.2 million irrecoverable at law in 2015-16."
>
> "For SGC at 30 June 2016, insolvent debt represents 52 per cent of the total SGC debt, this compares to 19 per cent for all debt types."

ASIC's role in relation to superannuation non-compliance does not relate to enforcing the employer company's primary obligation to pay, but rather to chasing wrongdoers with respect to any improper actions "behind the scenes". The controllers of companies

104 F Easterbrook and D Fischel, *The economic structure of corporate law* (Harvard University Press, Cambridge MA, 1991) 49-50.

105 S 556 Corporations Act. The Senate ERC recognised the special problems facing creditors of incorporated trusts, recommending that they be protected in the same way as they are under s 556 dealing with corporate liquidations: Superbad, above n 4, para 6.112, recommendation 21.

106 Note that secured creditors holding circulating security interests (formerly known as floating charges) are deferred behind these defined employee entitlements: s 561 Corporations Act.

107 S 556(1)(e)(i) Corporations Act. SGC estimates are also priority payments: s 556(1)(e)(ii).

108 ATO, *Submission 6*, Senate ERC Superannuation Guarantee Inquiry, para 183.

109 Ibid at para 184.

— its directors and senior officers — are subject to directors' duties to act with care, in good faith in the best interests and for a proper purpose, and not to misuse their position or information to make a gain for themselves or others or cause a loss to the company.[110]

Breaches of these duties come with considerable consequences, if they are detected and if action follows. As civil penalty breaches, ASIC may seek a pecuniary penalty of $200,000 against the director or officer, seek their disqualification or apply for a compensation order, remedying the loss to the company caused by their wrongdoing.[111] In the superannuation context, where the employer company's failure to pay was a deliberate strategy of its controllers, these measures could be highly effective both as a general deterrent as well as a source of recovery of superannuation, with the money travelling through the company in liquidation, to the ATO and eventually to the fund. However, these actions are not brought, reflecting a wider issue with ASIC enforcement in relation to insolvent companies.[112]

ASIC could also assist the ATO's recovery of superannuation by providing it with information supplied to ASIC by liquidators, but again, this does not happen. At the conclusion of liquidations, voluntary administrations and receiverships, external administrators provide ASIC with information about suspected offences and the amount owing to various categories of creditors.[113] Employee losses are broken down into wages, leave and redundancy entitlements, as well as superannuation. While the exact amounts of superannuation lost in each insolvency are not stated, because reporting by external administrators is in broad bands, nonetheless, ASIC is aware if there are superannuation losses in each of the insolvencies for which it receives reports. In some cases, the amounts are considerable. For example, there were 18 instances where over $1,000,000 of superannuation was unpaid; there were also 164 instances of unpaid superannuation between $250,001 and $1,000,000.[114]

Yet there appears to be no communication of this information from ASIC to the ATO.[115] The Senate ERC believed that "better coordination between government

110 Ss 180 to 183, Pt 2D Corporations Act.

111 Ss 1317G, 206C and 1317H Corporations Act, respectively.

112 See, generally, Senate Economics References Committee, Parliament of Australia, *Performance of the Australian Securities and Investments Commission* (2014), ch 16.

113 This reporting is done in compliance with ASIC, *Regulatory Guide 16: external administrators – reporting and lodging* (July 2008) (ASIC Regulatory Guide 16).

114 Ibid. See also the supplementary submission of Industry Fund Services, Submission 53, Senate ERC Superannuation Guarantee Inquiry, at 4: "In 2015/16 the IFS insolvency team managed 9,725 cases. … Of the insolvency cases managed by IFS 28% of cases closed returned a dividend for 23,362 members from 1,472 employers, recovering $23.4 million".

115 The ATO submission to the Senate ERC noted that in 2015-16, the Fair Work Ombudsman made 2,405 referrals, with 73 from super funds, 651 community referrals, 70 internal ATO referrals and 57 from "other". ATO, *Submission 6*, Senate ERC Superannuation Guarantee Inquiry, 10. Similar numbers of referrals were made in 2014-15, with 2,103, 33, 431, 50 and 50 respectively.

agencies is a necessary condition to improve the detection of SG non-payment".[116] It was "particularly concerned that valuable information held by ASIC on insolvency cases is not being properly referred to the ATO".[117] It therefore recommended that "the ATO and ASIC review their data sharing arrangements to ensure that information on insolvency cases is being referred in a timely manner from ASIC to the ATO".[118]

4.2 The Fair Work Ombudsman

Under the Fair Work Act, different parties have the right to enforce superannuation obligations and pursue a range of remedial outcomes.[119] Those parties with the requisite legal standing typically include the employee, an employee organisation, such as a trade union, and "an inspector", here the representative of the FWO.[120] In addition to, and separate from, the main enforcement provisions, the Fair Work Act also makes provision for a small claims process, which can be used to recover employee entitlements (including superannuation) up to a maximum amount of $20,000.[121] The range of parties involved in enforcement under the Fair Work Act stands in stark contrast to the enforcement monopoly that the ATO exercises over the SG scheme. While the scope and coverage of the Fair Work Act is more limited than the SG scheme, when it comes to enforcement, the workplace relations framework is potentially more potent. First, unions have an interest in becoming involved to ensure superannuation is paid. While it has long been administered as a tax, it is viewed by many employee organisations primarily as an important industrial entitlement. The Coalition Government may well resist the idea of expanding the union's role in recovering SG. But if it genuinely believes in ensuring that SG is realised, then it needs to break the enforcement monopoly currently exercised by the ATO and seek to enrol a range of non-state actors, including unions (as well as funds, community legal groups and others). However, recent developments suggest that the current Coalition Government has little inclination to take this step.[122]

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116 Superbad, above n 4, para 7.24.

117 Ibid at para 7.25.

118 Ibid at para 7.26, recommendation 26.

119 Ss 45 and 50 Fair Work Act. These sections prohibit the contravention of modern awards and enterprise agreements respectively. Where superannuation is a term of those (and pursuant to s 149B, modern awards must have a term requiring avoidance of liability to pay the SGC), ss 45 and 50 are the provisions that allow enforcement action to be brought under ch 4 of the Act.

120 S 539(2) Fair Work Act.

121 This is quicker, cheaper and more informal than regular court proceedings, given that the Federal Court filing fee alone is $3,000. The ACTU, *Submission 51*, Senate ERC Superannuation Guarantee Inquiry, 14.

122 The TLA 2018 No. 4 Bill does not envisage any further role for trade unions in relation to the SG regime. Indeed, the Coalition Government has arguably displayed hostility towards the trade union movement in a range of spheres evidenced by the initiation of the Heydon Royal Commission into Trade Union Governance and Corruption, the reinvigoration of the Australian Building and Construction Commission and the establishment of the Registered Organisations

Second, where an employee is not represented by a union, they can still pursue their superannuation entitlements independently through the ordinary court system, or via the small claims process. Third, and most importantly, the workplace relations regulator, the FWO, has a solid record of taking civil penalty litigation, or invoking other enforcement mechanisms, with respect to non-payments and underpayments of wages and other work-related entitlements. In addition, and more generally, the FWO seeks to provide an extensive array of information and resources on workplace entitlements, respond to requests for assistance and initiate its own compliance actions, including workplace audits.[123]

The FWO's powers are extensive. Underpayment or non-payment of their entitlements, including superannuation, which involve contraventions of modern awards and enterprise agreements, are civil remedy breaches under the Fair Work Act.[124] The consequences of these contraventions are provided for by s 545(2) of that Act and include injunctions and compensation. Pecuniary penalties may also be imposed,[125] not only on the company in breach, but also on accessories to the company's breach, such as directors and company officers.[126] In addition, the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) now allows for certain franchisors and holding companies to be held liable for a contravention of a civil remedy provision, and made responsible for rectification of underpayments committed by their franchisees or subsidiaries where they knew or ought reasonably to have known of the contraventions and failed to take reasonable steps to prevent them.[127]

Despite these extensive powers, the FWO was not part of the SG cross-agency working group convened by the Minister for Revenue and Financial Services,[128] and it plays down its enforcement role in relation to superannuation. This is evidenced by the testimony before the Senate ERC by Mr Michael Campbell, the Deputy Fair Work Ombudsman (Operations):[129,130]

Commission. For further discussion of some of these developments, see A Forsyth, "Law, politics and ideology: the regulatory response to trade union corruption in Australia" (2017) 40(4) *UNSW Law Journal* 1336-1365.

123 Australian Government, Fair Work Ombudsman, *The Fair Work Ombudsman and Registered Organisations Commission Entity 16-17 Annual Report*, 12.

124 Ss 45 and 50 Fair Work Act, respectively.

125 S 546 Fair Work Act.

126 S 550 Fair Work Act.

127 S 558B of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth).

128 The Hon. Kelly O'Dwyer, "Government takes action to address superannuation guarantee non compliance" (media release, 14 July 2017). Available at http://kmo.ministers.treasury.gov.au/media-release/060-2017/.

129 Mr Michael Campbell, Deputy Fair Work Ombudsman, Operations, Fair Work Ombudsman, *Proof Committee Hansard*, 3 March 2017, 36-37.

130 Ibid 39.

> "Our power to enforce a superannuation payment would only arise through a modern award and it would depend on how that clause is drafted to determine what our enforcement possibilities would be. If it is specific and it requires a percentage payment then we can enforce that as part of our regular work. However, that does not cover all Australian employees; it is only within our jurisdiction and those employees who are covered by a modern award. Again, that is not insignificant, but it is a smaller portion of the working community."
>
> "In simple terms, the work we [as the FWO] focus on is that which is clearly within our jurisdiction. The ATO has a broader jurisdiction than ours. It reaches more employees and employers and it has a better toolkit and set of powers to seek out and recover unpaid superannuation.[131] So we refer it to them and we think that is an appropriate approach. It is not that we do not prioritise it or think that it is important, but the mechanism that we have in place works. That is how we treat that work."

While we appreciate the challenges of limited resources, this approach is somewhat disappointing, given the difficulties for the ATO in detecting and enforcing the SGC outlined above. It is also concerning that there is evidence of some reluctance to seek recovery of unremitted superannuation in situations even where the FWO is already before the court in relation to other unpaid employee entitlements.[132] The FWO is very active in terms of seeking penalties against accessories[133] but has been more timid in pursuit of compensation remedies against them (at least historically).[134] This

131 This comment is referring to the ATO's SGC powers, as well as its director penalty notice powers discussed in section 5 below, in comparison to the FWO's ability to enforce the terms of modern awards and enterprise agreements.

132 See for example, *FWO v Grouped Property Services (No. 2)* [2017] FCA 557 at [115], [151], [496], [507], [583] and [592]. Katzmann J said, for example, at [496]: "The Ombudsman did not seek compensation for this contravention and made no attempt to establish the extent of the contributions that were not made". This breach was a contravention of cl 24.2 of the Clerks Award.

133 According to Fair Work Ombudsman Natalie James, "[n]early every matter we filed in court—92%—roped in an accessory (a party other than the employer who played a role in the exploitation of workers). In 2015–16 this included accountants and human resource managers". Fair Work Ombudsman, *Annual report 2015-2016*, 2.

134 A rare exception is *Fair Work Ombudsman v Yogurberry World Square Pty Ltd* [2016] FCA 1290. More typical is *Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 1456. In this case, the head contractor entity was held liable for being knowingly concerned in underpayment contraventions committed by the direct employer. However, the FWO did not seek to hold the head contractor liable for unpaid superannuation contributions, even though the employer entity had also failed to comply with its award obligations in this regard. Another example is *Fair Work Ombudsman v Samurais Paradise Pty Ltd* [2017] FCCA 2013, where the company was penalised for breaches including non-payment of superannuation and was ordered to pay those contributions, but the director as accessory to those breaches was only subject to small penalties but no compensation order.

is a missed opportunity in relation to superannuation entitlements. This approach also risks encouraging the controllers of the employer company to place it into liquidation as a strategy to avoid payment of both the penalties and the compensation order against it.

Having noted the difficulties in collecting superannuation as a tax noted in section 3, it might have been hoped that these other regulators with relevant powers were picking up the slack. However, this has not been happening. Rather, in the past five or so years, attempts were made to improve the collection of the SG and the SGC as a tax. These will be considered in the next section.

5. Attempts to improve superannuation compliance

This section will consider various measures that have been implemented or proposed since the SGC was introduced in 1992, in recognition of concerns about non-compliance.

5.1 Legislative attempts

In 2012, superannuation was included in the director penalty notice (DPN) regime,[135] allowing the ATO to impose personal liability on directors for unremitted PAYG(W) and superannuation contributions.[136] The legislation was a direct response to a Treasury paper on phoenix activity in 2009,[137] even though there was nothing about the subsequent legislation that confined it to the phoenix activity context.[138] Treasury's paper indicated that "the existing mechanisms provide little incentive not to phoenix, and remedial action is conducted on a case by case basis, well after the damage has been done".[139] It noted that the DPN provisions, which impose personal liability on directors for unremitted withholding taxes unless the company is promptly placed into external administration, did not cover unpaid SGC amounts.[140] The non-reporting and non-payment of these withholding taxes do not become apparent until the end of the financial year, by which time liabilities have reached a significant

135 The TAA was amended by the Tax Laws Amendment (2012 Measures No. 2) Act 2012 (Cth) and the Pay As You Go Withholding Non-compliance Tax Act 2012 (Cth), which came into effect on 29 June 2012.

136 S 269-15, Sch 1 TAA.

137 Treasury, "Action against fraudulent phoenix activity", proposals paper, November, 2009.

138 Phoenix activity generally involves one company closing and its business being continued by a new company, minus the debts of the insolvent company. See further H Anderson, A O'Connell, I Ramsay, M Welsh and H Withers, "Profiling phoenix activity: a new taxonomy" (2015) 33(2) *Company and Securities Law Journal* 133.

139 Treasury phoenix proposals paper, above n 137, 7.

140 Ibid 9.

amount. This defeats one of the purposes of the DPN regime,[141] which is to provide a strong incentive for directors to act swiftly to ensure companies prevent liabilities escalating.[142]

Thus, the idea behind the DPN is not to impose a draconian liability on directors for all of these unremitted amounts, but rather to give them an incentive not to allow company tax liabilities to mount up. To achieve this, there is no personal liability on the director if they report their PAYG(W) and superannuation obligations and then place their companies into liquidation or voluntary administration within 21 days of receiving the DPN.[143] In other words, the company avoids payment of the tax obligations by being placed into liquidation, and its director avoids liability for those amounts through that liquidation too. As noted above in relation to FWO action against the defaulting employer company, liquidation becomes a useful strategy to outmanoeuvre payment of liabilities and penalties, particularly where the company's business can be resurrected through a phoenix company.[144]

Director penalty notices do not appear to be a useful tool against unremitted superannuation. The Australian National Audit Office (ANAO) 2015 report into compliance with SG obligations[145] noted that in 2013-14, the ATO had issued 1,400 DPNs to directors, of which 219 related to insolvent companies.[146] The ATO had not been able to advise the ANAO how many directors of insolvent companies should have received DPNs, noting the use of the DPN has been limited by systems issues and staff resourcing and capability issues.[147] In 2015-16, the number had dropped further with the ATO submission to the Senate ERC inquiry reporting that 877 DPNs were issued in 2015-16 for a total SG debt of $130m. It did not, however, indicate how many of those DPNs did not result in payment of outstanding SG, either because the company was promptly liquidated or the director did not pay for some reason. The ATO called for improvements to recovery powers both for themselves and insolvency

141 The DPN regime was introduced in 1993 by the *Insolvency (Tax Priorities) Legislation Amendment Act 1993* (Cth).

142 The explanatory memorandum to the Insolvency (Tax Priorities) Legislation Amendment Bill stated that "[i]f company directors were made liable for unremitted amounts, which are currently subject to the priority, solvency problems would be confronted earlier and the escalation of debts in respect of those amounts could be prevented". See also the Hon. Bill Shorten, "Protecting employee super and strengthening the obligations of company directors" (media release, no. 138, 13 October 2011).

143 S 269-20, Sch 1 TAA.

144 The TCFUA submission to the Senate ERC noted the "clearly identifiable relationship between non-payment of superannuation, insolvency events and phoenix activity by employers" which "occurs so regularly as to constitute normalised corporate conduct". TCFUA *Submission 50*, Senate ERC Superannuation Guarantee Inquiry, para 4.11.

145 Australian National Audit Office, "Promoting compliance with superannuation guarantee obligations", The Auditor-General ANAO report no. 39 2014-15 performance audit.

146 Ibid at para 4.60.

147 Ibid.

practitioners, or some other means of reducing the incentive towards non-payment of SG,[148] after lamenting that:[149]

> "[g]iven that the reporting date for SGC is two months following the end of the quarter, it is often the case that the eventual liquidation of the company extinguishes the director penalties related to the past eight months of the company's unpaid superannuation obligations."

However, a DPN with respect to *unreported* obligations, known as a lockdown DPN, cannot be avoided by external administration,[150] but the lack of reporting increases the difficulty for the ATO in discovering the non-compliance in the first place. This makes the issue of a DPN less likely in these circumstances. ASIC could assist significantly by providing the ATO with information reported to it by external administrators, as noted above. ASIC knows of the approximate superannuation losses for each of these liquidated companies, but does not know if they have been reported to the ATO or not. The ATO, on the other hand, is unlikely to know of the losses if they are unreported and hence will not have issued a DPN. It therefore makes sense that ASIC, unaware of whether a superannuation liability has or has not been reported to the ATO, report *all* unpaid superannuation information from external administration reporting to the ATO to allow lockdown DPNs to be issued where possible and to augment the ATO's risk profile data collection.

As a precursor to this or any other exchange of information between ASIC and whatever agency is responsible for superannuation, there must be an improvement to the quality of the information held by ASIC. One of the deficiencies in ASIC's databases identified in recent years is the lack of identity verification of directors by ASIC.[151] At present, an application to incorporate a company simply needs the name, address and date of birth of the director. No attempt is made to verify whether these are real or fictitious, nor whether the person has consented to act as a director. In one notorious incident, a client of an accounting firm was named as a director of a company without his consent, and this directorship was backdated a number of years. The ATO then sent a DPN to the alleged director for the company's unremitted taxes. When the alleged director brought the matter to light,[152] the ATO and ASIC raided

148 ATO, *Submission 6*, Senate ERC Superannuation Guarantee Inquiry, para 186.

149 Ibid at para 188.

150 S 269-30(2) table items 1 and 3, Sch 1 TAA.

151 H Anderson, "An ounce of prevention: practical ways to hinder phoenix activity" (2013) 25(3) *Australian Insolvency Journal* 16; H Anderson, "Sunlight as the disinfectant for phoenix activity" (2016) 34 *Company and Securities Law Journal* 257.

152 D Oakes, "Unwitting clients signed up as directors to failing businesses", *7.30 Report*, ABC, 17 October 2016.

the premises of the accounting firm and seized documents to prosecute its fraudulent proprietor.[153] Freezing orders have also been obtained.[154]

It is not known from publicly available information how many DPNs are defeated by this sort of fraudulent arrangement or by the director being fictitious. The ATO's submission to the Senate ERC merely commented that "[a]dministrative improvements to the recovery of SGC potentially could be achieved by improving the systems that support the issuing of DPNs".[155] The Senate ERC went further by recommending that "the government consider implementing a Director Identification Number scheme to prevent individuals engaging in illegal phoenix activity and repeatedly avoiding SG obligations".[156] The federal government has now committed to introducing this measure.[157]

5.2 Administrative attempts

As noted above, a quarterly payment cycle, as opposed to an annual SG payment, was introduced in 2002 to reduce non-payment of superannuation.[158] However, submissions to the Senate ERC made it clear that a three-month payment period may not go far enough in addressing employer default.[159] Cbus submitted that "superannuation should be treated the same as wages and paid congruently".[160] Non-alignment of payment of wages and superannuation has the effect of reducing the level of transparency which makes it difficult for the ATO, and employees, to identify and reconcile their superannuation contributions with their wage and salary payments.[161] Ultimately, the Senate ERC recommended that "the government strongly consider introducing amendments to the SGA Act to require SG to be paid at least monthly, and preferably in alignment with regular pay cycles".[162] However, this still places the onus on the employee to match the amount stated on their payslip, if they receive one, with the amount received by their fund, with all of the difficulties in that process outlined above.[163]

153 D Oakes and S Clark, "Investigators raid offices of Melbourne man linked to multi-million-dollar tax avoidance scheme", ABC News, 3 April 2017. Available at www.abc.net.au/news/2017-04-03/investigators-raid-offices-man-linked-to-tax-avoidance-scheme/8411256.

154 *DCT v A & S Services Australia Pty Ltd* [2017] FCA 437.

155 ATO submission, Senate ERC Superannuation Guarantee Inquiry, para 185.

156 Superbad, above n 4, para 6.105, recommendation 20.

157 The Hon. Kelly O'Dwyer MP, "A comprehensive package of reforms to address illegal phoenixing" (media release, 12 September 2017).

158 Superannuation Guarantee Charge Amendment Bill 2002.

159 Industry Super Australia, *Submission 7.1*, Senate ERC Superannuation Guarantee Inquiry, 16; Cbus, *Submission 48*, Senate ERC Superannuation Guarantee Inquiry, 2–3, 7.

160 Cbus, *Submission 48*, Senate ERC Superannuation Guarantee Inquiry, 2–3, 7.

161 CPA Australia, *Submission 32*, Senate ERC Superannuation Guarantee Inquiry, 2; Institute of Public Accountants, *Submission 31*, Senate ERC Superannuation Guarantee Inquiry, 2–3.

162 Ibid at para 5.55, recommendation 5.

163 See above n 71 and accompanying text.

There appear to be two main objections to changing the frequency of the SG payment obligations. The first relates to cash flow concerns,[164] and the second to the additional administrative burden it may impose on employers. In relation to the issue of cash flow, there was evidence before the Senate ERC which suggested that financial pressures were an "endemic problem"[165] for many small and micro businesses.[166] Self-reportable amounts payable to the ATO, such as the SG, can become a source of funding when a firm enters some form of financial distress. As the Australian Restructuring Insolvency and Turnaround Association point out:[167]

> "By failing to report, the obligation or debt can become hidden and there is a perception that the outstanding amount will remain unidentified until such time as business improves and the amount can be paid. It is often the case that business does not improve and amounts continue to accrue and remain unpaid, and often unreported."

Yet it may be the case that making smaller superannuation payments on a more frequent basis results in employers being less likely to fall behind on payments.[168]

The second objection to increasing the frequency of superannuation payments was the added administrative burden. However, such burdens are arguably mitigated by the availability of software that makes both reporting and payment easier. Further, all employers are now obliged to remit superannuation contributions in compliance with SuperStream, which requires employers to make both contributions into fund bank accounts and notifications to funds electronically.[169] This allows funds to match up the contribution notification with the actual transfer of funds. SuperStream obligations can be complied with via a number of means, including a fund's own electronic portal or through the Small Business Superannuation Clearing House (SBSCH).[170] The SBSCH simplifies the remittance of superannuation for employers with 19 or fewer employees, or with an annual aggregated turnover of $2m or less, and is particularly

164 See Freudenberg and Sargent, above n 5, 102-104.

165 Australian Chamber of Commerce and Industry, *Submission 49*, Senate ERC Superannuation Guarantee Inquiry, 5–6.

166 This may be linked to extended payment times being imposed by larger businesses, as well as late payments of invoices. Office of the Australian Small Business and Family Enterprise Ombudsman, *Payment times and practices inquiry – final report*, April 2017, 4–6. Available at www.asbfeo.gov.au/sites/default/files/ASBFEO_Payment_Times_and_Practices%20Inquiry_Report.pdf.

167 Australian Restructuring Insolvency and Turnaround Association, *Submission 23*, Senate ERC Superannuation Guarantee Inquiry, 1; see also TCFUA, *Submission 50*, Senate ERC Superannuation Guarantee Inquiry, 5.

168 United Voice, *Submission 66*, Senate ERC Superannuation Guarantee Inquiry, 25.

169 ATO, "SuperStream". Available at www.ato.gov.au/Super/SuperStream/.

170 ATO, "Small Business Superannuation Clearing House". Available at www.ato.gov.au/Business/Super-for-employers/Paying-super-contributions/Small-Business-Superannuation-Clearing-House/.

useful where employees are members of different funds. By making payment to the SBSCH, which then distributes the receipts to the appropriate funds, the employer satisfies their SG obligations.

However, SuperStream only works to overcome timing differences between receipt by the fund of payments and notification of what those payments relate to. It does nothing to assist with non-reporting and non-payment of superannuation where the employer chooses not to comply. It also does nothing to overcome the enforcement problem: the fact that the fund has no standing to bring action for non-payment. Partly to address this problem, the federal government proposed single touch payroll (STP).[171] Originally it was mooted as involving payment of superannuation and automatic reporting of those payments of PAYG(W) and superannuation contributions via standard business reporting (SBR) software.[172] However, after concerns were expressed about the impact on company cash flows of more frequent and earlier payments,[173] the obligation was changed to involve only reporting of amounts owed.

Although STP reporting was available to all employers from 1 July 2017,[174] it was only made compulsory from 1 July 2018 and only for employers with 20 employees or more, even though this covers just 3% of Australian businesses.[175] The ATO's submission to the Senate ERC noted that "[s]ome 97 per cent of reports of unpaid super made to the ATO were against small business employers and this same group accounted for around 98 per cent of the liability raised by the ATO".[176] Single touch payroll as it stands at present will not assist the very employees most likely to suffer from SG default. The Senate ERC therefore recommended that:[177]

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171 The Hon. Kelly O'Dwyer, "Streamlining business reporting with a single touch payroll", media release 041-2015, 21 December 2015. Available at http://kmo.ministers.treasury.gov.au/media-release/042-2015/.

172 Available at www.ato.gov.au/General/Consultation/What-we-are-consulting-about/Papers-for-comment/Single-Touch-Payroll--ATO-consultation-paper/#.

173 "Nobody disputes that PAYG tax and super is an employee entitlement and must be paid, the sooner the better. But this is an area where a desirable policy objective needs to take into account the fact that many SMEs struggle with cash flow … It takes more than 50 days on average for small business accounts to be paid and many are in a weak negotiation position with key clients": Accountants Daily, "CAANZ latest to criticise ATO's single touch payroll". Available at www.accountantsdaily.com.au/latest-news/17-news/8069-caanz-latest-to-criticise-ato-s-single-touch-payroll, quoting Michael Croker, head of tax at Chartered Accountants Australia and New Zealand. See also M Croker, Submission to ATO, *Single touch payroll discussion paper* (12 March 2015) 10–13.

174 Available at www.ato.gov.au/general/new-legislation/in-detail/other-topics/single-touch-payroll/.

175 Australian Government, Australian Small Business and Family Enterprise Ombudsman, *Small business counts small business in the Australian economy*, 2016, 2.1.1.

176 Quoted in Superbad, above n 4, para 5.90.

177 Superbad, above n 4, para 7.54, recommendation 31.

> "the government strongly consider expanding Single Touch Payroll to all businesses, with equal consideration given to how small businesses could be best supported in adopting the initiative. The committee recommends that Single Touch Payroll apply to all employees and contractors on an employer's payroll. The committee also recommends that the government give consideration to whether STP should require both the reporting and payment of tax and superannuation obligations."

In response, the minister announced a package of reform measures including that "[e]mployers with 20 or more employees will transition to STP from 1 July 2018 with smaller employers coming on board from 1 July 2019".[178] The TLA 2018 No. 4 Bill represents the first step towards fulfilling this commitment. However, the portion of the Bill relating to fund reporting allows a dispensation to STP reporting for those employees whose funds are regulated by APRA.[179] The fund, not the employer, would submit an "event report" every time an employer makes a payment, and it would act as a substitute for both the *employer's* STP obligation and the *fund's* annual member contribution statement (MCS) reporting.[180]

If this is the case, then it misunderstands the value of STP reporting. STP reporting is about reporting *the obligation* to pay superannuation. It does not require simultaneous payment. Small businesses can remit their super on a quarterly basis (ie as late as legally possible) to retain this "working capital" as long as they can, whereas they pay their wages on a fortnightly or monthly basis. The usefulness of STP reporting is in letting the ATO know what to expect, so that it can chase up non-compliant employers if the superannuation remittance is not paid when it is due to be paid. The proposed fund reporting will only tell the ATO what is paid, not what is missing. Even corporate employers that know the company may later struggle to pay that super have an incentive to comply with STP reporting: its directors will not face "lockdown" DPNs. As discussed above, they will have 21 days to place the company into external administration if a DPN arrives in the mail.

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178 The Hon. Kelly O'Dwyer, "Turnbull Government backs workers on superannuation" (media release, 29 August 2017). Available at http://kmo.ministers.treasury.gov.au/media-release/086-2017/.

179 Para 4.16 of the explanatory memorandum to TLA 2018 No. 4 Bill. See particularly para 4.9: "Recommendation 1 in the Superannuation Guarantee Cross Agency Working Group's final report recommended more frequent and detailed superannuation fund reporting. This recommendation operates in conjunction with the expansion of Single Touch Payroll reporting to all employers. *However, reporting of superannuation guarantee contributions paid into employee superannuation accounts moves to superannuation funds and away from employers.*" (emphasis added)

180 The Bill is drawing on the Cross Agency Working Group recommendation, in its March 2017 report to the Minister, para 4.9.

The TLA 2018 No. 4 Bill exposure draft contains other procedural changes, including the closing off of timing loopholes for DPN estimates, the ability to order payments of security deposits, and the ability of the ATO to give directions to pay the SGC and to be educated on SG obligations. The Bill neatly typifies the government's approach, which is about providing relatively modest additional in-house tools to support the current approach to SG compliance. The next section considers a bolder approach.

6. Analysis

Section 3 showed the procedural difficulties facing the ATO in enforcing compliance with superannuation obligations,[181] and section 4 showed that the other regulators were not doing sufficient work to overcome those difficulties. The government is aware of the need to improve superannuation compliance, as demonstrated by the measures discussed in section 5. However, each of these measures is arguably tinkering around the edges and to date, have not been successful in overcoming the fundamental deficiencies of superannuation as a tax, as evidenced by the ATO's admitted superannuation tax gap, noted above. More could undoubtedly be done within the current framework to reduce superannuation non-compliance and there have been suggestions as to how this might be achieved both by the Senate ERC and this article. Nonetheless, this section seeks to make the case for reincarnating superannuation as a workplace entitlement.

Essentially, the choice is between treating superannuation as part of the wages "package", principally enforceable by the FWO, or part of the tax "package", along with PAYG(W), enforceable solely by the ATO. Enforcement depends on detection, and therefore the best agency for the task is the one that is most likely to be able to detect non-compliance. That agency needs powers to act, if those powers are not already there. The following discussion argues that the FWO is the appropriate agency for the task.

First, in terms of information gathering, the FWO is in a superior position. It is the logical place for employees to complain about poor treatment within their workplaces, and unremitted superannuation is likely to accompany other breaches, such as underpayments of wages and payslip issues. In contrast to the ATO, the FWO already has inspectors on the ground, conducting investigations where they suspect workplaces are not giving employees their proper entitlements, and it conducts audits of high risk workplaces. The FWO will know the underlying rate of pay on which the superannuation entitlement is calculated, and be more experienced than the ATO in detecting both deliberate and accidental miscalculations of those entitlements.

181 See also Superbad, above n 4, ch 6.

Second, in terms of who can bring an action, complainants under the Fair Work Act are in a superior position. Not only can the FWO bring the claim, as it does frequently with wages claims, but employees and unions also have standing. Putting the superannuation entitlement for "deemed employees" within the Fair Work Act would empower a whole new group of employees to pursue their entitlements themselves. While there are the hurdles of cost and information access that may make it difficult for employees and unions to undertake recovery proceedings, the powers to pursue recovery of unpaid superannuation would already be available. This contrasts with the exclusive jurisdiction of the ATO to enforce the SGC. It is impossible to envisage any reworking of the SGAA entitlement within the taxation sphere where employees and unions could have enforcement standing.

Third, in terms of the flexibility needed to address superannuation non-compliance in modern workplaces, the FWO is in a superior position. It understands the challenges posed by modern workplace practices and common organisational formats, including labour hire arrangements, sham contracting, franchises, supply chains, gig economy workers and casual employees.[182] These situations are its bread and butter. Moreover, the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) not only extended liability to holding companies and franchisors in specified circumstances, it also strengthened penalties and increased the powers of the FWO to investigate breaches.[183]

Finally, the reincarnation of superannuation as a workplace right, available to the same "deemed workers" covered by the SGAA, would ensure that they enjoy the same privileges and protections as those covered by modern awards and enterprise agreements under the Fair Work Act. This would include, for example, the right to receive payslips showing superannuation payments.

In terms of the form of action that can be taken, there are difficulties for both the ATO and FWO. While liability pursuant to both the SGC imposed on the employer and DPNs imposed on directors of employer companies are imposed administratively, rather than through court proceedings, both are defeated by the company being placed into liquidation. Equally, court action against the employer company for breach of the Fair Work Act strict liability provisions requiring payment of entitlements[184] is

182 The FWO's insights into, and familiarity with, these issues are evident in a range of public reports, speeches and submissions, including their inquiries into systemic non-compliance in the 7-Eleven network, supply chain issues at Woolworths and the labour procurement arrangements of the Baiada Group. See Fair Work Ombudsman, "Inquiry reports". Available at www.fairwork.gov.au/about-us/access-accountability-and-reporting/inquiry-reports.

183 The *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* inserted into the Fair Work Act s 557A dealing with serious contraventions, attracting higher penalties under s 539(2), and Subdiv DB—Powers to ask questions and require records and documents.

184 Ss 45 and 50 Fair Work Act.

stayed by the company's liquidation.[185] However, accessory liability on the directors, officers and even outside parties as accessories to the company's breach of the civil remedy provisions of the Fair Work Act is still available.[186] There is an established and expanding jurisprudence concerning accessory liability for these types of breaches,[187] including joint and several liability for remedying underpayments.[188] Nonetheless, in reincarnating superannuation as a workplace right, there should be consideration of whether there may be administratively imposed sanctions for non-compliance as there are for the SGC as a tax.

Putting superannuation enforcement in the hands of the FWO, for the reasons recommended above, does nothing to increase the actual superannuation burden on employers, if they were complying with both the spirit and letter of the SG requirements. However, if superannuation were to be reincarnated in this way, it makes sense to take the opportunity to change the entitlement to one calculated on the basis of an employee's gross remuneration, rather than OTE. This would make the payment and recovery process simpler for employees, employers and the regulator tasked with overseeing the system. It would also "properly reflect the intent that SG is a deferred consistent percentage of employee remuneration".[189] It would also be timely to re-examine whether the $450 minimum monthly earnings threshold should be maintained, given the suggestion that it provides an incentive for businesses to engage casual employees on low work rostering.[190]

Section 4 above looked at the powers of ASIC against wrongdoing, including where that involves deliberate non-payment of superannuation. ASIC could not replace the ATO as the agency responsible for superannuation for a range of reasons. This includes the fact that not all employers are companies and ASIC lacks the type of complaints, audit and enforcement infrastructure that makes the FWO so suited to the task. ASIC could, however, play a useful role in superannuation compliance. First, it could ensure that information about superannuation non-compliance from external administrators' reports are sent to the FWO to assist in their intelligence-gathering activities. Second, it could ensure that those caught misusing their positions as directors are appropriately sanctioned, whether through penalties, disqualification or actions to recover compensation.

185 S 471B Corporations Act.

186 S 550 Fair Work Act.

187 See, for example, *Fair Work Ombudsman v Blue Impression Pty Ltd* [2017] FCCA 810, where a firm of outside accountants was liable as an accessory to the employer's breach.

188 See, for example, *Fair Work Ombudsman v Step Ahead Security Services Pty Ltd* [2016] FCCA 1482.

189 Council for the Ageing, *Submission 52*, Senate ERC Superannuation Guarantee Inquiry, 8–9.

190 Australian Institute of Superannuation Trustees, *Submission 37*, Senate ERC Superannuation Guarantee Inquiry, 22– 23. The Sharkie Bill proposed to remove this limit: item 6 of the Fair Work Amendment (Recovering Unpaid Superannuation) Bill 2017 (Cth).

It is undeniable that a great deal of change — legislative, administrative and possibly constitutional — would be required to achieve a full reincarnation of superannuation as a workplace entitlement. There could be a further referral of state legislative powers, as has occurred with both labour law powers and workplace health and safety powers.[191] However, as noted earlier, both of those referrals failed to attract the support of one state.[192] An example of a successful referral is the Corporations Act, which followed years of cooperative schemes.[193] The approach recommended by Rebekha Sharkie MP was that the SG entitlement become part of the national employment standards (NES),[194] which are enforceable by the FWO against national system employers.[195] This would require no constitutional change or further referral of powers by states to the federal government. However, while including the SG entitlement in the NES would cover a wider group of workers than the group presently covered by awards and enterprise agreements, the coverage would not be as broad as the "deemed employees" presently entitled to superannuation under the SGAA.[196]

These limitations would not be present if the government simply utilised its pensions power under s 51(xxiii) of the Australian Constitution. As noted in section 2, in *Roy Morgan*, the Full Federal Court held that "[t]he SGC Act and the SGA Act establish a scheme whereby funds are to be made available for the material support of employees in their invalidity or old age. The legislation is, therefore, properly characterised as a law with respect to 'invalid and old-age pensions'".[197] The court expressly rejected an argument that any payments had to come from the government directly,[198] contrasting the power to make laws with respect to invalid and old-age pensions with the immediately following power in s 51(xxiiiA) dealing with "*the provision of* maternity allowances, widows' pensions …".[199] There is nothing in the Constitution linking the pensions power with the taxation power. Therefore, if the federal government were to use the pensions power exclusively to legislate for superannuation, it could place its entitlements and enforcement into the hands of any government agency it chooses,

191 Above n 37 and accompanying text.

192 Above n 37 and 38.

193 These are summarised in R Austin and I Ramsay, *Ford, Austin and Ramsay's principles of corporations law*, 16th ed, 2015, para 2.170.

194 Item 2 of the Fair Work Amendment (Recovering Unpaid Superannuation) Bill 2017 (Cth).

195 See www.fwc.gov.au/about-us/the-national-workplace-relations-system/coverage. Workers are covered by the national workplace relations system if they work for a constitutional corporation (ie "foreign corporations, or trading or financial corporations formed within the limits of the Commonwealth", per s 51(xx) of the Australian Constitution; work in Victoria, the Australian Capital Territory or the Northern Territory (except law enforcement officers or an executives in the public sector in Victoria, or members of the Police Force in the Northern Territory); work in the private sector in New South Wales, Queensland or South Australia; or work in the private sector or local government sector in Tasmania.

196 S 12(3) SGAA.

197 *Roy Morgan Research Pty Ltd v FCT* (2010) 184 FCR 448 at [100].

198 Ibid at [101].

199 Ibid at [102] to [104] (emphasis added).

including the FWO, Department of Employment, Department of Human Services or a dedicated superannuation agency.

An alternative to all of these is a change to the federal constitution, following a referendum, giving the government direct power to legislate for superannuation. This option would only be required if the High Court were to overturn the Full Federal Court's view in *Roy Morgan* and decide that superannuation was not supported by the pensions power. Indeed, the maternity allowances provision noted above[200] was inserted in 1946 following a referendum, after the *Pharmaceutical Benefits case*[201] had held that the *Pharmaceutical Benefits Act 1944* (Cth) was unconstitutional, as it was not supported by either a s 51 head of power or the executive spending power in s 81 of the Constitution.[202]

A referendum could be justified by the size of the non-compliance problem. The most recent referendum — dealing with Australia becoming a republic — cost $66.8m. This was just under 70% of the cost of the federal election held the previous year.[203] Looking at the cost of Australia's federal election in 2013[204] and allowing for some inflation, one could therefore estimate that a referendum in 2018 or 2019 would cost between $150m and $200m. This is undoubtedly a substantial sum but pales into insignificance compared to the current estimated losses of superannuation and the increase in reliance on the aged pension that will inevitably follow. The voting public, properly informed, are highly likely to support such a constitutional amendment, given the benefits they could personally enjoy. Following a successful referendum, an entirely new superannuation regime could be introduced by the federal government which stands apart from the tax system and the ATO and properly reflects the nature of this entitlement as one related to work and one aimed at ensuring a comfortable retirement.

The second major change would be to the administrative underpinnings of superannuation collection, although there is no reason why reporting arrangements such as SuperStream and single touch payroll could not be maintained and improved as suggested above. These sorts of processes are not dependent on superannuation being a tax. Indeed, this information made available to the FWO or collected directly by it would be very useful to FWO profiling of high risk employers who warrant further investigation, and would augment its other complaint information from

200 See n 199 and accompanying text.

201 *Attorney-General (Vic) ex rel Dale v Commonwealth* (1945) 71 CLR 237.

202 These issues were aired again in *Pape v FCT* (2009) 238 CLR 1 in relation to the global financial crisis-related government stimulus package.

203 See www.aec.gov.au/Elections/Australian_Electoral_History/Cost_of_Election_1901_Present.htm. The 1998 election cost $96,709,059.

204 The figure for the 2016 election is not available, ibid. The cost of the 2013 election was $193,774,374.

employees and unions about delinquent employers. Funds and ASIC would also report to the FWO, the MCS and external administrator information, respectively.

7. Conclusion

It is a truism that no one likes to pay tax. The fact that the SG is characterised as a tax may be contributing to the problem of non-compliance. Employers may believe that tax minimisation is a normal part of running a profitable business. Reframing SG as deferred wages, and treating it more akin to an employment entitlement, may not only improve recovery as this article has suggested, but may also help shift business norms and societal expectations in this regard. Failure to pay SG in full and on time is not about avoiding tax or outsmarting the ATO; it is instead an insidious form of "wage theft" which potentially deprives workers of the opportunity to enjoy a comfortable retirement.

There is much that could be done to improve superannuation collection within the current legislative framework. Examples include better information flows among regulators and between regulators and super funds, expanding single touch payroll to small business as the TLA 2018 No. 4 Bill proposes, and improvements to the performance of both ASIC and the FWO within their existing powers.

But fundamental difficulties would still remain even if these improvements were made. Superannuation as a tax, enforceable purely by the ATO, fails to recognise the multiplicity of parties who hold information and are motivated to act. Heavy reliance by the ATO on employee notifications profoundly disadvantages those with the least "voice" who are most vulnerable. This has repercussions for the government through later increased reliance on the aged pension. It is also deeply unfair that those workers who are receiving their SG entitlement as a result of a modern award or enterprise agreement have better avenues for redress, as well as the right to better payslip information, than other types of workers.

Superannuation, reincarnated as a workplace right, has the capacity to overcome many of the deficiencies with the present arrangements. Through the recent inquiries into superannuation non-compliance, the government is undoubtedly aware of these issues. With an eye on budget pressures and an aging workforce heading towards retirement, now could well be the time to act.