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feature

DETECTING UNPAID SUPERANNUATION

Who knows? Who cares?

In early 2017, the Senate Economics References Committee (SERC) conducted an inquiry into the impact of the non-payment of the superannuation guarantee (SG). Its terms of reference included matters of interest to liquidators, such as the economic impact on workers and the impact on government revenue, and remedies to recoup SG in the event of company insolvency and collapse, including last-resort employee entitlement schemes.

Many submissions dealt with the machinery of SG collection, including various information flows between employer, employee, fund, the Australian Tax Office (ATO), collection agency and union. Timing issues were of particular concern. In May, the committee reported, making 32 recommendations.¹ This article considers recommendations on the detection of unpaid superannuation.

It is difficult for employees to monitor their employer's compliance with SG obligations, notwithstanding payslip reporting of SG payments. This is because information on the payslip may not match the amount showing on funds' members' online portals. Those most vulnerable to under-payment and non-payment of superannuation – casual or poorly educated workers or those from a non-English-speaking background (NESB) – are the least likely to monitor employer compliance.

ATO SUBMISSION

The ATO's submission was of particular interest since the organisation is charged with recovering unpaid SG amounts. The ATO can prove its debt in the company's liquidation because the superannuation guarantee charge, as well as superannuation itself, is a priority category.² In its submission, the ATO reported that:

[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 2015–16.³

For the superannuation guarantee charge (SGC) at 30 June 2016, insolvent debt represented 52 percent of the total SGC debt; this compares to 19 percent for all debt types.⁴

Detecting unpaid SG is difficult. The ATO submission to the inquiry indicated that 70 percent of its reports of superannuation non-compliance came from employee complaints, known as employee notification (EN) reporting.⁵ Employees cannot force the ATO to take action on their behalf.⁶ The ATO is also provided with member contribution statements (MCSs) from superannuation funds regulated by Australian Prudential Regulation Authority (APRA). The funds lodge these before 31 October following the end of the financial year for which the fund is reporting. This means that the ATO may become aware of a non-remittance more than 15 months after it was due to be paid.

THIRD-PARTY REFERRALS.

Superannuation non-compliance can also be detected and reported to the ATO through third-party referrals. The ATO submission to the Senate Expenditure Review Committee (ERC) noted that in 2015–16, the Fair Work Ombudsman (FWO) made 2,405 referrals: 73 from super funds, 651 community referrals, 70 internal ATO referrals and 57 from 'other'.⁷ No figure is given for referrals from the Australian Securities and Investments Commission (ASIC).

This is not because ASIC is unaware of unpaid superannuation. On the contrary, external administrator (EXAD) reporting shows that in 2015–16, there was unpaid

¹ Senate Economics References Committee, *Superbad – Wage theft and non-compliance with the Superannuation Guarantee*, May 2017. ² *Corporations Act* s 556(1)(e)(ii). SGC estimates are also priority payments: s 556(1)(e)(iii). ³ ATO submission, [183]. ⁴ ATO submission, [184]. ⁵ ATO submission no 6, 3. ⁶ *Kronen v FCT* [2012] FCA 1463; *Kronen v Commissioner of Taxation* [2013] FCA 416. ⁷ ATO submission no 6, 10. Similar numbers of referrals were made in 2014–15, with 2,103, 33, 431, 50 and 50 respectively.

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superannuation in 3,709, or 39.2 percent, of reports to ASIC.⁸ According to 19 reports, over \$1million of superannuation was lost; 171 reports revealed unpaid superannuation of between \$250,001 and \$1million, and 468 reports showed non-payment of between \$101,000 and \$250,000.⁹

These figures show that at the very least, there was over \$100m of unpaid superannuation. This did not even take into account the 3,051 companies that had failed to pay superannuation of between \$1 and \$100,000. ASIC knows the names of these companies; liquidators, receivers and administrators have looked into the companies' affairs enough to know that these amounts have not been remitted to their employees. In my submission to the SERC, and in my appearance at a public hearing of the committee, I highlighted this issue.

DATA SHARING

It is therefore pleasing that the SERC recommended the ATO and ASIC review data sharing so that information on insolvency cases is referred by ASIC to the ATO.¹⁰ It is not clear why such communication is not already taking place. ASIC's view might be that the contents of EXAD reports are not useful to the ATO because it is then too late to allow a director penalty notice (DPN). Liquidation of the company within 21 days of receipt of the notice allows the director to avoid liability. However, this only applies to so-called 'standard' DPNs where the amount of the liability has been reported but not paid to the ATO.

'Lockdown' DPNs, on the other hand, which are issued with respect to *unreported* withholding and superannuation liabilities, are *not* avoided by external administration. It therefore makes sense that ASIC, unaware of whether a superannuation liability has or has not been reported to the ATO, report through EXAD *all* unpaid superannuation information to the ATO. This would allow lockdown DPNs to be issued and to augment the ATO's risk profile data collection.

The SERC did not take up this point directly. On the subject of DPNs, it simply recommended that the government investigate strengthening the ATO's ability to recover SG liabilities through that regime. If ASIC provided the ATO with EXAD information about unpaid SG, it might boost the number of the ATO's lockdown DPNs, so that further legislative reform would not be necessary.

ABANDONED COMPANIES

I also highlighted the unknown amount of SG that might be lost to employees of abandoned companies. The SERC

recommended that ASIC and the ATO work together to get a comprehensive picture of the levels of unpaid SG contributions left by abandoned companies.¹¹ Other relevant recommendations were that the ATO and FWO improve information exchanges;¹² and that ATO and ASIC increase their formal cooperation with superannuation funds to improve early detection of SG non-payment.¹³

Another approach to the issue of under-detection and lack of enforcement by the ATO is to look elsewhere. The SERC indicated its desire to see the FWO 'more active in the SG compliance space' with appropriate resourcing.¹⁴ It also contemplated a greater role for private enforcement by the employees themselves, unions or superannuation funds.¹⁵

The SERC also touched on the government's Single Touch Payroll (STP) initiative. At present, STP applies only to businesses with over 20 employees, and will only involve reporting, not payment, of SG amounts.

To the extent that STP relates to reporting, it removes the advantage of lockdown DPNs. The ATO is back in the position of detecting the non-payment, issuing the standard DPN, then watching the company swiftly enter liquidation so that the director escapes personal liability. The SERC recommended that the government consider extending STP to all businesses and requiring both the reporting and payment of tax and superannuation obligations.¹⁶

The committee was dominated by non-government representatives. Deputy Chair Senator Jane Hume, a Liberal Party member, gave a dissenting report in which she expressly endorsed only the recommendation to lower the \$450 monthly threshold on eligibility for the SG. In light of this, it will be interesting to see whether any of the SERC's recommendations are taken further. The separate report of a multi-agency working group inquiry into SG non-compliance, reporting to Assistant Treasurer Kelly O'Dwyer, has yet to surface. ▲

⁸ This reporting is done in compliance with ASIC, *Regulatory Guide 16: External Administrators – Reporting and Lodging* [July 2008] (*ASIC Regulatory Guide 16*). ⁹ ASIC, *Report 507 Insolvency Statistics: External Administrators' Reports (July 2015 to June 2016)* [December 2016], Table 37. ¹⁰ Superbad, above n 1, recommendation 26. ¹¹ Ibid recommendation 27. ¹² Ibid recommendation 28. ¹³ Ibid recommendation 29. ¹⁴ Ibid [6.84] – [6.85], recommendation 17. ¹⁵ Ibid recommendation 14. ¹⁶ Ibid recommendation 31.