DETECTION, ENFORCEMENT AND RESPONSIBILITY: REMEDYING EMPLOYER NON-COMPLIANCE WITH SUPERANNUATION OBLIGATIONS

Angus Mackenzie
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I INTRODUCTION

Mandatory superannuation is the primary mechanism for the provision of retirement income in Australia.\(^1\) The Australian mandatory superannuation scheme is called the Superannuation Guarantee (‘SG’), though entitlements to superannuation can also be sourced in industrial instruments and contracts of employment. Under this scheme, employers must pay contributions to superannuation funds for the benefit of employees. However, data suggests that many employers do not make the required contributions, often forcing employees to rely on the age pension for retirement income.\(^2\) This is because there are a number of barriers to enforcement. These include under-funding of government agencies responsible for detection of non-compliance and enforcement, a lack of adequate reporting obligations on employers, and over-reliance on employees to detect non-compliance and enforce the superannuation scheme. In this paper, I will argue that the current arrangements for enforcing employees’ superannuation entitlements are inadequate, and suggest some reforms to better protect those entitlements, and prevent reliance on the age pension.


II CONTEXT

A Retirement Income in Australia

It is useful to understand the Australian retirement income regime as a system of ‘pillars’. Typically, Australia’s retirement income system is understood as having three pillars, namely, the social security age pension, occupational superannuation and voluntary private savings.

Australia's first State pension was set up in 1900 and from 1908 Australia has had a federal flat-rate pension available to all, with only limited exceptions. Until the expansion of the superannuation regime in the 1980s, this was the major source of retirement income in Australia. Eligibility for the age pension was tightened from 1978, to deal with the implications of the ageing population for the cost of the pension, retirees’ higher expectations for retirement income, and macroeconomic concerns. The same pressures provided the impetus for the introduction of mandatory

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5 Swoboda, above n 4, 3; Invalid and Old-Aged Pensions Act 1908 (Cth); Hazel Bateman and John Piggott, ‘Australian Retirement Income Policy’ (1992) 9(1) Australian Tax Forum 1, 1.
7 Borowski, above n 3, 48-50.
8 Australian Government Treasury, above n 1, 83.
9 Ibid 78.
superannuation as the primary means for the provision of retirement income in the early 1990s, though the pension remains as a safety net retirement income.10

Superannuation is a monetary benefit accumulated in a superannuation fund or scheme, for the benefit of a person, normally accessible when that person attains a certain age.11 Although private pensions existed in Australia as early as 1862, the role of occupational superannuation in Australia before 1986 was small, and coverage was limited mainly to white collar civil servants.12

However, support for a national superannuation scheme was strong with unions.13 The Hawke Government initiated discussions with unions with a view to broadening access to superannuation in 1983.14 With support from the government, the ACTU sought a mandatory 3 per cent superannuation contribution from employers in the 1986 National Wage Case.15 The subsequent agreement, The Accord Mark II, cemented the 3 per cent superannuation contribution, known as Productivity Award Superannuation (‘PAS’), in industrial awards.16 This created a rapid increase in superannuation coverage.17

However, there were numerous problems with PAS. Non-compliance, in particular, was widespread. Indeed, the Australian Industrial Relations Commission recognised in 1991

10 Ibid 90.
12 Borowski, above n 3, 46-7.
13 Australian Government Treasury, above n 1, 77.
17 Australian Government Treasury, above n 1, 80-81.
that the system ‘may be flawed to the point of frustrating its contribution to the
achievement of an adequate national retirement incomes system’.\(^\text{18}\) In response, the
Keating Government introduced a new legislative scheme, the Superannuation
Guarantee (‘SG’), requiring employers to make superannuation contributions to
approved funds on behalf of their employees.\(^\text{19}\) This scheme made superannuation
available to all employees,\(^\text{20}\) and operates alongside, but independently of,
superannuation entitlements under industrial instruments and contracts of
employment.\(^\text{21}\)

\[C \text{ The Superannuation Guarantee Scheme}\]

The SG scheme imposes a tax, the Superannuation Guarantee Charge (‘SGC’), on
employers who do not make legislated minimum contributions to superannuation funds
on behalf of their employees in each quarter of the year.\(^\text{22}\) The purpose of the SGC is to
courage employers to make the minimum contributions.\(^\text{23}\)

There is no provision expressly setting out the employer’s obligation to pay the
minimum contributions. Rather, if an employer does not make contributions on behalf
of an employee of a certain amount, expressed as a percentage of the employee’s
earnings for the quarter, the employer will have an SG shortfall, and SGC will be imposed

\(^{\text{18}}\) National Wage Case April 1991 (Australian Industrial Relations Commission, Case No 4, April
1991), [61].

\(^{\text{19}}\) Superannuation Guarantee (Administration) Act 1992 (Cth); Commonwealth, Parliamentary
Debates, House of Representatives, 2 April 1992, 1763-8 (John Dawkins); Bateman and Piggott,
‘Mandatory Retirement Saving’, above n 6, 555.

\(^{\text{20}}\) James Leow, Shirley Murphy and Giles Hooper, CCH, Australian Master Superannuation Guide
2014/15, 18th ed (at 30 June 2014), ¶1-000.

\(^{\text{21}}\) Ibid ¶12-020.

\(^{\text{22}}\) Ibid ¶12-000; Woodford v Landline Investments Pty Ltd [2000] QDC 258 [6].

\(^{\text{23}}\) Woodford v Landline Investments Pty Ltd [2000] QDC 258 [6]; Commonwealth, Parliamentary
on the shortfall.\(^{24}\) For 2015, that percentage, called the charge percentage, is 9.5 per cent.\(^{25}\) Making the contributions allows employers to avoid having shortfall, and thereby avoid incurring liability to pay SGC, by reducing the charge percentage to zero.\(^{26}\)

If the minimum contributions are not made, and SG shortfall remains unpaid after the 28\(^{th}\) day after the end of the quarter, the employer must lodge a SG statement\(^ {27} \) and the SGC becomes payable.\(^ {28} \)

\textit{D The Superannuation Guarantee Charge}

In addition to the component representing the employer’s SG shortfall for the quarter, the SGC includes an administration component and a nominal interest component.\(^ {29} \) The nominal interest component is a substitute for fund earnings that would have accrued to the employee, had the employer made the required contributions.\(^ {30} \) The administration component is twenty dollars for each employee in respect of whom there is an SG shortfall.\(^ {31} \) The nominal interest and administrative components, as well as the

\(^{24}\) \textit{Superannuation Guarantee Charge Act 1992 (Cth)} s 5. An employer’s total SGC for a quarter is the sum of the individual shortfalls it owes for the quarter as well as other amounts. See \textit{Superannuation Guarantee (Administration) Act 1992 (Cth)} s 17.

\(^{25}\) Ibid s 19(2).

\(^{26}\) Ibid ss 17, 19(1), 22, 23. Note that the contributions reducing the charge percentage under s 23 are calculated by reference to an employee’s OTE for the quarter, whereas the SG shortfall is calculated by reference to the employee’s salary and wages, under s 19. An employee’s salary and wages are often a greater amount than her OTE. See, \textit{Leow, Murphy and Hooper, above n 20, ¶ 12-215; Superannuation Guarantee Ruling SGR 2009/2 [2009] ATO 2008/7486}. OTE are usually those set out in an industrial instrument, but if not specified are the earnings an employee would receive for the normal, regular, usual or customary hours worked by the employee. See, \textit{Superannuation Guarantee Ruling SGR 2009/2 [2009] ATO 2008/7486}.

\(^{27}\) \textit{Superannuation Guarantee (Administration) Act 1992 (Cth)}, s 33.

\(^{28}\) Ibid ss 16, 46.

\(^{29}\) Ibid s 17.

\(^{30}\) \textit{Leow, Murphy and Hooper, above n 20, ¶ 12-150; see Superannuation Guarantee (Administration) Regulations 1993 (Cth) reg 7A}.

\(^{31}\) \textit{Superannuation Guarantee (Administration) Act 1992 (Cth)} s 32.
calculation of the SGC by reference to salary and wages instead of ordinary time
earnings (‘OTE’), which is often a lesser amount, provide incentives for employers to
avoid incurring SGC. 32 The SGC is also not tax deductible, where contributions reducing
the charge percentage are.33

Under taxation legislation, the SGC is a ‘tax-related liability’.34 This means that when SGC
becomes due and payable, it is a civil debt due to the Commonwealth and payable to the
Federal Commissioner of Taxation (‘the Commissioner’).35 If the debt is not paid, the
Commissioner can recover the liability from the employer or a director of the
employer36 or from certain third parties.37

Ordinarily,38 where SGC is paid to the Commissioner, the Commissioner must pay an
amount representing the employer’s individual SG shortfall and nominal interest
component into a complying fund for the benefit of the employee.39

D Other Superannuation Entitlements

Whilst the SG scheme provides the minimum superannuation contributions an employer
is required to make for the benefit of an employee, an employee may also be entitled to
contributions under her contract of employment, or an industrial instrument, such as a
modern award or enterprise agreement.40

33 Income Tax Assessment Act 1997 (Cth) s 26.95.
34 Taxation Administration Act 1953 (Cth) sch 1 div 255-1, 255-10.
36 Ibid sch 1 div 255-5.
37 Ibid sch 1 div 260-5.
40 Leow, Murphy and Hooper, above n 20, ¶ 12-030.
1 Employment Contracts

All employees have contracts of employment with their employers.41 These contracts can provide that employers must make superannuation contributions on behalf of employees.42 These provisions operate alongside entitlements under the SG scheme. Therefore, in addition to minimum superannuation entitlements under the SG scheme, employees may also be entitled to the same or greater contributions under their contracts of employment.

2 Modern Awards

Part 2-3 of the Fair Work Act 2009 (Cth) (‘FWA’) provides for the Fair Work Commission (‘FWC’) to make, vary and revoke modern awards.43 Modern awards constitute part of the safety net of minimum employment conditions. However, unlike statutory elements of the safety net, like the SG scheme, modern awards do not apply to all employees.44 Rather, modern awards are industry-specific and are only relevant to employment relationships governed by the Fair Work legislation.45 Further, even where there is a modern award which covers the industry in which the employee works, the award may not apply to the particular employee46 Notwithstanding these various exceptions, most Australian employees are covered by modern awards.47

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42 See, eg, Willis v Health Communications Network Ltd (No 2) [2008] NSWCA 2.
43 Fair Work Act 2009 (Cth) s 132.
44 See Fair Work Act 2009 (Cth) pt 2-2.
45 Eg, Western Australian employers who are not constitutional corporations, and some public state employers are not subject to the Fair Work Act 2009 (Cth).
47 Creighton and Stewart, above n 41, 229.
Under s 149B of the FWA, all modern awards must now include a term requiring employers covered by the award to make superannuation contributions for the benefit of their employees such as to avoid liability to pay the SGC.48

Superannuation provisions in modern awards may also entitle an employee to contributions in excess of those required under the SG scheme, or require contributions to be made for the benefit of employees who would otherwise not be entitled to them.49

3 Enterprise Agreements

Enterprise agreements are industrial instruments created by agreement between employers and employees (and/or their respective representatives) about the terms of employment. These agreements must be approved by the FWC to take effect under the FWA.50

Enterprise agreements can include provisions about superannuation.51 These provisions operate in a similar way to superannuation entitlements under modern awards as further elements in the superannuation safety net.

III ENFORCEMENT

A Self-Assessment

Though the Commissioner is responsible for the general administration of the SG scheme, the SGC is administered on a self-assessment basis.52 That is, employers must assess their own liability to pay the SGC.53

48 Fair Work Act 2009 (Cth) s 149B.
49 See, eg, Willis v Health Communications Network Ltd (No 2) [2008] NSWCA 2.
50 Fair Work Act 2009 (Cth) pt 2-4; Creighton and Stewart, above n 41, 300.
51 Fair Work Act 2009 (Cth) s 194.
Employers must themselves determine whether or not they have SG shortfall for a quarter, and those employers that have SG shortfall and are liable to pay SGC must lodge a SG statement with the Australian Tax Office (‘the ATO’) with payment of the SGC by the 28th day of the second month following the end of the quarter. SG statements must set out the amount of SGC the employer is liable to pay for the quarter. When the SG statement is lodged, the Commissioner is taken to have made an assessment of the employer’s liability to pay SGC, though the Commissioner can amend an assessment, or make a default assessment where an employer has not lodged an SG statement.

Penalties apply to employers who fail to lodge SG statements, provide false or misleading information, or fail to pay SGC. In particular, employers who fail to self-assess their liability to pay SGC may face enforcement proceedings, become liable to pay additional SGC, or be subject to administrative penalties and fines. The Commissioner also has wide powers to require employers to provide information or attend before him to answer questions.

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53 Leow, Murphy and Hooper, above n 20, ¶ 12-350.
54 Superannuation Guarantee (Administration) Act 1992 (Cth) s 46(2).
55 Ibid s 33(2)(b).
56 Ibid s 35(1)(c).
57 Ibid s 37.
58 Ibid s 36.
60 See, eg, Taxation Administration Act 1953 (Cth) s 8C; Superannuation Guarantee (Administration) Act 1992 (Cth) pt 7.
63 Superannuation Guarantee (Administration) Act 1992 (Cth), ss 34, 77.
There are, however, ways in which liability to pay SGC may come to the attention of the ATO without the employer self-assessing that liability. In general, the ATO employs a risk management approach to compliance. As regards SG compliance, this involves investigating complaints made by employees about non- or under-payment of SG contributions, as well as targeting employers in high-risk industries for proactive operations.

1 Employee Notification

The primary means by which the ATO becomes aware of an employer’s liability to pay SGC where the employer has not self-assessed that liability is through an employee making an Employee Notification ('EN') complaint.

An EN complaint is a complaint lodged by an employee, former employee, or someone on their behalf to the ATO regarding non- or under-payment of SG contributions. An employee can lodge an EN complaint either through the ATO’s Employee SG Calculator Tool, or by phoning the ATO.

66 Inspector-General of Taxation, above n 2, 4 and 53.
Employees may become aware of non- or under-payment of their SG entitlements through their employers, or through their superannuation funds. Employers must provide their employees with pay slips within one working day of each payment.69 Pay slips must include the amount of any SG contributions that have been made or for which the employer is liable to make, as well as other information.70 However, because an employer may comply with its payslip reporting obligations by providing their liability to pay SG contributions, instead of the actual amount contributed, an employee will not necessarily be able to tell whether their super contributions have been made, or when they will be made.71 Non-compliant employers may also be able to avoid detection without breaching their payslip reporting obligations by not distinguishing between contributions made and liability to pay contributions.72 Legislation has been enacted with a view to requiring employers to provide more useful information to employees on their payslips.73 However, the regulations required to give effect to the changes have not been enacted.74

Though the Gillard Government in 2012 released draft legislation requiring superannuation funds to report to their members about the contributions made by employers to the fund, this legislation has also not been enacted.75 Similarly, trustees of superannuation funds are required to comply with superannuation data and payments

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69 Fair Work Act 2009 (Cth) s 536.
70 Fair Work Regulations 2009 (Cth) reg 3.46.
71 Leow, Murphy and Hooper, above n 20, ¶ 12-520.
73 Tax and Superannuation Laws Amendment (2012 Measures No 1) Act 2012; Superannuation Industry (Supervision) Act 1993 (Cth), s 336JA(2).
74 Leow, Murphy and Hooper, above n 20, ¶ 12-520.
75 Exposure Draft, Superannuation Legislation Amendment (Stronger Super and Other Measures) Bill (No 2) 2012 (Cth).
regulations and standards set by the Australian Prudential Regulation Authority. However, regulations and standards requiring trustees to provide information to members about employer contributions made on their behalf have not been made. Currently, superannuation funds report to members about contributions made on their behalf annually.

The ATO’s website makes clear that it expects employees to first raise the under- or non-payment of their SG entitlements with their employers and check their most recent fund member statements before initiating an EN complaint.

2 Proactive Actions by the ATO

Proactive operations taken by the ATO towards detecting SG non-compliance include data-matching and proactive audits. All proactive operations are targeted towards employers and industries that pose a high risk of non-compliance. In 2012-13, the ATO focussed on cafes and restaurants, and real estate and carpentry businesses.

In addition to SG statements, the ATO receives information from employers for varied reasons, for instance, when an employer files its tax return. It also receives information from third parties such as financial institutions, superannuation funds and

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76 Superannuation Industry (Supervision) Act 1993 (Cth), s 34M.
78 Inspector-General of Taxation, above n 2, 45.
81 Ibid.
other government bodies through its third party referral processes.\textsuperscript{83} This data is used by the ATO to cross-check the information provided to it by employers to identify SG non-compliance as part of its data-matching operations.\textsuperscript{84}

The ATO also proactively audits employers’ compliance with SG obligations in focussed SG audits where it finds evidence of non-compliance, and through general employer obligation reviews.\textsuperscript{85} These operations target employers who pose a high risk of non-compliance.\textsuperscript{86}

\textit{C Recovery of Unpaid Entitlements}

\textit{1 Recovery through the ATO}

SGC and penalties associated with it are civil debts due to the Commonwealth and payable to the Commissioner.\textsuperscript{87} The SGC is part of the revenue-raising mechanism of the federal taxation system.\textsuperscript{88} This means that SGC is imposed automatically and without a court order.\textsuperscript{89} If not paid, SGC may be recovered by the Commissioner through direct action against an employer,\textsuperscript{90} a director of the employer,\textsuperscript{91} or from a third party.\textsuperscript{92}

\begin{footnotes}
\item[83] Ibid; Inspector-General of Taxation, above n 2, 49.
\item[86] Ibid.
\item[87] \textit{Taxation Administration Act} 1953 (Cth) sch 1 div 255-5(1).
\item[88] Anderson and Hardy, above n 2, 190.
\item[89] Ibid 190.
\item[90] \textit{Taxation Administration Act} 1953 (Cth) sch 1 div 255-5(2).
\item[91] Ibid sch 1 div 269.
\item[92] Ibid sch 1 div 260-5.
\end{footnotes}
Collection and recovery of unpaid tax-related liabilities, such as SGC, by the ATO is governed by pt 4-14 of sch 1 to the Taxation Administration Act 1953 (Cth). The normal response to non-payment of a debt is for the ATO to pursue enforcement measures of increasing consequence with increasing risk of non-compliance and continuing failure to comply. The most extreme sanction taken against tax debtors who do not pay their debts is sequestration of an individual’s estate in bankruptcy or the liquidation of a company, though this is normally only used where other measures have been taken or proven unsuccessful. Steps taken by the ATO to recover unpaid SGC early in the recovery process include sending letters to employers encouraging them to pay their debts and setting out the penalties that may arise in the event of non-payment, though the ATO’s preferred means of recovery of unpaid SGC is through payment arrangements made with employers.

The Commissioner’s garnishee powers allow him to require a third party who owes, or who may later owe, money to an employer with unpaid SGC to pay money to the Commissioner in place of the employer’s paying the debt. Heavy penalties apply to third parties who fail to comply with such requirements.

Likewise, the director penalty regime that applies to companies who breach their tax obligations applies to unpaid SGC, though defences are available to directors in some circumstances.

93 Australian Commissioner of Taxation, Practice Statement Law Administration 2011/18, PS LA 2011/18, 3 July 2014, 8.
94 Ibid; Inspector-General of Taxation, above n 2, 84.
95 Australian Commissioner of Taxation, above n 93, 8.
96 Ibid 84.
97 Ibid 84.
98 Taxation Administration Act 1953 (Cth), sch 1 div 260-5.
99 See, eg, ibid sch 1 div 260-20.
100 Ibid sch 1 div 269, 269-35.
There are significant consequences for recovery of employee superannuation entitlements when an employer becomes insolvent. Broadly speaking, superannuation contributions are treated similarly to other employee entitlements. A full discussion of the consequences of employer insolvency for the recovery of superannuation entitlements is beyond the scope of this essay. It is sufficient to note that unpaid superannuation entitlements are much more difficult to recover from insolvent employers.

2 Other Avenues

(a) Private Actions Under the Superannuation Guarantee Act

An employee cannot force the ATO to pursue unpaid superannuation contributions through applications for judicial review. This is because the words of ss 36 and 37 of the Superannuation Guarantee (Administration) Act 1992 (Cth) (‘SGAA’) are wholly permissive and so do not create rights in employees, or impose duties on the ATO.

In the absence of an entitlement to superannuation under an industrial instrument or contract, an employee has no private right of action to recover unpaid superannuation contributions from her employer. This rule was established in Woodford. In that case,

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101 Corporations Act 2001 (Cth), s 556(1), (1A), (1AB).
102 See, eg, Anderson and Hardy, above n 2, 171-5; Scott and Marchetti, above n 2, 13-15; Leow, Murphy and Hooper, above n 20, ¶ 12-400.
105 Ibid 505.
106 Woodford v Landline Investments Pty Ltd [2000] QDC 258.
McGill DCJ held that the SGAA did not evince a statutory intention to grant a right of action to enforce superannuation entitlements to employees.107

(b) Actions in Contract

An employee whose contract of employment entitles her to superannuation contributions can enforce that entitlement in an action for breach of contract.108

Importantly, under s 542(1) of the FWA, safety net contractual entitlements, including superannuation, are treated as entitlements under the FWA.109 This means that a Fair Work Ombudsman ('FWO') inspector can apply for an order on behalf of an employee in relation to an employer's contravention or proposed contravention of contractual superannuation entitlements,110 even if the entitlement is to contributions greater than those required under the SG scheme or an industrial instrument.111

(c) Actions under Industrial Relations Legislation

Industrial legislation in some States allows courts to avoid or vary contracts of employment if they are unfair, harsh or unconscionable, or against the public interest.112 The New South Wales Industrial Relations Commission has used this power to vary a contract of employment to require an employer to pay superannuation contributions that would have been paid to the employee under the SG scheme.113 But, since 2006, the

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107 Ibid [38].
108 See, eg, Willis v Health Communications Network Ltd (No 2) [2008] NSWCA 2.
109 Fair Work Act 2009 (Cth) ss 12, 139(1)(j).
110 Ibid s 541(2).
111 Creighton and Stewart, above n 41, 509.
112 Eg, Industrial Relations Act 1996 (NSW) ss 105, 106; Industrial Relations Act 1999 (Qld) s 276.
operation of this State legislation has been much restricted as a result of federal
enactments.\(^{114}\)

Further, unfair contracts legislation is not present in all States, and the terms of any
variation under existing legislation is at the discretion of the Court.\(^{115}\) As such, it need
not reflect the employee’s entitlements under the SG scheme.

\((d)\) Actions for Breach of an Implied Term

It has been suggested that an employee may be able to recover unpaid superannuation
contributions in an action for breach of a term of good faith or mutual trust and
confidence implied into his or her contract of employment.\(^{116}\) Indeed, duties of good
faith and mutual trust and confidence have previously been implied into contracts by
Australian courts.\(^{117}\) However, since the decision of the High Court in *Commonwealth
Bank of Australia v Barker*,\(^{118}\) it is clear that arguments based on an implied term of
mutual trust and confidence will now fail. That said, it is still not settled whether a term
of good faith can be implied into contracts of employment in Australia.\(^{119}\)

For an employee to recover unpaid superannuation contributions in an action for
breach of an implied term, they would need to establish the existence of the term, and
that failure to pay the contributions constitutes a breach of that term.\(^{120}\) This would be

\(^{114}\) See *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) s 16(1)(d) and *Fair Work
Act 2009* (Cth) s 26(2)(e).

\(^{115}\) Eg, *Industrial Relations Act 1996* (NSW) s 106; *Industrial Relations Act 1999* (Qld) s 276.

\(^{116}\) Leow, Murphy and Hooper, above n 20, ¶12-420.

\(^{117}\) See, eg, *Russell v Trustee of the Roman Catholic Church for the Archdiocese of Sydney* [2007] 69
NSWLR 198; *Rogers v Millennium Inorganic Chemicals Ltd* [2009] 229 FLR 198.

\(^{118}\) (2014) 312 ALR 356.

The High Court left open the possibility that a duty of good faith may be implied into all
commercial contracts. See generally, Andrew Stewart, *Stewart’s Guide to Employment Law*

\(^{120}\) Leow, Murphy and Hooper, above n 20, ¶ 12-420.
difficult for an employee to make out in most cases, and the outcome of claims would be even more difficult to predict, given the unsettled status of the law on implied terms.

(e) Actions for Breach of an Industrial Instrument

Employees and FWO inspectors can take actions for breach of modern awards or enterprise agreements.\textsuperscript{121} As indicated above, all modern awards must contain a clause entitling the employee to superannuation contributions reflecting their entitlements under the SG scheme, and most employees covered by the Fair Work legislation are also covered by awards.\textsuperscript{122} Consequently, most Australian employees, and the FWO on their behalf, can take actions to enforce their entitlement to at least the superannuation contributions required under the SG legislation.

(f) Conclusions as to Other Avenues

It is important to note that, whilst the above avenues provide a means for most employees to enforce their superannuation entitlements, these avenues are not open to all employees covered by the SG scheme.\textsuperscript{123}

In particular, actions for breach of industrial instruments will not be available to employees not covered by the Fair Work legislation, or employees covered by that legislation but not covered by an industrial instrument. If such employees want to take an individual action to enforce their superannuation entitlements, and they have no contractual superannuation entitlement, they are left only to take actions under industrial relations legislation (if that is available), or for breach of implied contractual terms.

\textsuperscript{121} Fair Work Act 2009 (Cth) s 539.
\textsuperscript{122} Ibid s 149B.
\textsuperscript{123} Ibid.
Actions under industrial relations legislation are inadequate to protect most employees’ superannuation entitlements because relevant industrial relations legislation is only applicable in confined circumstances, only enacted in some States, and the orders made in successful cases need not reflect the employee’s superannuation entitlements.

The law with respect to implied terms is unsettled, and it is difficult to predict the likelihood of success in actions for breach of implied terms. As such, actions for breach of implied contractual terms are not adequate to enforce employees’ superannuation entitlements.

There have been strong suggestions that the SG legislation should be amended to allow employees to bring private actions to enforce their superannuation entitlements.\(^{124}\) However, as I will discuss further below, employees are poorly placed to enforce their entitlements, because they are often under-resourced, uninformed and fearful of retaliatory action.\(^{125}\) There are also broader problems associated with over-reliance on employees to enforce superannuation entitlements. As such, it is not recommended that the SG legislation be amended to grant employees a private right of action to enforce their superannuation entitlements.

### IV DISCUSSION

#### A Superannuation Policy

It is clear from the history of superannuation in Australia and its position in Australia’s three-pillar retirement income system that the two major policy outcomes driving the SG scheme are the provision of higher retirement incomes, and reducing workers’

\(^{124}\) See, eg, Scott and Marchetti, above n 2.

\(^{125}\) Creighton and Stewart, above n 41, 507-8.
reliance on the age pension. If these outcomes are to be achieved, it is vital that non-compliance with employers’ obligations to make superannuation contributions on behalf of their employees is detected and the obligations enforced.

However, though it is unclear the extent to which non-compliance is present, it is evident that a significant number of employers are not making the required contributions, and that there are important impediments in enforcing the regime. This subverts the policy outcomes of the SG scheme, because it lessens the amount of retirement income available to retirees, and causes more people to rely on the age pension. This is especially the case because the most vulnerable employees, who are most likely to have to rely on the age pension to fund their retirement, are also those most likely not to receive their superannuation entitlements.

B The ATO’s Reach

The ATO is best placed to enforce the SGC. This is because, unlike any other agency, the SGC is owed as a debt to the Commonwealth and the Commissioner can recover it from non-compliant employers without a court order. The ATO also has an information advantage over other agencies, because it collects data from employers for reasons

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126 Commonwealth, Parliamentary Debates, House of Representatives, 2 November 2011, 12420-24 (Bill Shorten), 12420.
127 Inspector-General of Taxation, above n 2, 4.
128 See, eg, Anderson and Hardy, above n 2; Scott and Marchetti, above n 2; Inspector-General of Taxation, above n 2. In 2010, the amount of unpaid SGC that the ATO knew about but did not recover was $936.1 million.
129 Inspector-General of Taxation, above n 2, 53-55.
130 Anderson and Hardy, above n 2, 190.
other than SG compliance, and can collect unpaid entitlements from directors and third parties.\textsuperscript{131}

As Bateman and Piggott point out, however, the minimum superannuation contributions required under the SG scheme are often insufficient to provide adequate retirement income, and many retirees on behalf of whom the required SG contributions have been made nevertheless end up relying on the age pension for retirement income.\textsuperscript{132} This is especially true of vulnerable workers such as those with broken work histories.\textsuperscript{133} For this reason, many industrial instruments provide for entitlement to contributions greater than those required under the SG scheme, and many workers ‘salary sacrifice’ into superannuation.\textsuperscript{134} It is notable that workers with broken work histories and casual and low-income workers are also the workers whose superannuation contributions are most likely not to be made.\textsuperscript{135} It is therefore evident that in many cases unpaid superannuation contributions not recovered by the ATO translate into revenue required to pay the age pension.

It is the ATO’s policy not to pursue unpaid SGC where the cost of recovery exceeds the amount owed.\textsuperscript{136} As a result, recovery from an employer of an amount of SGC will ordinarily pose a lower cost to revenue than payment of the same amount of age pension. This may warrant an expansion of the regime under which unpaid superannuation contributions are owed as a debt to the ATO to cover entitlements to

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\textsuperscript{131} Streckfuss, ‘Regulation of Unpaid Superannuation Contributions’, above n 67, 293; \textit{Taxation Administration Act 1953} (Cth), sch 1 div 260-5, 269.
\textsuperscript{132} Bateman and Piggott, ‘Mandating Retirement Provision’, above n 15, 104.
\textsuperscript{133} Ibid.
\textsuperscript{135} Inspector-General of Taxation above n 2, 53-55.

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contributions under contracts of employment and industrial instruments. By this extension, more superannuation entitlements can be enforced by the most efficient means available. This is important if we are to ensure reduced reliance on the age pension at the lowest cost to revenue.

However, the ATO’s track record in enforcing the SG regime is poor. Expanding the responsibilities of the ATO is therefore an ideal reform that should be addressed only when the immediate inadequacy of the ATO’s enforcement activities has been rectified. It has been strongly suggested that the ATO’s poor enforcement outcomes are in large part due to under-resourcing. It is therefore recommended that the ATO’s funding to pursue detection and enforcement of unpaid SGC be expanded. In addition, the Government should consider expanding the regime under which unpaid superannuation contributions are owed as a debt to the ATO to cover entitlements arising under contracts of employment and industrial instruments. This latter recommendation should only be pursued, however, if the ATO is first funded to improve on its current enforcement outcomes and allocated funding to reflect the proposed increase in its responsibilities.

C The FWO’s Responsibilities

In contrast to the ATO, the FWO has a strong enforcement record. In January 2014, the Government amended the FWA to include s 149B, which provides that every modern award must contain a provision requiring employers covered by the award to

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137 See, eg, Anderson and Hardy, above n 2; Scott and Marchetti, above n 2; Inspector-General of Taxation, above n 2.
138 Inspector-General of Taxation, above n 2, 50-53.
make superannuation contributions to avoid liability to pay SGC.\textsuperscript{140} This allows the FWO to enforce an entitlement to contributions required under the SG regime on behalf of any employee covered by a modern award.\textsuperscript{141}

However, it is unclear whether the FWO has been funded to accommodate this increase in responsibility for superannuation enforcement.\textsuperscript{142} Nor is it clear that the FWO is willing to accept the increase. Certainly, the FWO's website indicates that primary responsibility for enforcement of superannuation entitlements remains with the ATO.\textsuperscript{143}

In any event, the broadening of the FWO's responsibilities to enforce superannuation entitlements can only provide a partial solution to the problems posed by the inadequacy of the enforcement system. This is because s 149B only allows the FWO to enforce the superannuation entitlements of employees covered by modern awards, which excludes employees who do not fall under the Fair Work legislation, and employees covered by that legislation but not covered by a modern award\textsuperscript{144} or to whom a modern award does not apply.\textsuperscript{145} The SG scheme, which is administered through taxation legislation, is not restricted in this way, and covers all employees. Moreover, the FWO, unlike the ATO, requires court orders to enforce entitlements, which is a less efficient means of enforcement than the ATO's collection of the

\textsuperscript{140} \textit{Fair Work Amendment Act 2012} (Cth), sch 1 s 13 inserting \textit{Fair Work Act 2009} (Cth) s 149B.

\textsuperscript{141} \textit{Fair Work Act 2009}, s 539.

\textsuperscript{142} Comparison of the FWO's Budget Statements for 2012-13 and 2013-14 suggest that total FWO funding has decreased. Fair Work Ombudsman, 'Portfolio Budget Statement 2012-13' (Budget Statement, Fair Work Ombudsman) cf Fair Work Ombudsman, 'Portfolio Budget Statement 2013-14' (Budget Statement, Fair Work Ombudsman).


\textsuperscript{144} As noted earlier, Western Australian employers who are not constitutional corporations, and some public state employers are not subject to the \textit{Fair Work Act 2009} (Cth).

\textsuperscript{145} For example, modern awards do not apply to high income employees: \textit{Fair Work Act 2009} (Cth) s 47(2).
underpayment as a debt. The FWO also does not have the ATO's garnishee or director penalty powers.

Nevertheless, good ground may have been made with the introduction of s 149B. That provision may provide most employees with another avenue for the recovery of unpaid entitlements. That said, the same objective might have been better achieved through expansion of the regime under which unpaid contributions are owed as a debt to the ATO to cover entitlements under contracts of employment and industrial instruments. Though, as I will show, s 149B is problematic insofar as it places more responsibility on employees to enforce superannuation entitlements.

\textit{D Information}

In order for any person or agency to become aware of an employer's liability to pay SGC, two pieces of information are required: the contributions actually made on behalf of the employee for the quarter, and the employee's OTE for the quarter.\textsuperscript{146} At present, only the employer must have both pieces of information.

This is because employers can avoid disclosing to employees the actual contributions that have been made for a quarter by reporting only liability to pay superannuation contributions for the quarter.\textsuperscript{147} Unless the employer self-assesses liability to pay SGC, the ATO will only become aware of the amount of contributions made through superannuation funds' annual reporting to the ATO, and may never become aware of the employee's OTE for the quarter.\textsuperscript{148} Superannuation funds also need not be made aware of their members' OTE. Consequently, at no time is it necessary that any person or agency have the information needed to detect non-compliance, except the non-compliant employer.

\textsuperscript{146} \textit{Superannuation Guarantee (Administration) Act 1992} (Cth), ss 22-23.
\textsuperscript{147} \textit{Fair Work Regulations 2009} (Cth), reg 3.46.
\textsuperscript{148} \textit{Taxation Administration Act 1953} (Cth), sch 1 div 390.
Clearly, this makes it difficult to detect intentionally non-compliant employers. As I will show, there are important problems with heavy reliance on the EN system for the detection of non-compliance. However, if the EN system is to work, an improved set of reporting obligations are required under which the employee is notified of her OTE and the contributions actually made on her behalf at intervals short enough to allow the employee to make an EN complaint promptly after contributions are not made and avoid so far as possible the contributions being lost through insolvency. This might be achieved by enacting the Gillard Government’s proposals or APRA standards and regulations requiring superannuation funds to report to members quarterly about the contributions made on their behalf. The recommendations below regarding the self-assessment regime would also solve this problem by substantially removing the need to rely on employees to complain for the ATO to detect non-compliance.

E Self-Assessment

There are serious problems with the self-assessment regime. Firstly, there is reason to think that some non-compliant employers are never discovered by the ATO. Because the only ways the ATO can become aware of liability to pay SGC that is not self-assessed are through proactive operations and the EN system, it has no compliance data that covers all employers. Consequently, the ATO has no data on what the actual level of non-compliance with the SG scheme is. For this reason, the Inspector-General of Taxation has recognised that non-compliance may be a far bigger problem than current ATO data suggests.

149 Exposure Draft, Superannuation Legislation Amendment (Stronger Super and Other Measures) Bill (No 2) 2012 (Cth); Superannuation Industry (Supervision) Act 1993 (Cth), s 34M.

150 Inspector-General of Taxation, above n 2, 3-4.

151 Ibid.
This lack of data could be remedied by the ATO’s conducting auditing on a scale and in a manner such as would allow it to get a representative picture of the extent of non-compliance across all employers. There is no indication that this kind of research is contemplated, and the ATO has indicated it does not intend to engage in any random auditing.152

Secondly, the self-assessment regime will miss employers who intentionally fail to comply with their SG obligations. Unless these employers are audited by the ATO as part of its proactive operations, or complained about by their employees, their non-compliance may never be detected, and the required contributions may never be made. This is especially problematic where employers are facing insolvency. As Anderson and Hardy point out, it is tempting for such businesses not to comply and use the money saved through non-payment of contributions as extra working capital to stave off insolvency.153 When an employer does become insolvent, entitlements become much more difficult to recover.154 For this reason, it is important that non-compliance is detected early so that unpaid contributions can be recovered before employers become insolvent.

The director penalty regime serves to remedy this problem somewhat because it allows unpaid contributions to be recovered from the directors of employers where they cannot be recovered from insolvent employers.155 However, this avenue for recovery is not available in all circumstances, and the director’s personal bankruptcy and the available defences may stand in the way of recovery in some cases.156

152 Ibid 8.
153 Anderson and Hardy, above n 2, 171-5.
154 Inspector-General of Taxation, above n 2, 89-93; Barkehall Thomas, above n 103, 425-6.
155 Taxation Administration Act 1953 (Cth), sch 1 div 269-20(5).
156 Ibid sch 1 div 269-35.
It is not recommended that the self-assessment regime be abandoned. If non-compliant employers are willing to self-assess their liability to pay SGC, the option to do so should remain open to them. This is especially so because self-assessed SGC is the most readily recoverable category of unpaid contributions.157

However, more can be done to detect intentionally non-compliant employers. It is recommended that a new system be implemented whereby employers provide information to the ATO allowing it to assess whether each employer has been compliant without its having to rely on the honesty of non-compliant employers. To allow the ATO to act quickly when insolvency threatens an employer, the information should be delivered at short intervals, for instance, quarterly. When considering the cost of such reform, regard must be had to the fact that a successful recovery operation by the ATO will often save revenue, because it prevents later reliance on the age pension. Such a measure should also allow the ATO to become aware of non-compliance without the need for employees to make EN complaints. It is important though that the EN system should remain, along with the ATO’s data-matching and proactive auditing, to ensure employers who report false or misleading information do not escape detection.

F Employee-Focussed Regulation

As Anderson and Hardy point out, the system for detection of non-compliance and enforcement of superannuation entitlements relies heavily and increasingly on employees.158 This is evident in recent reforms, like the introduction of s 149B of the FWA, and the new obligations on employers to report contributions to employees. This presents a number of problems.

157 Inspector-General of Taxation, above n 2, 91-2.
158 Anderson and Hardy, above n 2, 181-4.
The first is the information deficit highlighted above. Even if employees are sufficiently knowledgeable and motivated to find out what their entitlements are, and research indicates that most are not,\textsuperscript{159} employees will not always have access to both pieces of information needed for them to detect their employers’ non-compliance.\textsuperscript{160}

The second is a problem peculiar to complaint-based regulatory systems. As Weil and Pyles have shown with American data, the rate of employer non-compliance far outstrips the rate of complaints made to workplace regulators.\textsuperscript{161} This is because, in spite of legislative protections for the exercise of workplace rights similar to the general protections provisions in the FWA,\textsuperscript{162} employees often expect the cost of making a complaint to be greater than the benefit that could come from it.\textsuperscript{163} Costs include the cost of gathering information about one’s rights and how to make a complaint, as well as the possibility of being demoted or dismissed for making a complaint.\textsuperscript{164} We should expect the ATO’s instruction to employees to speak with their employers about the under- or non-payment of superannuation entitlements before making an EN complaint to exacerbate employees’ fear of retaliation for complaints.\textsuperscript{165} Indeed, the fact that 70 per cent of EN complaints are made by former employees indicates that it is only when the threat of retaliatory action by employers is removed that many employees are willing to complain.\textsuperscript{166}

\textsuperscript{159} Benita Tan and Fadil Pedic, ‘Superannuation Guarantee Research’ (Report to Australian Taxation Office, 13 August 2013)

\textsuperscript{160} Fair Work Regulations 2009 (Cth), reg 3.46.


\textsuperscript{162} Fair Work Act 2009 (Cth), part 3-1 div 3.

\textsuperscript{163} Weil and Pyles, above n 158, 82-6.

\textsuperscript{164} Ibid 82-4.

\textsuperscript{165} Australian Tax Office, above n 79.

\textsuperscript{166} Inspector-General of Taxation, above n 2, 5.
It is not recommended that the EN complaint system be abandoned. If an employee is in a position to bring non-compliance to the attention of the ATO, the facility for her to do so should remain. However, reform is needed.

Firstly, the information deficit highlighted above needs to be remedied to put as many employees as possible in a position to detect their employers’ non-compliance. The adoption of the recommendations above regarding the EN system should be sufficient to put employees in a position to detect their employers’ non-compliance. However, a system that does not rely on employees to detect non-compliance at all would be preferable. For this reason, the reforms suggested regarding the self-assessment regime are ideal.

Secondly, the Government should consider reforms that take the regulatory onus off employees and place it elsewhere. There are both detection and enforcement elements to such considerations.

For the reasons outlined above, we cannot rely on employee complaints to bring non-compliance to the ATO’s attention. If the recommendations made in relation to the self-assessment regime were adopted, this would also prevent the ATO from having to rely on employees for detection.

As Creighton and Stewart point out, we cannot rely on employees to enforce their entitlements any more than we can rely on them to detect non-compliance. The reasons for this are similar to the reasons many employees do not complain about their employers’ non-compliance, namely, they do not have the time, information or other resources needed to take action to enforce their rights, and are deterred by fear of victimisation by their employers for taking action. This is also a good reason to think

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167 Creighton and Stewart, above n 41, 507-8.
168 Ibid 507.
that the creation of a private right of action for employees to enforce the SG scheme will not solve the compliance problems.

Nevertheless, reforms such as the introduction of s 149B of the FWA suggest that the government intends for employees, and potentially the FWO, to play a larger role in the enforcement of their superannuation entitlements into the future. As noted earlier, s 149B essentially imports the SGC requirements into all modern awards. Its introduction is particularly important in relation to those modern awards that did not previously contain terms requiring employers to make superannuation contributions. This statutory amendment expands the potential source of superannuation entitlements. As a result, and to the extent that a modern award applies to their employment, it now means that employees have a private right of action to enforce their entitlements under the SG scheme. These employees are no longer forced to rely on the ATO to bring enforcement action on their behalf. The introduction of s 149B also potentially expands the FWO’s responsibilities insofar as the regulator has responsibility for ensuring compliance with a greater number of modern awards that include superannuation entitlements. When we consider that the FWO appears not to have been funded to accept any increase in responsibility for the enforcement of superannuation entitlements, and has not indicated an intention to accept any such increase in responsibility, there is cause to worry that the real impetus behind s 149B is to place more responsibility on employees to take action to enforce the SGC.

Clearly, such reliance on employees cannot provide an adequate means for protecting employee entitlements and preventing reliance on the age pension. There have been

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suggestions that the reason the ATO does not pursue some claims is because of resource constraints. Increasing the ATO’s resources to allow it to pursue more claims must therefore play a large part in any reforms contemplated. As I have indicated, such increases need to be viewed in light of the fact that unrecovered SGC often translates into age pension that must later be paid out of revenue.

Resources allocated for the protection of employees’ superannuation entitlements should focus on the ATO because it is responsible for the minimum protections for employees’ superannuation entitlements where the FWO only has the capacity to enforce entitlements equal to or greater than the minimum. The means available to the ATO to recover unpaid superannuation are also more efficient than those available to any other person or agency. However, in the absence of any expansion of the ATO’s responsibility to include superannuation entitlements under industrial instruments and contracts of employment, the Government should consider funding the FWO to enable it to take on a more active role in recovering contributions derived from these other sources. In turn, the FWO should accept such responsibility, and reflect its ability to enforce superannuation entitlements in the information it provides on its website.

V CONCLUSIONS

Occupational superannuation is a vital part of Australia’s retirement income system, enabling higher retirement incomes and preventing reliance on the age pension. However, employer non-compliance remains a significant problem facing the system. If we are to remedy this problem, reforms are needed to address inadequate mechanisms for detection of non-compliance, enforcement of entitlements and information flow, as

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171 Inspector-General of Taxation, above n 2, 50.
172 Fair Work Ombudsman, above n 141.
well as a wider over-reliance on employees to detect non-compliance and enforce entitlements.

Ideally, the Government should extend the regime under which unpaid superannuation contributions are owed as a debt to the Commonwealth and are recoverable by the Commissioner to cover entitlements under contracts and industrial instruments. It should also enact a new system requiring employers to report their compliance with superannuation obligations to the ATO quarterly. However, in the absence of these reforms the ATO’s and the FWO’s funding should be expanded to allow those agencies to adequately fulfil their current responsibilities, and reporting obligations should be enacted to provide employees with sufficient information to detect non-compliance.

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