AUSTRALIAN GOVERNMENT
SENATE ECONOMICS STANDING COMMITTEE
IMPACT OF THE NON-PAYMENT OF THE SUPERANNUATION GUARANTEE

Submission

Dr Tess Hardy
Centre for Employment and Labour Relations Law
Melbourne Law School
28 February 2017

1. Introduction

I thank the Senate for the opportunity to make this submission. While the scope of this inquiry is wide-ranging, this submission generally focuses on the role and effectiveness of measures to improve compliance with the payment of the superannuation guarantee (***SG***) and other related matters.

I have previously undertaken extensive research in the area of regulatory compliance and the enforcement of minimum employment entitlements. This research is relevant to the extent that superannuation is somewhat of a hybrid entitlement.[1] Although SG is primarily viewed through a tax lens, it is an entitlement which is ultimately and inherently linked to the performance of work. The nexus between superannuation and employment is critical in that regulatory challenges identified in the workplace relations sphere, and proposed legal reforms designed to address these problems, may provide important insights into how compliance in the SG system may be improved as a whole.

This submission will address two issues:

a) enhancing detection of SG non-compliance by strengthening record-keeping obligations;
b) improving enforcement of SG by making individuals behind, and entities beyond, the employer liable for SG non-compliance.

In addition, and for the Committee's further consideration, I attach as an appendix to this submission a copy of an article originally published in the UNSW Law Journal. This article, which is co-authored with Professor Helen Anderson, sets out a range of proposals geared towards improving the detection and recovery of unremitted SG.[2]

2. Enhancing Detection of SG Non-Compliance: Strengthening Record-Keeping Obligations

The SGC regime pivots, to a large extent, on employees being in a position to detect unpaid superannuation and report it to the Australian Taxation Office (***ATO***) (or other regulators, such as the Office of the Fair Work Ombudsman (***FWO***)). There is evidence to suggest that effective detection of an SG shortfall by employees (and regulators) is challenging for a range of reasons.[3] One of the most critical and persistent problems is that employers are failing to comply with their record-keeping obligations.

Under the *Fair Work Act 2009* (Cth) (***FW Act***) and the *Fair Work Regulations 2009* (Cth), employers are required to issue payslips to employees and make and keep employment records. These documents must include details relating to a range of prescribed matters, including information relating to the employment status of the employee, the rate of remuneration, the number of overtime hours worked and superannuation contributions that the employer is liable to make (or has made).[4]

---

[1] See also Chief Justice Robert French, 'Superannuation – A Confluence of Legal Streams' (Speech delivered at the Law Council of Australia, Superannuation Committee Conference, Canberra, 26 February 2009).
[2] Helen Anderson and Tess Hardy, 'Who Should Be the Super Police? Detection and Recovery of Unremitted Superannuation' (2014) 37(1) *UNSW Law Journal* 162.
[3] Australian National Audit Office, 'Promoting Compliance with Superannuation Guarantee Obligations' (ANAO Report No 39, 2014-15) (***ANAO Report***).
[4] See, eg, *Fair Work Regulations 2009* (Cth), reg 3.46, reg 3.37.

While an employer is obliged to indicate on payslips the amount of superannuation contributions accrued, it does not mean that this amount is actually paid to the superannuation fund. In order to identify any shortfall, an employee must compare the amounts stated on their payslips with the statements issued by their superannuation fund. Given that these statements are often published on an annual basis, an employee may not be in a position to detect any underpayment until almost 12 months after the payment was due.

Detection by employees and/or regulatory agencies is made even more complex when payslips and employment records are absent or fabricated. In these circumstances, effective identification and assessment of unpaid SG is likely to be problematic given that a lack of accurate records makes it difficult, if not impossible, to ascertain the employee's correct remuneration entitlements. The link between an employee's remuneration and their SG entitlement means that problems encountered in detecting and assessing any underpayment of wages will also make it challenging to accurately identify and calculate the relevant SG shortfall.

These problems were laid bare in the 7-Eleven case. In that instance, franchisee employers attempted to evade detection by the regulator and avoid scrutiny by the franchisor by systematically and deliberately manipulating employment records in order to hide the number of real hours worked. As a result, workers lost wages and other work-related entitlements, including SG contributions.

The widespread nature of these practices had gone largely undetected by the workplace regulator, notwithstanding the fact that the FWO (and its predecessors) had undertaken a number of proactive compliance audits over the preceding five years. The FWO later conceded that the relevant audit methodology may have been flawed to the extent that it involved a desk-based review of employment records provided by the employer and there was limited, if any, independent verification of these records.[5] Ultimately, in order to accurately assess and calculate the employees' entitlements, Fair Work Inspectors had to undertake unannounced inspections throughout the course of the night so as to interview staff, take photographs, collect records and issue notices to produce.[6] These issues are relevant to the ATO to the extent that the SG compliance line adopts a similar audit methodology in seeking to proactively detect SG non-compliance.[7]

It further shows that record-keeping contraventions are not necessarily inadvertent or benign. Indeed, the issue of non-compliance with record-keeping obligations is not isolated to 7-Eleven. Of the 50 cases that the FWO put into court in 2015, just under half involved record-keeping breaches and almost a third involved allegations of false or misleading records.[8] The FWO has recently acknowledged that 'keeping records is not just red tape, it is the bedrock of compliance with workplace laws. Without records and pay slips an employee is effectively disempowered from asserting their workplace rights.'[9] This is especially true in respect of the SG regime which relies

[5] 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) (***FWO Inquiry***).
[6] See Fair Work Ombudsman, '7-Eleven Franchisee Admits Doctoring Records and Underpaying Workers to Cut Operating Costs' (Media Release, 1 September 2015).
[7] ANAO Report, above n 3.
[8] Natalie James, 'Regulation of Work and Workplaces: The Fair Work Ombudsman's Role in the Development of Workplace Law' (presented at the Australian Labour Law Association National Conference, Melbourne, 4 November 2016) 5.
[9] Ibid.

heavily on employees being informed and active in the enforcement of their own superannuation entitlements.[10]

The Coalition government has committed to lifting the maximum penalties for failing to keep proper records or falsifying records and introducing new penalty provisions relating to the obstruction of FW Inspectors and the provision of false or misleading information to FW Inspectors. The Coalition Government has further proposed that the FWO will be provided with compulsory evidence-gathering powers in order to allow the regulator to better collate evidence where proper records do not exist.[11] These are all important steps in the right direction in terms of reducing the perceived economic benefits associated with employer non-compliance with employment-related entitlements, including SG.

Another innovative, albeit more controversial, way in which to address some of the regulatory challenges associated with an absence of accurate employment records, and enhance compliance with employment-related entitlements, including SG, is to shift the onus of proof to employers where non-payment or underpayment of these entitlements is alleged by an employee.[12] For example, if an SG claim is 'disputed' and employment records appear to be absent or inaccurate, it is up to the employer to provide the necessary evidence to show that they have duly complied with their SG obligations.[13]

3. Improving Enforcement - Extending Liability for SG Non-Compliance

Even where employer non-compliance with SG obligations can be successfully detected, recovery of the SG shortfall, interest and SG charge may be derailed because 'the liability to pay the SGC remains quarantined in an insolvent employer company.'[14] Where the putative employer entity elects to liquidate or deregister the relevant employing corporation, the employer is not only rendered immune from the legal consequences of its non-compliance, it may mean that the outstanding SG payments are never fully recovered via the employer or otherwise. Moreover, targeting the direct employer may not be effective in addressing some of the systemic drivers of employer non-compliance with SG, which may be determined by more powerful firms positioned higher in the supply chain or at the apex of the franchise network.

Making directors personally liable for SG obligations via Director Penalty Notices is a critical way in which to address some of these problems. Efforts in this regard should be encouraged and expanded, particularly in relation to entities or individuals with a history of poor compliance with SG obligations. A further proposal is to allow the ATO and the FWO to bring proceedings for the disqualification of a director.[15]

An alternative, and potentially more powerful, way to address problems of enforcement is to make entities beyond the employer liable for these amounts. This is particularly relevant to work performed in the context of fragmented organisational forms, such as franchising, labour hire and corporate groups. Indeed, in these types of work arrangements, the FWO has increasingly used the

---

[10] Anderson and Hardy, above n 2, 179-184.
[11] Liberal Party of Australia, 'The Coalition's Policy to Protect Vulnerable Workers', May 2016 (***Coalition Policy***).
[12] For further discussion of this proposal, see Tess Hardy, 'Who Should Be Held Liable for Workplace Contraventions and On What Basis?' (2016) 29(1) *Australian Journal of Labour Law* 78.
[13] An example of this proposal can be found in the specific provisions relating to the textile, clothing and footwear industry. See *Fair Work Act 2009* (Cth), s 789CD.
[14] Anderson and Hardy, above n 2, 168. See generally, Helen Anderson, *The Protection of Employee Entitlements in Insolvency: An Australian Perspective* (MUP, 2014).
[15] See Anderson and Hardy, above n 2, 193.

accessorial liability provisions of the FW Act to pursue third party entities for compensation for underpayment of wages and superannuation entitlements, as well as civil penalties.[16] This is not to suggest that the accessorial liability provisions are sufficient in their current form. Indeed, the 7-Eleven case revealed that there were some significant regulatory shortcomings.

In particular, the FWO's comprehensive inquiry into the 7-Eleven franchise found that that the franchisor 'controlled the settings of the system in which franchisee employers operated…[and] had the resources and tools to inquire into and direct the behaviour of franchisees'.[17] Yet, the regulator concluded that the franchisor of 7-Eleven was not legally liable for the wrongdoing committed in its franchise network. It seems that Australia's existing laws have permitted franchisors and other lead firms to 'have it both ways'.[18] Such firms may exercise high levels of influence over the performance of work, and yet remain legally insulated from the problems this may create (which includes, amongst other things, SG non-compliance).

Again, in a bid to better protect vulnerable workers and stem employer non-compliance with basic employment standards, the Coalition Government has proposed that it will introduce laws to make franchisors and parent companies liable for contraventions of the FW Act committed by their franchisees or subsidiaries respectively.[19] While the precise details of this proposal are yet to be released, it would seem that this would allow the FWO to pursue relevant superannuation entitlements[20] against entities outside of, and separate to, the employer in relevant circumstances. While this reform is not without controversy or critics, it provides a promising avenue for enhancing and ensuring employer compliance with minimum employment standards arising under the FW Act.[21] On the same basis, it is arguable that adopting a parallel mechanism for extending liability to third party entities under the *Superannuation Guarantee (Administration) Act 1992* (Cth) would serve to similarly strengthen employer compliance with the SG regime.

[16] See, eg, *Fair Work Ombudsman v Yogurberry World Square Pty Ltd* [2016] FCA 1290 (2 November 2016).
[17] FWO Inquiry, above n 5, 67.
[18] David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014) 4
[19] Coalition Policy, above n 11.
[20] The FWO has the power and authority to recover superannuation entitlements to the extent that they arise under modern awards, enterprise agreements and, in some cases, contracts of employment. See Anderson and Hardy, above n 2, 169.
[21] See generally Hardy, above n 12.