WHO SHOULD BE THE SUPER POLICE? DETECTION AND RECOVERY OF UNREMITTED SUPERANNUATION

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I INTRODUCTION

An employee's immediate concern if their employer becomes insolvent is usually whether they have been fully paid their wages, annual leave, payment in lieu of notice and redundancy entitlements. Protection of these entitlements is critical, so that employees who have lost their jobs do not suffer additional financial stress. However, of equal significance is an employee's superannuation entitlements, which may not have been remitted to the employee's nominated fund by the employer for months, years or ever. Corporate insolvency exacerbates the recovery of unpaid employment entitlements, including any unremitted superannuation contributions, because the main target of enforcement action – the company – is likely to have insufficient assets to meet the claim.

This article describes the range of issues surrounding unremitted superannuation contributions in insolvency and also more generally. We argue that more should be done to improve the detection and recovery of non-payments because of the importance of superannuation to both employees and the government. We contend that any model of enforcement that shifts the policing of unpaid superannuation to employees is flawed. This is true whether their employer is insolvent or not. Unfortunately, it seems to be the model that the government is increasingly embracing.

As an alternative, we argue for more sophisticated detection methods, increased focus on recovery efforts and greater coordination between key agencies. Part II provides the necessary background to the discussion, including a

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brief review of key regulatory models. Part III looks at the particular problem of unpaid superannuation in corporate insolvency – circumstances which highlight the central challenges facing enforcement agencies in this area. Part IV examines the former government's 'Protecting Workers' Entitlements Package', which was released in 2010 and was designed to improve the recovery of employment entitlements, including superannuation. Part V identifies current detection and enforcement problems for the Australian Taxation Office ('ATO') and the Fair Work Ombudsman ('FWO') in relation to unremitted superannuation. Part VI makes recommendations to improve the functioning of the ATO and FWO as 'super police', and in particular advocates for an approach which is more proactive and collaborative. Part VII concludes.

II BACKGROUND AND REGULATORY ISSUES

Superannuation is a key part of Australia's financial landscape. According to the Australian Prudential Regulation Authority ('APRA'), for the year to 30 June 2013, contributions to all superannuation entities totalled $115.3 billion, comprising employer contributions of $77.5 billion and member contributions of $36.5 billion.[1] Total superannuation assets increased to $1.62 trillion.[2] Recent Australian Securities and Investments Commission ('ASIC') statistics show that unpaid superannuation represents the largest category of unpaid entitlements in insolvency,[3] and estimates of unremitted superannuation involving both solvent and insolvent companies are in the hundreds of millions of dollars.[4] Superannuation differs from 'regular' employee entitlements in a number of significant ways and this has meant that it is frequently overlooked as part of the employee entitlements debate.[5] First, the employee will generally not have access

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1 See APRA, 'APRA Releases Annual Superannuation Statistics to 30 June 2013' (Media Release, 8 January 2014) <http://www.apra.gov.au/MediaReleases/Pages/14_01.aspx>.

2 Ibid.

3 The most recent external administrators' reports, collated as ASIC, *Report 372 Insolvency Statistics: External Administrators' Reports (July 2012 to June 2013)* (2013), indicate that 43.9 per cent of administrations involved unpaid superannuation. Table 27 takes the 'cup half full' approach by saying that in 56.1 per cent of external administrators' reports, unpaid superannuation is shown as 'not applicable'. This is in contrast to the 'not applicable' status of unpaid wages (79.2 per cent), unpaid annual leave (74.8 per cent), unpaid pay in lieu of notice (84.8 per cent), unpaid redundancy (90.1 per cent) and unpaid long service leave (89.7 per cent). ASIC's longitudinal statistics on unpaid superannuation are shown in Part III below.

4 See below n 113 and accompanying text.

5 There are some exceptions to this: see Matthew Walsh and Michael Murray, 'Superannuation Claims in an Employer's Bankruptcy' (1999) 9(4) *New Directions in Bankruptcy* 25; Susan Barkehall Thomas, 'Unpaid Superannuation Entitlements: A Matter of Trust?' (2002) 30 *Australian Business Law Review* 423; Karen 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. See also Karen Streckfuss, 'Superannuation Accountability – the Regulation of Reporting of Superannuation Contribution for Employees' (2012) 23 *Australian Superannuation Law Bulletin* 163.

to their superannuation contributions until retirement, so its importance can be underestimated. Second, the amounts that employers are required to pay by way of superannuation go directly to funds rather than to the employees, and therefore many employees remain unaware of their non-payment. Third, unlike other employee entitlements, the government has introduced the superannuation guarantee charge ('SGC') – a tax which is designed to penalise employers that fail to remit superannuation contributions to employees' funds and to recover that unremitted superannuation for employees.[6] This can give the erroneous impression that the problem has been 'solved'. It also perpetuates an incorrect assumption that the SGC legislation is the only source of superannuation entitlements, provides the only mechanism for the enforcement of superannuation rights in Australia, and that the ATO is the only government agency authorised and empowered to detect and recover unremitted superannuation contributions.

Under the superannuation guarantee legislation, the amount payable by employers was originally set at three per cent of an employee's gross salary and has been gradually increased by successive governments to its present level of 9.25 per cent.[7] This amount was originally set to increase again between 1 July 2013 and 1 July 2019 to 12 per cent, but the timing of this increase has been placed in doubt by the election of the Coalition government in September 2013.[8] Initially, employer superannuation 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 arrears.[9] This measure was introduced in part to reduce employer default.[10] The SGC is payable in the event that the employer fails to remit superannuation contributions to the employees' nominated funds. The obligation is to contribute to a 'chosen fund' which is a fund nominated by the employee or if none, the default fund chosen by the employer.[11] There are important policy imperatives underlying the SGC, as an inadequacy of superannuation can result in increased reliance on the aged pension which in turn imposes a greater burden on the taxpayer.

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6 *Superannuation Guarantee Charge Act 1992* (Cth); *Superannuation Guarantee (Administration) Act 1992* (Cth). See further APRA, *Insight: Celebrating 10 Years of Superannuation Data Collection 1996–2006* (2007) 3–4.

7 ATO, *Compulsory Employer Contributions* (2 August 2013) <http://www.ato.gov.au/Individuals/Super/Compulsory-employer-contributions/>.

8 *Superannuation Guarantee (Administration) Act 1992* (Cth) s 19(2). Prior to the election, they announced that they would delay the scheduled increases by at least two years: see Liberal Party of Australia, *The Coalition's Policy for Superannuation* (September 2013) 3 <http://lpaweb-static.s3.amazonaws.com/Coalition%202013%20Election%20Policy%20%E2%80%93%20Superannuation%20%E2%80%93%20final.pdf>.

9 *Superannuation Guarantee Charge Amendment Act 2002* (Cth), amending *Superannuation Guarantee Charge Act 1992* (Cth) ss 5–6. This followed the report of the Senate Select Committee on Superannuation and Financial Services, Parliament of Australia, *Enforcement of the Superannuation Guarantee Charge* (2001) <http://www.aph.gov.au/~/media/wopapub/senate/committee/superfinan_ctte/completed_inquiries/1999_02/sgc/report/report_pdf.ashx> ('*Senate Committee Report*'). This Committee's report is discussed below in Part V.

10 See Department of Parliamentary Services (Cth), *Bills Digest*, No 160 of 2001–02, 5 June 2002.

11 *Superannuation Guarantee (Administration) Act 1992* (Cth) s 32C.

On the face of it, the SGC ensures that either employers will remit the required amounts to the employees' funds or else the ATO will receive the SGC payment and remit the relevant amounts on behalf of employees.[12] The tax deductibility of superannuation contributions, in contrast to the *non*-deductibility of the SGC, interest and administration penalties levied for non-payment, is intended to provide a powerful incentive for compliance.[13] However, this sanction is only likely to drive improved compliance if there is a real risk that the non-payment of superannuation is likely to come to the attention of a regulator such as the ATO and enforcement action is likely to result.

It is important to acknowledge at this point that incentives for business compliance (or evasion) may be driven, influenced and potentially undermined by a whole range of factors. For example, previous research suggests that most businesses seek to comply either because they believe that it is 'the right thing to do' or because they are concerned about damaging their reputation.[14] Notwithstanding their apparent willingness to comply, non-compliance may still occur because of a lack of knowledge and capacity: a problem which is most pronounced in relation to small or micro businesses.[15] Other research suggests that where enforcement is uneven, or where the regulator lacks credibility, non-compliance may occur because firms and individuals are disillusioned with, and disengage from, the regulatory regime.[16] Regulatory overlap between different government authorities, and duplication of audit and inspection efforts, can exacerbate these issues. In such circumstances, the regulation may be viewed as ineffective, unduly burdensome or both.[17] The central focus in this article, however, is on those businesses which are principally motivated by economic self-interest, and comply with regulation only when they believe that the costs of non-compliance are likely to outweigh the financial benefit to be gained.[18]

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12 *Superannuation Guarantee (Administration) Act 1992* (Cth) s 65. Note that the SGC assessment is done in the first instance by the employers themselves, pursuant to the formula provided by s 19 of the same *Act*.

13 Superannuation contributions are deductible pursuant to *Income Tax Assessment Act 1997* (Cth) ss 290.1–290.6; charges imposed by the *Superannuation Guarantee Charge Act 1992* (Cth) are not deductible: *Income Tax Assessment Act 1997* (Cth) ss 26.1–26.95.

14 For a recent exploration of these themes, see Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2012).

15 This trend has been observed in a number of different areas from occupational health and safety (see Hazel Genn, 'Business Responses to the Regulation of Health and Safety in England' (1993) 15 *Law and Policy* 219) to food safety regulation (see Robyn Fairman and Charlotte Yapp, 'Enforced Self-regulation, Prescription, and Conceptions of Compliance within Small Businesses: The Impact of Enforcement' (2005) 27 *Law & Policy* 491).

16 See Robert A Kagan, Neil Gunningham and Dorothy Thornton, 'Fear, Duty and Regulatory Compliance: Lessons from Three Research Projects' in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2012) 37.

17 Productivity Commission, 'Regulator Engagement with Small Business' (Research Report, September 2013) 104 ('*PC Report*').

18 See Gary S Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 *Journal of Political Economy* 169; George J Stigler, 'The Optimum Enforcement of Laws' (1970) 78 *Journal of Political Economy* 526.

Just as compliance motivations are hybrid and pluralistic, so too are regulatory responses. In the last 20 years, a number of different regulatory enforcement approaches have emerged including, amongst others, responsive regulation and risk-based regulation. The former concept – which was originally devised by Ayres and Braithwaite[19] – is primarily concerned with the most effective sanctioning strategy and is most commonly associated with the 'enforcement pyramid'. The enforcement pyramid is designed to sensitively and judiciously respond to the compliance motivations and behaviour of the regulated entity. In summary, the pyramid works on the basis that '[t]he more the regulated firm refuses to comply, the greater the sanction that should be adopted.'[20] Accordingly, enforcement activity commences at the foundation of the pyramid, which incorporates cooperative techniques, such as education and advice. If compliance is not achieved on this basis, the regulator escalates up the pyramid and employs more coercive measures, including administrative sanctions, such as infringement notices or enforceable undertakings. The most punitive sanctions, such as penalties, prosecution, disqualification and suspension, are reserved for the most egregious cases. As such, these sanctions sit at the apex of the pyramid.

Precisely what sanctions are contained in the enforcement pyramid varies with the area being regulated. However, a central requirement is that there is a 'range of credible sanctions that enable [the regulatory agency] to match sanction to the form of non-compliance.'[21] Where a system assumes that only 'carrots and sticks' will be effective to deal with 'self-interested opportunists', it ignores those who are trying to comply.[22] Under the enforcement pyramid, '[c]ompliance is rewarded with more cooperative, less adversarial, and more firm-based enforcement strategies.'[23] Indeed, one of the most attractive aspects of the 'enforcement pyramid' is its ability to take into account the 'motivational complexity in regulatory encounters' and allow inspectors flexibility in determining which sanctions are appropriate to meet the characterisation of the duty holder.[24] Where such flexibility is absent, enforcement is less likely, and the threat of deterrence is significantly diminished. The prospects for self-regulatory behaviour are also reduced.

The theory of responsive regulation, and the 'pyramidic' model of enforcement, have been embraced by many Australian regulators. However, this theory is not without some weaknesses. Among other things, it often assumes an unrealistic level of resources and interaction between the inspector and

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19 Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulatory Debate* (Oxford University Press, 1992) 35.

20 Julia Black, 'Managing Discretion' (Paper presented at the Australian Law Reform Commission Conference, Penalties: Policy, Principles and Practice in Government Regulation, Sydney, 8 June 2001) 18.

21 Ibid.

22 Cynthia Estlund, 'Rebuilding the Law of the Workplace in an Era of Self-regulation' (2005) 105 *Columbia Law Review* 319, 356.

23 Ibid 357.

24 Ayres and Braithwaite, above n 19, 35.

regulated.[25] Further, the theory provides little guidance in relation to the efficient and effective detection of business non-compliance. An increasingly influential complement to responsive regulation is the theory known as risk-based regulation, which is explicitly geared towards targeted and efficient detection and enforcement.[26] More specifically, this regulatory model advocates that regulators should target their inspection and enforcement resources based on an assessment of the risk to regulatory outcomes that is posed by different firms and business activities (ie, taking into account the potential magnitude of harm and/or the likelihood of the harm materialising).[27]

A risk-based approach inherently requires that some risks are prioritised at the expense of others. Besides the potential political fall-out associated with this approach, another weakness is the tendency of risk-based regulation to focus on a set number of significant, recognised risks and overlook or ignore new or smaller risks, which may nevertheless harbour a cumulative danger.[28] Further, risk-based regulation often focuses on the individual firm, rather than the more challenging problem of how to address the systemic drivers leading to non-compliance.[29] Perhaps the most substantial challenge, however, is how to obtain sufficiently reliable and accurate data on which to properly undertake a risk analysis in the first place. Baldwin and Black note that acquiring information from businesses adds to their compliance burdens, and analyse the data collected requires the allocation of resources by the regulator.[30]

This brief review illustrates that it is not just the theoretical model which shapes the detection and enforcement strategy, but a number of more practical elements. In addition to the level of resources and the strength and range of inspection powers and enforcement tools, other relevant factors include the nature and purpose of the regulation being administered, the information available and the extent to which the mandate of one regulator overlaps with another.[31]

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25 Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71 *Modern Law Review* 59, 66. Gunningham points out that 'risk-based regulation' can be complementary to responsive regulation insofar that the enforcement pyramid approach can be applied to those enterprises which have been identified as posing the greatest risk according to the prior assessment of the regulator: Neil Gunningham, 'Strategizing Compliance and Enforcement: Responsive Regulation and Beyond' in Christine Parker and Vibeke Lehmann Neilsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2012) 199, 205.

26 See, eg, Julia Black, 'The Emergence of Risk-Based Regulation and the New Public Risk Management in the UK' [2005] *Public Law* 512.

27 See Fiona Haines, 'Facing the Compliance Challenge: Hercules, Houdini or the Charge of the Light Brigade?' in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2012) 287.

28 Record keeping contraventions could be an example of such a risk. While they are considered to present a fairly low risk when considered in isolation, if they are consistently overlooked, record keeping breaches have the effect of undermining more substantive rights, including the right to superannuation payments.

29 Baldwin and Black, above n 25, 67.

30 Ibid.

31 *PC Report*, above n 17, 104–5.

Detection and recovery of unpaid superannuation is all the more difficult to achieve when the liability to pay the SGC remains quarantined in an insolvent employer company. Further, a focus on the SGC does not duly account for superannuation entitlements that arise under non-legislative sources, including superannuation provisions found in industrial instruments and employment contracts. The question of who is, and who should be, responsible for policing the non-remittance of superannuation entitlements, both in terms of detection and enforcement, forms the focus of this article.

An assumption underpinning the SGC regime is that employees are in a position to detect unpaid superannuation and report it to the ATO. In reality, employees may be ignorant of their entitlements to superannuation, the source of this entitlement or how to check that correct payments are being made.[32] They may fear that questioning their employer will result in their dismissal. They may be more concerned about underpayments of wages and other entitlements, unaware that underpaid wages almost automatically means underpaid superannuation. In the case of insolvent corporate employers, the employee may believe that it is too late to complain. From the perspective of a worker missing out on employment entitlements, it may not seem logical to lodge their complaint with the ATO. Combined, these issues make it relevant to inquire whether the current approach is adequate in protecting employees and whether any of the detection and enforcement functions, which are increasingly placed on employees, can and should be shared with key government agencies.

One of the challenges presented by the regulation of superannuation entitlements is the fact that the industry is comprised of a complex web of relationships between numerous participants, intermediaries and agencies.[33] This partly reflects the hybrid nature of the entitlement itself. Traditionally, it was only public sector employees and executives in small pockets of the private sector who received superannuation entitlements.[34] In the late 1980s, unions played a significant role in agitating for the inclusion of superannuation entitlements in awards[35] which had the effect of greatly expanding the coverage of superannuation. Unions were also integral to enforcing these entitlements via

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32 There is a growing body of work concerning financial literacy and superannuation. A recent example is Julie R Agnew, Hazel Bateman and Susan Thorp, 'Financial Literacy and Retirement Planning in Australia' (2013) 6(2) *Numeracy* Article 7. However, it deals with decisions facing retirement savers such as choice of funds and whether to make additional contributions, rather than what savers should do about unremitted contributions: at 2.

33 See Arie Freiberg, 'Trends and Issues in Crime and Criminal Justice: Superannuation Crime' (Paper No 56, Australian Institute of Criminology, June 1996) 4.

34 For a detailed history of the origin and evolution of superannuation entitlements in Australia, see Dean Paatsch and Graeme Smith, 'The Regulation of Australian Superannuation: An Industrial Relations Law Perspective' (Pt 1) (1992) 5 *Corporate & Business Law Journal* 131; see also Dean Paatsch and Graeme Smith, 'The Regulation of Australian Superannuation: An Industrial Relations Law Perspective' (Pt 2) (1993) 6 *Corporate & Business Law Journal* 29.

35 'Awards' (which are now known as 'modern awards') are industrial instruments which set out specific minimum employment standards for various industries and/or occupations. The *Fair Work Act 2009* (Cth) s 139(1)(i) ('*Fair Work Act*') allows for a modern award to include terms about superannuation.

the federal industrial relations tribunal[36] in the event of disputes. In a unanimous decision, the High Court ruled in *Re Manufacturing Grocers' Employees Federation of Australia; Ex parte Australian Chamber of Manufactures*[37] that a dispute between employees and employers in respect of contributions to a superannuation fund was an industrial dispute within the meaning of section 51(xxxv) of the *Constitution*. In particular, the Court ruled that the dispute was sufficiently 'connected with the relationship between an employer in his capacity as an employer and an employee in his capacity as an employee in a way which is direct and not merely consequential'.[38]

As a result, universal superannuation is often viewed as 'an industrial achievement of the labour movement, specifically the unions'.[39] Given this background, it may be easier and more logical for employees to complain to traditional labour market intermediaries, such as unions, as well as the federal labour inspectorate[40] – now the FWO. In recent years, the FWO has played an increasingly prominent role in protecting and recovering workers' entitlements to minimum pay, leave and termination payments, including in insolvency situations. In many respects, it makes sense for employees to approach the FWO in relation to unpaid superannuation given that this entitlement is inherently linked to the person's employment.

Since the introduction of the SGC legislation, however, the FWO and its predecessors have largely left superannuation compliance issues to the ATO, rather than actively exercising their power and authority to recover superannuation entitlements that arise under modern awards, collective agreements and, in some cases, contracts of employment.[41] However, in 2012, the Government[42] flagged a wider role for the FWO through reform to the

36 The federal tribunal has had a number of different names since its establishment in 1904, but over the two decades prior to the creation of Fair Work Australia by the *Fair Work Act* it was called the Australian Industrial Relations Commission.

37 (1986) 160 CLR 341. For further discussion of this case and others, see Karen J Wood and Ron McCallum, 'Crafting the Law: The High Court and Superannuation as an Industrial Matter' (1995) 8 *Australian Journal of Labour Law* 121.

38 *Re Manufacturing Grocers' Employees Federation of Australia; Ex parte Australian Chamber of Manufactures* (1986) 160 CLR 341, 353.

39 Greg Combet, 'Superannuation: Past, Present and Future' (2004) 53 *Journal of Australian Political Economy* 17, 17.

40 Under previous statutory regimes, the federal labour inspectorate was known as the Office of the Workplace Ombudsman and, before that, the Office of Workplace Services.

41 While employees may enforce the terms of their employment contract under the common law, there may be an additional avenue available under the *Fair Work Act*. In particular, it is possible that a superannuation entitlement set out in an individual contract of employment may constitute a 'safety net contractual entitlement'. In some ways, safety net contractual entitlements are similar to other civil remedy provisions under the same *Act* insofar that employees and Fair Work Inspectors have standing to enforce these provisions under the legislation rather than at common law. Pecuniary penalties are not, however, available in relation to any contravention of a safety net contractual entitlement: see *Fair Work Act* ss 541–4.

42 This reform was a very small part of an extensive range of improvements to superannuation in Australia: see Treasury, Australian Government, *Stronger Super: Overview of Reforms* <http://strongersuper.treasury.gov.au/content/Content.aspx?doc=reforms.htm>.

Superannuation Industry (Supervision) Act 1993 (Cth) which broadened the powers of the FWO with regard to enforcement of payslip reporting of superannuation contributions.[43] While the 2012 amendments relate to the employers' recordkeeping, rather than payment, obligations, these recent developments may signal that the time is right to reconsider the detection and enforcement roles of different regulators both generally and more specifically in insolvency situations.

Indeed, before considering the issues confronting the ATO and the FWO in more detail, brief mention should be made of one other agency[44] with some broad interest in the protection of unpaid superannuation entitlements, namely ASIC. ASIC was only part of the former Government's 'Protecting Workers' Entitlements Package' in relation to 'phoenix' activity, and not in relation to the broader superannuation non-compliance issue.[45] As a statutory priority under s 556(1)(e) of the *Corporations Act 2001* (Cth), superannuation is paid by liquidators to employees once the estate of the liquidated company has been fully realised. However, ASIC plays no role here,[46] except to the limited extent that it might take action against a director and that action might result in an order that the director compensate the company.[47] This would involve bringing civil penalty action against a director or officer of the company for breach of duty.[48] There are very few of these actions initiated, and almost none in relation to the type of employer company that is most likely to fail to remit superannuation contributions.[49] In any event, ASIC is not likely to engage in additional enforcement activity in respect of superannuation as its current priorities are

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43 *Tax and Superannuation Laws Amendment (2012 Measures No 1) Act 2012* (Cth) sch 6, inserting *Superannuation Industry (Supervision) Act 1993* (Cth) pt 29B. The reporting requirement from the *Fair Work Regulations 2009* (Cth) was transferred to the *Superannuation Industry (Supervision) Act 1993* (Cth), extending the reach of the Fair Work Ombudsman: at s 336JD. Section 336JA of the same *Act* requires employers to provide superannuation information on payslips, and makes non-compliance a civil remedy provision.

44 Note that detecting unremitted superannuation and prosecuting employees' complaints are not within the legislative mandate of either the Superannuation Complaints Tribunal or APRA. A fuller discussion of the roles of these organisations is beyond the scope of this article. Likewise, the creation of a new body such as a Superannuation Ombudsman is unlikely as the present Coalition Government is committed to cutting costs, reducing red tape and simplifying superannuation administration: see Liberal Party of Australia, above n 8.

45 See further Helen Anderson, 'The Proposed Deterrence of Phoenix Activity: An Opportunity Lost?' (2012) 34 *Sydney Law Review* 411.

46 As noted above, ASIC also records statistics in relation to unpaid superannuation, which it collates from reports submitted to it by external administrators.

47 *Corporations Act 2001* (Cth) s 1317H.

48 *Corporations Act 2001* (Cth) pt 2D.1. A civil penalty action is available under pt 9.4B, which allows the court to order compensation, disqualification and the payment of a pecuniary penalty. Where recklessness or dishonest intent is shown, a criminal prosecution may be launched: at s 184.

49 See below n 64 and accompanying text, noting that 95 per cent of unremitted superannuation attracting the SGC is attributable to the micro and small business sector. ASIC chooses its targets for enforcement action in part based on size: see ASIC, *Whistleblowers and Whistleblower Protection* (18 February 2014) <http://www.asic.gov.au/asic/asic.nsf/byheadline/Whistleblowers+and+whistleblower+protection?openDocument>. It says 'generally … we will seek to take action only where our action will result in a greater impact in the market and benefit the general public more broadly'.

focused on financial markets.[50] This is not to suggest that it would be inappropriate for ASIC to play a role, at the very least in cooperating with the ATO and FWO in enforcement actions and providing necessary information about directors and the previous insolvencies with which they have been associated. However, given ASIC's extensive responsibilities in other areas, its poor enforcement track record in relation to unpaid employee entitlements and its lack of 'on the ground' intervention compared to the ATO and the FWO, it is not recommended that ASIC be given a broader role in superannuation detection and recovery.

The hybridity of superannuation entitlements[51] – the principal enforcement mechanism being a tax, their status as an employee entitlement, and the various agencies that play some role – make detection and enforcement of unremitted superannuation complex and difficult.[52] These difficulties are compounded when the employer company collapses. This situation will now be examined.

III SUPERANNUATION AND INSOLVENCY

While this article is concerned with the detection and recovery of unpaid superannuation generally, these issues are magnified in the context of insolvency. Accordingly, the treatment of superannuation in insolvency provides a useful prism in which to explore the underlying problems that confront employees and plague regulatory agencies in this area. Where companies are teetering on the edge of insolvency, the SGC penalty may not be uppermost in the employer's mind, and the unremitted superannuation amounts provide a welcome source of temporary working capital. In some cases, the required contributions are never calculated or kept separate within the business. Where employers fail to remit Pay As You Go ('PAYG') tax withheld from employees' pay packets to the ATO, the ATO still credits the employees with those sums so that they are not personally responsible for that tax liability. This is not the case, however, with superannuation entitlements, and non-remittance by the employer means the

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50 Its current priorities are listed on its website: ASIC, *Our Role* (1 November 2013) <http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Our%20role>. They are to ensure '[c]onfident and informed investors and financial consumers'; '[f]air and efficient financial markets'; and '[e]fficient registration and licensing'.

51 See 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) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj26feb09.pdf>.

52 See Australian Council of Trade Unions et al, *Review into the Tax Office's Administration of the Superannuation Guarantee Charge*, July 2009, 5 ('*ACTU Submission*'); M Scott Donald, 'What's in a Name? Examining the Consequences of Inter-legality in Australia's Superannuation System' (2011) 33 *Sydney Law Review* 295.

employees may miss out.[53] Fortunately for employees, unpaid superannuation contributions by employers have been given the same express statutory priority as wages in a liquidation since 1993.[54] This was to 'resolve uncertainty in the existing law under which only award-based superannuation contributions appear to have such priority'.[55] Therefore, where the liquidated company has some assets for payment to unsecured creditors, there is a chance that employees, or rather, their superannuation funds, will receive a distribution.[56]

However, despite this priority, unpaid superannuation exists in about 45 per cent of external administrations and the percentage is increasing each year.[57] Scholars have considered the mechanism of constructive trust to 'ring-fence' these monies away from the reach of other creditors in insolvency but found it an unworkable solution given the statutory priorities clearly specified in the *Corporations Act*.[58] It is also difficult to justify prioritising superannuation – where the benefit to employees is delayed until retirement – over the recovery of wages, leave and redundancy entitlements that are due, and needed by employees, now. Prioritising the full suite of entitlements over secured creditors has been considered, and dismissed, by the government in the past decade.[59] In any event, in a jurisdiction that does not require a minimum mandatory capitalisation for incorporation, there may be no assets owned by the company so prioritisation can be easily sidestepped.

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53 'Fraudulent phoenix operators also benefit from the non-payment of other liabilities imposed by the taxation law. This includes SG payments. The non-payment of SG is of particular concern as, unlike other liabilities imposed under Australia's taxation laws, it will result in a direct loss to the individual employee.': Treasury, Australian Government, 'Action Against Fraudulent Phoenix Activity' (Proposals Paper, November 2009) 6 [2.1] ('*2009 Phoenix Proposals Paper*').

54 Section 96 of the *Corporate Law Reform Act 1992* (Cth) amended s 556(1)(e) of the *Corporations Act 2001* (Cth) as follows: 'subject to subsection (1A) – next, wages and superannuation contributions payable by the company in respect of services rendered to the company by employees before the relevant date'. This came into effect from 23 June 1993. The inclusion of superannuation in the wages priority in liquidation was also provided for in the *Superannuation Guarantee (Administration) Act 1992* (Cth) s 52 (now repealed). Note that in a receivership, wages and superannuation entitlements must be paid by the receiver from the proceeds of the realisation of assets subject to a circulating security interest (formerly floating charge) but not from assets secured by a non-circulating security interest (formerly fixed charge): *Corporations Act 2001* (Cth) s 433(3)(c). The *Corporations Amendment (Insolvency) Act 2007* (Cth) sch 1 para 6 added 'superannuation guarantee charge' to s 556(1)(e) of the *Corporations Act 2001* (Cth). The SGC amount also forms part of the $2000 limit on wages payable to excluded persons under s 556(1A).

55 Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth) 11 [31].

56 Note from 2007, superannuation contributions and the superannuation guarantee charge have enjoyed the same priority pursuant to *Corporations Act 2001* (Cth) s 556(1)(e) as amended by *Corporations Amendment (Insolvency) Act 2007* sch 1 item 6.

57 The 'not applicable' column shows those external administrations where unpaid superannuation was not a factor. Therefore a decrease in that column means an increase in the number of administration where there is unpaid superannuation.

58 See Barkehall Thomas, above n 5. She notes that while the remedial constructive trust is problematic as a device to safeguard superannuation contributions, there is some scope for trust law to play a part based on the model of the Canadian statutory trust: at 423.

59 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Insolvency Laws: A Stocktake* (2004) 174–80 [10.33]–[10.51].

ASIC statistics on unremitted superannuation contributions, drawn from external administrators' reports, show the inadequacy of the statutory priority as a means of protection.

Table 3.3.10.6: Initial External Administrators' Reports by Unpaid Employee Entitlements (Superannuation), Annual[60]

Financial year	$1–$100,000	$100,001 – $250,000	$250,001 - $1 million	Over $1 million	Not applicable	Total
ANNUAL TOTAL						
2004-2005	1,660	114	25	21	2,813	4,633
2005-2006	1,994	142	28	37	3,573	5,774
2006-2007	2,229	124	29	16	4,462	6,860
2007-2008	2,021	144	32	24	4,711	6,932
2008-2009	2,495	177	46	11	5,004	7,733
2009-2010	2,734	232	72	13	4,852	7,903
2010-2011	3,034	294	90	13	4,623	8,054
2011-2012	3,853	439	144	24	5,614	10,074
2012-2013	3,548	382	113	17	5,193	9,253
ANNUAL PERCENTAGE						
2004-2005	35.8%	2.5%	0.5%	0.5%	60.7%	100.0%
2005-2006	34.5%	2.5%	0.5%	0.6%	61.9%	100.0%
2006-2007	32.5%	1.8%	0.4%	0.2%	65.0%	100.0%
2007-2008	29.2%	2.1%	0.5%	0.3%	68.0%	100.0%
2008-2009	32.3%	2.3%	0.6%	0.1%	64.7%	100.0%
2009-2010	34.6%	2.9%	0.9%	0.2%	61.4%	100.0%
2010-2011	37.7%	3.7%	1.1%	0.2%	57.4%	100.0%
2011-2012	38.2%	4.4%	1.4%	0.2%	55.7%	100.0%
2012-2013	38.3%	4.1%	1.2%	0.2%	56.1%	100.0%

ASIC's table is somewhat confusing: the amounts of unpaid superannuation are represented in bands, and the 'not applicable' column gives the number and then percentage of companies in which unpaid superannuation was *not* a factor.

60 ASIC, 'Australian Insolvency Statistics, Series 3: External Administrators' Reports, 3.3 – External Administrators' Reports Time Series for 1 July 2004 – 30 June 2013' (Report, 16 October 2013) 'Table 3.3.10.6'.

To put the information in this table in more understandable terms, in 2012–13, for example, there was over $1 million of unremitted superannuation in each of 17 external administrations of companies or groups of companies; in 113 external administrations, at least $250 001 of superannuation was not remitted. The number of employees affected and the size of their individual losses are not reported. As a result, it is difficult to get more than a vague idea of the true extent of unpaid superannuation, but these figures clearly show that at the very least, over $83 million in superannuation contributions was not paid by companies in external administration in 2012–13. Fuller reporting by external administrators and then by ASIC would assist in accurately calculating the true extent of the amounts unremitted.

Employees of companies with insufficient assets to pay their wages, annual and long service leave and redundancy entitlements are able to look to the federal government safety net scheme for these entitlements. Until December 2012, this was the General Employee Entitlement and Redundancy Scheme ('GEERS').[61] In November 2012, the Federal Parliament passed the *Fair Entitlements Guarantee Act 2012* (Cth) ('*FEG Act*'). As a consequence, for liquidations occurring after 5 December 2012, the Fair Entitlements Guarantee ('FEG') – a scheme enshrined in legislation – has replaced GEERS – a scheme of executive government.[62] However, the employer's superannuation contribution amount was not covered by GEERS, and will not be covered by FEG. GEERS, however, did cover three months of the *employee's* own contributions, through salary sacrifice or otherwise, to superannuation.[63] This has not been replicated under the *FEG Act*. Narrowing this means of recovery adds further impetus to the call for better detection and enforcement in relation to unremitted superannuation.

Some workers are particularly vulnerable to missing out on their superannuation. In 2010, the *Super System Review* into superannuation chaired by Jeremy Cooper, recommended that GEERS should be extended to cover up to three months of unpaid *employer* superannuation guarantee contributions.[64] The *Super System Review* stated that government-sponsored payments 'would be of

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61 From 2000 to 30 June 2013, GEERS, its predecessor, the Employee Entitlements Redundancy Scheme and its successor, the Fair Entitlements Guarantee, have paid employees over $1.3 billion.

62 See Department of Employment, Australian Government, *General Employee Entitlements and Redundancy Scheme (GEERS)* (20 November 2013) <http://employment.gov.au/general-employee-entitlements-and-redundancy-scheme-geers>.

63 Department of Education, Employment and Workplace Relations, *General Employee Entitlements and Redundancy Scheme: Operational Arrangements* (2011) 21 [23] 'Defined Terms – Unpaid Wages'. The definition of unpaid wages 'excludes Employer contributions and payments made in respect of the Employee (such as the Employer's superannuation payment).': at para (h). However, para (e) of the definition refers to 'net salary deductions … such as personal superannuation contributions'. The GEERS Operational Arrangements are the rules governing GEERS as a scheme of executive government.

64 Super System Review Panel, 'Review into the Governance, Efficiency, Structure and Operation of Australia's Superannuation System: Final Report – Part Two: Recommendation Packages' (Australian Government, 2010) 328 'Recommendation 10.19' (emphasis added) ('*Super System Review*'). This was also recommended by the Inspector-General of Taxation's review of the SGC: see Inspector-General of Taxation, 'Review into the ATO's Administration of the Superannuation Guarantee Charge: A Report to the Assistant Treasurer' (Australian Government, March 2010) ('*IGT Report*').

particular assistance to low income earners and casual workers since there is evidence that these groups most commonly miss out on getting their superannuation entitlements.'[65] However, this recommendation was not supported by the former government.[66] This vulnerability has also been recognised outside of the GEERS context. When the Inspector-General of Taxation ('IGT') reviewed the ATO's administration of the SGC in March 2010,[67] in stressing the importance of the SGC, he noted that:

> The people most at risk with the current SG system are the employees who are the least empowered[68] or incorrectly classified as 'independent contractors' – and it is these very people who are most reliant upon compulsory superannuation contributions for a higher standard of living in retirement than only relying on the age pension.[69]

The IGT learnt that over 70 per cent of complaints come from ex-employees, 'with anecdotal evidence suggesting that many employees are concerned that, if they query their employer about their SG entitlement or lodge a complaint with the ATO, then they could either lose their job or no longer be given work'.[70] Again, this heightens the need for other means of protecting employees' superannuation. Despite the ATO's efforts, the amount of unpaid superannuation contributions continues to grow, as the external administrator data noted above shows. The Government's policy announcements prior to the 2010 election and the legislation that followed recognised that more needed to be done. These developments will now be examined.

IV THE GOVERNMENT'S 'PROTECTING WORKERS' ENTITLEMENTS PACKAGE'[71]

In 2010, the Gillard Labor Government made a series of promises to improve the recovery of employee entitlements prior to its re-election that year.[72] There

65 *Super System Review*, above n 64, 328 [12].

66 This was on the basis that their Fair Entitlements Guarantee policy, announced before the 2010 election, would make this change unnecessary: see Treasury, Australian Government, *Stronger Super* (2010) ('*Stronger Super Response*'). The Coalition Government made no reference to the issue in its 2013 election promises: see Liberal Party of Australia, above n 8.

67 *IGT Report*, above n 64. See also Streckfuss, 'The Regulation of Unpaid Superannuation Contributions', above n 5.

68 The *IGT Report* noted that the mean salary in 2006 of those in high risk segments was less than $30 000 per annum: *IGT Report*, above n 64, 37 [4.31].

69 Ibid 3 [2.5].

70 Ibid 5 [2.6(9)].

71 See Australian Labor Party, 'Protecting Workers' Entitlements Package' (Campaign Media Release, 25 July 2010) <https://www.aist.asn.au/media/38043/2010.07.26_protectingworkersentitlementspackage.pdf>.

72 Note that the superannuation policy of the Coalition Government, elected in September 2013, makes no promises of relevance to the present discussion: see Liberal Party of Australia, above n 8.

were three parts to the package: the Fair Entitlements Guarantee, noted above;[73] 'Securing Super', and 'Strengthening Corporate and Taxation Law'.

The 'Securing Super' promise is as follows:

> Unfortunately some employers fail to pay their employees' superannuation entitlements. That is why the Gillard Labor Government will take strong action to make sure that these employers do the right thing.
>
> Employees will receive information on their payslips about the amount of superannuation actually paid into their accounts and notification from their superannuation fund if regular superannuation payments cease.
>
> The enforcement powers of the Australian Taxation Office and the Fair Work Ombudsman will be enhanced, giving them stronger powers to ensure businesses pay their employees' Superannuation Guarantee entitlements.
>
> The Government will consult with the superannuation industry, employer representatives and unions about the implementation of these measures.
>
> This is the implementation of the Super System Review[74] recommendation that requires employers and superannuation funds to provide employees with extra information about the contributions being made on their behalf.[75]

This announcement makes plain the former government's intention to elevate the role of the employee by making employees themselves responsible for detecting any default in their superannuation payments and promptly alerting the relevant authorities. In mid-2012, the Government released the draft of a Bill for public comment.[76] The provisions are designed to ensure that employees become aware of deficiencies in the payment of their superannuation, by requiring superannuation funds to report quarterly or half-yearly[77] to their members on contributions made by their employers. This is intended to enable employees to chase up their employers in relation to non-payment, so that unpaid entitlements do not mount up, and in the event that they remain unpaid, to report their

73 This was done through a change to the GEERS Operational Arrangements in January 2011, and the increased redundancy entitlement has been carried through to the new *Fair Entitlements Guarantee Act 2012* (Cth): see Department of Employment, above n 62 and accompanying text.

74 *Super System Review*, above n 64, 298 'Recommendation 9.16(c)'. For implementation plans, see *Stronger Super Response*, above n 66, 59.

75 Australian Labor Party, above n 71.

76 Exposure Draft, Superannuation Legislation Amendment (Stronger Super and Other Measures) Bill (No 2) 2012 – Reporting to Members. Its Explanatory Memorandum stated that: '[u]nfortunately some employers fail to pay their employees' superannuation entitlements. Employees worst affected tend to be low-income, casual or part-time workers. The fund notification measure, which forms part of the Securing Super package, will provide greater protection for these vulnerable workers.': Explanatory Memorandum, Superannuation Legislation Amendment (Stronger Super and Other Measures) Bill (No 2) 2012 (Cth) 1 [1]–[2].

77 Exposure Draft, Superannuation Legislation Amendment (Stronger Super and Other Measures) Bill (No 2) 2012 – Reporting to Members, proposed that new provisions would be introduced into the *Corporations Act 2001* (Cth). There would be two options for employees: s 1017CA(1)(a) allows for quarterly electronic messages (via email or SMS) that payments have been received by the fund, and s 1017CA(1)(b) allows for half-yearly statements by post that show the amount of payments received. If the first option is chosen, members must also be able to access their fund details via a web-based portal. Reporting must take place within 42 days of the end of the period. At the date of writing, this amendment has not been made.

employer to the ATO.[78] To further assist employees to monitor payments into their chosen funds, trustees of retirement savings accounts and superannuation funds are now required to comply with superannuation data and payments regulations and standards set by APRA.[79] Drafts of these standards are in the process of being released. The Coalition Government's superannuation policy, released prior to the federal election in September 2013, did not address the issue of the detection of unremitted superannuation.[80]

The third part of the package, called 'Strengthening Corporate and Taxation Law', also needs a brief mention here because of its impact on superannuation. It is important to begin with some background, in order to understand the significance of the reforms that were enacted in 2012. In 1993, the Commissioner of Taxation's priority in liquidation was replaced by a regime of director personal liability (known as the director penalty notice ('DPN') regime) for taxes which are collected and remitted to the Commissioner of Taxation, including PAYG.[81] Liability is imposed unless the director promptly puts their insolvent companies into liquidation or voluntary administration.[82] In 2010, the location of the DPN provisions was moved to the *Taxation Administration Act 1953* (Cth) ('*TAA*'),[83] and necessary changes were made to the section numbers. Yet despite what appeared to be a fairly draconian set of liability provisions, a Treasury paper in 2009 noted that limitations in the DPN regime 'prevent [it] from being used effectively'.[84]

One of these limitations was the fact that DPNs only covered unremitted PAYG withholding liabilities, but did not cover unpaid SGC amounts. On 5 July 2011, the Treasury released, for public consultation, an Exposure Draft of 'tax law amendments to strengthen company director obligations and deter fraudulent

78 However, whether it is realistic to expect employees to do so is discussed below in Part V.

79 This requirement was inserted by the *Superannuation Legislation Amendment (Stronger Super Act 2012* (Cth) sch 1 pt 1.2, amending *Superannuation Industry (Supervision) Act 1993* (Cth) s 34M. For the draft standards, see APRA, *Superannuation Reforms 2011–13* <http://www.apra.gov.au/Super/Pages/Superannuation-reforms-2011-2013.aspx>.

80 See Liberal Party of Australia, above n 8.

81 *Insolvency (Tax Priorities) Legislation Amendment Act 1993* (Cth). The provisions were contained in the *Income Tax Assessment Act 1936* (Cth) pt VI div 8 ss 222AFA–222AMB, div 9 ss 222ANA–222AQD ('*ITAA*').

82 The workings of the director penalty regime under the 1993 legislation are set out in detail in Helen Anderson, 'Directors' Liability for Unpaid Employee Entitlements: Suggestions for Reform Based on Their Liabilities for Unremitted Taxes' (2008) 30 *Sydney Law Review* 470.

83 The *Tax Laws Amendment (Transfer Of Provisions) Act 2010* (Cth) sch 1 moved the DPN provisions from the *ITAA* to sch 1 of the *Tax Administration Act 1953* (Cth) ('*TAA*').

84 *2009 Phoenix Proposals Paper*, above n 53, 7 [3.1]. See also Michael Murray, 'The ATO as an Insolvency Regulator?' (2007) 19 *Australian Insolvency Journal* 24. Murray commented that '[t]he absence of indicators on the use of DPNs makes it difficult to assess the extent of use of the significant regime to which the ATO has access; and what impact, good or bad, it may be having on the responsibilities of directors and on creditors generally': at 27.

phoenix activity'.[85] After an initial failure to have key provisions in the legislation passed, in 2012, the government was successful in having unreported and unremitted superannuation amounts included in the revamped DPN regime.[86]

While imposing personal liability for unremitted superannuation might seem to overcome the problem of companies avoiding these debts, the 2012 reforms as they were eventually passed did little to improve the detection issue.[87] The ATO must still discover those companies that have not reported or remitted superannuation liabilities, in order to send out the required DPN. Companies wishing to avoid these (and possibly other) liabilities can simply liquidate or enter voluntary administration before three months has elapsed without reporting or paying their SGC liabilities. In such circumstances, the directors will face no personal consequences,[88] even if the ATO later identifies the lack of superannuation payment. The business may then be reborn through a 'phoenix' company and the behaviour continues.

This is a fundamental concern and shows the deficiency of the legislative response. The underlying problems with detection mean that the deterrence value of any enforcement action is reduced and the overall credibility of the regulatory regime may be diminished. Given the stiff opposition that the former Government faced in its attempts in to simplify the DPN mechanism, it is unlikely that any further amendment to this area of the law will produce an adequate tool to deal with unremitted superannuation. It is troubling that the former Government's espoused view was that it would do more for the protection of superannuation contributions, yet it rejected the *Super System Review*'s recommendation to include three months of unpaid employer superannuation in the government's safety net scheme. It is also troubling that the present Coalition Government did not address the issue at all in its pre-election policy statement. Although providing employees with more details about their superannuation entitlements on their payslips is important, it only goes so far in addressing the information barriers identified above. The next Part outlines particular issues

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85 Treasury, Australian Government, *Exposure Draft – Tax Law Amendments to Strengthen Company Director Obligations and Deter Fraudulent Phoenix Activity* (5 July 2011) <http://archive.treasury.gov.au/contentitem.asp?ContentID=2073>. The release acknowledged that '[w]hile these amendments aim to deter fraudulent phoenix activity, they apply more broadly to extend the personal obligations of company directors to ensure that the company complies with its PAYG withholding and superannuation guarantee obligations.'

86 *Tax Laws Amendment (2012 Measures No 2) Act 2012* (Cth); *Pay As You Go Withholding Non-compliance Tax Act 2012* (Cth).

87 The relevant provisions are contained in *TAA* sch 1 div 269. Where three months have lapsed after the due day for the company liability and the liability remains both *unreported and unpaid* the director penalty is not remitted as a result of placing the company into administration or beginning to wind it up: at s 269.30(2). This means there is a new regime for failing to report the tax liability within three months of it becoming due. Once the DPN is issued to the directors: at s 269.25, the usual DPN extinguishment avenues – placing the company into VA or liquidations: at s 269.15 – no longer provide a director with a means of avoiding personal liability for this amount. Therefore, either the director must establish one of the defences to liability, such as illness or absence from management for good reason: at s 269.35, or else be personally liable to pay the tax debt. This harsh penalty is intended to make sure that directors continue to report their liabilities, and this of course enables the ATO to detect non-payment more easily.

88 *TAA* sch 1 s 269.15.

facing regulators in detecting and recovering unremitted superannuation in Australia.

V ISSUES FOR REGULATORS IN DETECTION AND ENFORCEMENT

The role of 'super police' encompasses both detection and enforcement dimensions. Together, they are essential to ensuring that regulatory activities achieve the key policy objectives: recovery of unpaid superannuation contributions in order to protect the interests of affected employees; and sanctioning of the contravening employer in order to deter future non-compliance within the specific firm and in the regulated community more generally. The next two sections examine the detection and enforcement strategy of both the ATO and the FWO, and identify a number of aspects which could be improved.

A Detection: Self-reporting and Regulator Reliance upon Individual Complaints

If employers are making the superannuation contributions that they are obliged to pay under the SGC legislation, there is no requirement for them to provide information to the ATO.[89] The employer's obligation to report for SGC purposes arises only when payments are not made. This method of detection of non-payment relies, therefore, on the non-complier willingly disclosing their breach. However, this is unlikely to happen, particularly where the company is heading towards insolvency or where its controllers are deliberately avoiding their responsibilities. As a result, the ATO's ability to detect non-payment of superannuation is significantly impeded.

Rather, detection and reporting of non-payment of superannuation is largely left to the employees themselves. In this respect, and depending on the source of their superannuation entitlements, employees face a number of options. In relation to superannuation entitlements arising under relevant industrial instruments, it is possible for employees to lodge a complaint with the FWO – an option which is perhaps most appealing where other minimum employment entitlements, such as wages, leave and termination entitlements, have not been paid. Alternatively, employees can submit a complaint about unpaid superannuation arising under the superannuation guarantee legislation to the ATO using a form called an Employee Notification of Insufficient Employer Contributions. These are commonly known as ENs. The ATO utilises a 'risk-based' approach that uses individual complaints from ENs to establish a database

89 *IGT Report*, above n 64, 18 [3.10]. SGC amounts are not 'reportable superannuation contributions', which are, for example, salary sacrifice payments made by employers on behalf of their employees. These are reported for the purpose of determining the tax liability of the employee. See further ATO, *Employer Guide for Reportable Employer Super Contributions* (5 December 2011) <http://www.ato.gov.au/businesses/content.aspx?menuid=0&doc=/content/00189411.htm&page=7&H7>.

of non-compliance behaviour so that patterns can be determined and enforcement action targeted towards areas of particular non-compliance.[90] In 1999, the Australian National Audit Office ('ANAO') audited the superannuation guarantee scheme, and it was supportive of what was then a new detection strategy:

> The ANAO recognises that SPR's [Superannuation Business Line's] move away from following up individual complaints through ENs may result in problems for some individual employees. However, we consider that the risk-based approach to audits now being employed by SPR is a more effective use of resources and is more likely to lead to improvements in overall compliance levels. The ANAO therefore endorses SPR's new approach in this area.[91]

While this may be a cost-effective way to enhance detection, it leaves individual complainants dissatisfied, and increasingly disillusioned with their policing responsibilities. This may lead to under-reporting, which is problematic not only because employees' own superannuation is not recovered, but also because that complaint data is necessary for the risk-based approach. Complainant dissatisfaction was also noted in April 2001 by the Senate Select Committee on Superannuation and Financial Services in its report entitled *Enforcement of the Superannuation Guarantee Charge*.[92] Later, the *IGT Report* recommended that the ATO explore options to allow employees to follow up on complaint progress.[93] In response, the ATO noted it is committed to addressing all employee SG complaints.[94] According to the ATO's *Compliance Program* 2012–13:

> we will review, in focussed superannuation guarantee audits, around 400 high risk employers where we find evidence of non-compliance, particularly in the industries where we have previously focused communication activities … Additionally, we will check the superannuation guarantee compliance of some 3000 employers as part of broader employer obligations reviews … Last year we also followed up complaints about unpaid superannuation with around 12 000 employers, mainly micro enterprises. This year we expect to contact around 13 000 employers regarding complaints about unpaid superannuation.[95]

However, the ATO recognised that following up individual complaints necessarily constrains the resources available for proactive work.[96] The circularity of this relationship presents a particular dilemma for a detection system based on individual complaints. The more the ATO focuses on the risk-

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90 *Senate Committee Report*, above n 9, [3.28].

91 ANAO, *Superannuation Guarantee: Australian Taxation Office, The Auditor-General Audit Report No 16 1999–2000: Performance Audit* (1999) [3.109] ('*ANAO Superannuation Guarantee Report*').

92 *Senate Committee Report*, above n 9, [3.28], [3.31]–[3.37].

93 *IGT Report*, above n 64, 12 'Recommendation 6', 25 [3.58].

94 Ibid 10.

95 ATO, *Compliance Program 2012–13* (2012) 58.

96 *IGT Report*, above n 64, 10. The IGT noted that 'of a total 24 195 SG audit activities, 20 199 related to EN complaints. In 2009–10, proactive risk-based auditing will still only represent 27 per cent of the ATO's total SG audit activities, up from 16 per cent in 2008–09.': at 4 [2.6(7)], 38–9 [4.36]–[4.37]. Similar comments have previously been made by the FWO: see, eg, Nicholas Wilson, 'The Fair Work Ombudsman: Two Years Navigation and the Land within Sight?' (Speech delivered at the Australian Labour and Employment Relations Association National Convention, 8 October 2011).

based approach, the less employees' own complaints are dealt with and the less incentive they have to take the trouble to make a complaint, damaging the foundations of the risk-based approach.

On the other hand, there are shortcomings from a policy of responding to and investigating complaints at the expense of more proactive measures. It has the potential to skew the allocation of resources to those industries where there is the greatest number of complaints, which does not necessarily correlate with the greatest incidence of non-compliance. For example, vocal unions might encourage and assist workers in making complaints, leading to more reporting, whereas a largely casual workforce with no union presence might in fact be more susceptible to employer non-compliance and therefore more in need of intervention. Responding to complaints is also resource-intensive, and relatively inefficient, insofar that any resolution is generally confined to one individual in one workplace. Further, the deterrence effects of regulatory interventions following a complaint are of limited assistance in influencing the structural basis for the relevant non-compliance.[97] For the same reasons, even where employee complaints are used as intelligence for the risk-based approach, they may not necessarily uncover the most serious contraventions or address the systemic drivers of employer non-compliance. This potentially results in a misdirection of precious funding.

Furthermore, there is evidence to suggest that many employees who are entitled to superannuation guarantee contributions simply do not enter the system. They may be paid wholly or partly by cash-in-hand or they may be incorrectly classified as independent contractors in order to avoid the superannuation guarantee liabilities.[98] The unlawfulness of these arrangements may mean that employees are even less likely to lodge a formal complaint in relation to their unpaid superannuation for fear that this may expose them to personal liability, for example, in relation to unpaid taxes.

The issues regarding individual complaints and their relationship to the risk-based detection strategy are of particular concern when evaluating the

97 David Weil and Amanda Pyles, 'Why Complain? Complaints, Compliance and the Problem of Enforcement in the US Workplace' (2005) 27 *Comparative Labor Law and Policy Journal* 59. The *Super System Review*, above n 64, 298 [9.16(e)] recommended that 'when an employee makes a complaint that an employer is not meeting its SG Act obligations, the ATO should continue, on a risk-assessed basis, to assess the employer's compliance with its SG Act obligations for all employees in the particular workplace, and not only the complainant.'

98 Eg, the Australian Council of Trade Unions ('ACTU') and others note in a joint submission to the IGT review that it 'is aware that in many industries employers regularly engage workers as sham contractors to avoid their SG liabilities. One independent study suggests that as many as 45 per cent of the workers in the construction industry are sham contractors': *ACTU Submission*, above n 52, 4. This was evidenced in a case brought by the FWO, an employer admitted reclassifying the employment relationship as an independent contractor relationship in order to avoid rights to employment protection, including superannuation, insurance, protection for unfair dismissal and rights under the relevant award: see *Rajagopalan v CM Sydney Building Materials Pty Ltd* [2007] FMCA 1412 [36]. See also Cameron Roles and Andrew Stewart, 'The Reach of Labour Regulation: Tackling Sham Contracting' (2012) 25 *Australian Journal of Labour Law* 258.

Government's further movement towards employees as 'super police' through the payslip[99] and reporting reforms[100] contained in the 2012 legislation. While this development may be driven, at least in part, by resourcing constraints, it potentially comes at the expense of achieving the relevant public policy objective (ie, ensuring that employees are adequately protected and that superannuation is paid in accordance with the applicable laws). A recent Productivity Commission report notes that: '[w]hen regulators are not adequately resourced to effectively enforce all regulations within their ambit, either risks to communities go unmitigated or the costs of mitigation are pushed onto those regulated.'[101] This is essentially what has occurred in relation to the detection of unremitted superannuation.

This method of 'outsourcing' detection relies on a motivated and informed public to be active in their own self-protection – employees must be aware not only of their legal entitlements, but be alert as to whether their funds are (or are not) receiving the full amount. More specifically, the payslip reporting amendments effectively rely on an employee matching up the information from their employer with the report from their superannuation fund, identifying a discrepancy and then informing the relevant agency.

Some people, undoubtedly, will benefit from the additional payslip reporting, and it is not suggested that this be wound back. Those strongly motivated to monitor their contributions will now have the required information to approach their employer where a discrepancy is detected. However, the proposed reforms do nothing to deal with those people, identified by the *IGT Report*, who are afraid of losing their jobs if they report employer non-compliance. In addition, the reforms are likely to be of limited assistance for vulnerable classes of lower paid workers, some of whom may come from non-English speaking backgrounds, who are unaware of their entitlements or unable to understand the information about superannuation on their payslips. Although providing employees with information about when and where their contributions were remitted and in what amounts 'may serve to "arm" the employee with more information … [these reforms] still leave the employee to "fight the fight" in terms of lodging an EN complaint'.[102] Moreover, the current SGC system does not allow the employee to 'fight the fight' themselves; rather, they must rely on the ATO to do so on their behalf.

This information deficit is potentially exacerbated by the position adopted by the FWO – the federal regulatory agency which has primary responsibility for providing information and raising awareness about federal workplace entitlements in Australia. In particular, the FWO has sought to carefully circumscribe its enforcement role in respect of superannuation. For example, on

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99 *Tax And Superannuation Laws Amendment (2012 Measures No 1) Act 2012* (Cth) sch 6: see above n 43.

100 Exposure Draft, Superannuation Legislation Amendment (Stronger Super and Other Measures) Bill (No 2) 2012 – Reporting to Members.

101 *PC Report*, above n 17, 7.

102 Streckfuss, 'The Regulation of Unpaid Superannuation Contributions', above n 5, 291. See also Streckfuss, 'Superannuation Accountability', above n 5.

the FWO website, there is a page entitled 'Superannuation – Where to Go For Help', which states that:

> If you're covered by an award or agreement that has specific super rights, you should contact us and we'll help you figure out the best way to resolve the issue. Find out more in the Complaints section.
>
> If you don't have a contract or you're not covered by an award or agreement, or your contract, award or agreement just provides the minimum 9% super guarantee, visit the ATO's unpaid super page or call the ATO on 13 10 20.[103]

While this statement implies that an employee covered by an award or agreement with 'specific super rights' can lodge a complaint with the FWO, the page entitled 'Can I make a complaint?' tells a different story. Under the heading, 'What we can't help you with', the FWO website states that workplace problems which the FWO cannot assist with includes '[u]npaid superannuation or if you haven't received a payment summary (also called a group certificate).'[104] Rather, they instruct the worker to contact the ATO in relation to these issues.

Given the complexity of superannuation obligations and entitlements, the information available on the FWO website is of limited utility, particularly for employees who are not familiar with the Australian workplace relations system. The inconsistency of the information available – on the one hand stating that the FWO can assist with the enforcement of specific superannuation rights, and on the other hand, stating that this is the responsibility of the ATO – does little to help workers navigate the maze of superannuation regulation. Further, even if the employee were able to point to an applicable award or agreement with 'specific super rights', it is not entirely clear that the FWO would be willing to pursue non-remittance of superannuation, without any accompanying complaint of underpayment of wages.[105] To confuse matters further, the Department of Employment's factsheet on the Fair Entitlements Guarantee does not even mention the ATO (or the FWO) as the appropriate enforcement agency. Instead it states:

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103 See Fair Work Ombudsman, *Superannuation – Where to Go for Help* (21 May 2012) <http://www.fairwork.gov.au/media-centre/latest-news/2012/05/pages/20120521-superannuation>.

104 See Fair Work Ombudsman, *Can I Make a Complaint?* (14 June 2013) <http://www.fairwork.gov.au/complaints/can-i-make-a-complaint/pages/default.aspx>.

105 See *ACTU Submission*, above n 52, 6, where the ACTU notes that 'where an employee makes a complaint of underpayment of superannuation, without an accompanying complaint of underpayment of wages, the FWO simply refers the employee to the ATO, even if the underpayment of the superannuation is also a breach of an industrial award or agreement (which is the FWO's responsibility)'. This contrasts with the approach generally taken by unions who see enforcement of superannuation entitlements as integral to their role. Eg, the ACTU is currently running a 'Stand Up for Super!' campaign which is focused on protecting the superannuation entitlements of employees, particularly those covered by modern awards and enterprise agreements: see Australian Council of Trade Unions, *Stand up for Super!* <www.standupforsuper.com.au>.

> Employer superannuation contributions required under the Superannuation Guarantee are not covered by FEG. If you have unremitted employer superannuation contributions you should contact the insolvency practitioner managing your former employer's affairs to discuss your rights as an employee creditor.[106]

B Enforcement Issues – Recovery and Sanctions

Even if the government's enhanced role for employees in terms of detection is successful and more EN complaints are received by the ATO, the recovery of their unremitted contributions is uncertain. As noted earlier, employees do not have standing to enforce the 'tax' directly against their defaulting employer; rather the ATO is the only body empowered to act in these circumstances. Nor will every reported case be pursued by the ATO, as it considers a superannuation debt to be 'not recoverable' where 'the cost of us pursuing the unpaid super is higher than the amount owed to you'.[107]

In any event, following up individual complaints does not necessarily ensure that the unremitted superannuation is recovered. Many complaints are not lodged until nearly two years after the time at which the employer should have paid the superannuation. This makes recovery that much more difficult[108] and significantly increases the likelihood of irrecoverability through insolvency. It also hampers the ATO's and government's efforts to maintain a level playing field amongst employers and ensure that compliant employers do not face a financial disadvantage against non-compliant competitors.[109]

Concerns about the lack of recovery of unremitted superannuation by the ATO have been voiced for many years. In 2001, the Senate Committee noted dissatisfaction from the Association of Superannuation Funds of Australia ('ASFA'), amongst others, regarding the lack of ATO follow-up to combat systemic employer non-compliance in this area.[110] At the time, the ATO had collected $323 million in SGC monies, and written off $45 million 'as being uneconomical to pursue (ie, the employers were without assets).'[111] The Committee recommended that the ATO educate both employers and employees about the superannuation guarantee, and in particular target those businesses most 'at risk' of non-compliance.[112] However, the problems plaguing the ATO persisted. In 2010, the *IGT Report* found that '[t]ogether with the current SGC debt relating to insolvent employers, approximately $600.8 million in SGC raised

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106 Department of Employment, Australian Government, 'Eligibility for FEG Assistance' (17 March 2014) <https://docs.employment.gov.au/system/files/doc/other/eligibility_for_feg_assistance_fact_sheet_march_2014_0.pdf >.

107 See ATO, *What Information Will You Be Told?* (12 September 2012) <http://www.ato.gov.au/Individuals/Super/In-detail/Employer-contributions-and-salary-sacrifice/Unpaid-super/?page=11#What_information_will_you_be_told?>.

108 *IGT Report*, above n 64, 5 [2.6(10)].

109 Ibid 6 [2.9].

110 *Senate Committee Report*, above n 9, [2.11]–[2.16], [3.3]–[3.6].

111 Ibid [2.4].

112 Ibid [2.70].

by the ATO has not been recovered, with most of this debt having been written-off and representing known lost employee retirement savings.'[113] In addition, the IGT acknowledged that the actual figure for non-compliance could in fact be much higher, as its calculation was reliant on employee notification complaints, and in the absence of a complaint, the non-payment may be undetected by the ATO.[114] Nonetheless, a complaint, even one involving a substantial sum, does not automatically elicit a satisfactory response from the ATO. By way of example, in 2012, employees at a failed restaurant group in Sydney, owed $990 000 in superannuation, complained to the ATO six months before the company went into liquidation, but nothing was done.[115]

The circumstances in which non-compliant employers will be prosecuted, for the purpose of specific and general deterrence, is also unclear. In 1999, the ANAO was critical of the ATO's lack of a prosecution strategy:

> [The] SPR had not developed a clear strategy for prosecuting employers who choose not to comply with their obligations. … Although we recognise that it is not cost-effective to pursue prosecution action in all instances, we recommend that SPR develop an effective prosecution strategy for SG avoidance.[116]

In addition, the 2001 Senate Committee recommended that 'the ATO focus more attention on prosecuting employers who repeatedly default on their SG responsibilities'.[117] The ATO has the advantage of a range of criminal laws with respect to anti-avoidance and fraud that could be utilised.[118] However, their use in practice is constrained by the requirement to satisfy the criminal standard of proof. Moreover, the practical difficulties of achieving effective deterrence through enforcement actions has been recognised by Mark Konza, Deputy Commissioner, Small and Medium Enterprises, who said to the Joint Committee of Public Accountants and Audit in 2009:

> in the early 2000s we obtained a number of high profile successful prosecutions, but after a few years we found that the penalties that were imposed on people who were successfully prosecuted became ineffective. We went from people getting custodial sentences to people getting home detention, which included a provision that allowed them out during daylight hours to conduct business, so there was essentially no penalty. I think that led to a loss of confidence and a loss of interest, to some extent. When you are dealing with the court system and the Director of

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113 *IGT Report*, above n 64, 3 [2.6(1)]. See further Nick Tabakoff, 'Unpaid Super Doubles, Workers Diddled', *Herald Sun* (Melbourne), 24 February 2012, 29. Tabakoff says that '[t]he ATO and Government are alarmed by a near doubling of unpaid super to $517 million in the two years to 2011.'

114 *IGT Report*, above n 64, 4 [2.6(2)].

115 See Jonathan Marshall, 'Celebrity Chef Justin North's Appealed to the Australian Tax Office to Help Secure Unpaid Super', *News.com.au* (online) (29 July 2012) <http://www.news.com.au/money/superannuation/celebrity-chef-justin-norths-appealed-to-the-australian-tax-office-to-help-secure-unpaid-super/story-e6frfmdi-1226437481568>; 'Inquiry Launched as ATO Staff "Warned" Six Months Ago over Missing $1 Million Staff Roast North over Super Loss', *The Sunday Telegraph* (Sydney), 29 July 2012, 15.

116 *ANAO Superannuation Guarantee Report*, above n 91, [17], [3.138].

117 *Senate Committee Report*, above n 9, [3.23].

118 Eg, criminal proceedings may be brought under s 5 of the *Crimes (Taxation Offences) Act 1980* (Cth) with respect to arrangements to avoid paying income tax. Its operation is extended to cover the SGC pursuant to s 17 of the same *Act*.

> Public Prosecutions, they have an enormous caseload of very serious cases. It is hard to get cases up when their assessment is that the penalty is likely to be a slap on the wrist.[119]

Not every case must go to court, however, and it is pertinent to consider the nature of the other sanctions available to both the ATO and the FWO. As discussed earlier, responsive regulation is premised on the idea that regulators have an adequate range of enforcement tools at their disposal. Indeed, in addition to being able to bring enforcement litigation, both agencies have administrative penalties available to them. The ATO can levy a general interest charge under SGC legislation, as well as administrative penalties for misleading statements[120] and non-reporting of liabilities.[121] Similarly, the FWO can issue penalty infringement notices ('PINs') for failures in relation to record keeping and payslip obligations.[122] The availability of administrative remedies provides greater certainty for the regulator and reduces the cost of enforcement as no court proceedings are required.[123] Further, these sanctions are important ways in which to deliver some form of deterrence. However, the weakness of administrative penalties is that, as they generally impose set amounts,[124] they do not reflect the particularly egregious behaviour of the repeat or deliberate offender. For example, repeat 'phoenix' operators, closing one company owing superannuation and opening another to continue their business, will face an identical administrative penalty in each instance, unless the matter is taken to court.

The next Part examines ways in which detection of unremitted superannuation contributions and their recovery could be enhanced. It also considers what additional actions could be taken against those who are behind a corporate employer's failure to pay.

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119 Commonwealth, *Official Committee Hansard,* Joint Committee of Public Accounts and Audit, Reference: Biannual Hearing with Commissioner of Taxation, 23 October 2009, PA24.

120 The base penalty amount is 75 per cent of the shortfall for intentional disregard: see ATO, *False or Misleading Statement Penalty – Shortfall Amount* (21 December 2012) <http://www.ato.gov.au/General/Correct-a-mistake-or-dispute-a-decision/In-detail/Instructions-and-guides/Penalties-and-interest/?page=4>.

121 The base penalty amount for not providing a statement when requested is 200 per cent of the shortfall: *Superannuation Guarantee (Administration) Act 1992* (Cth) s 59(1).

122 *Fair Work Act* s 558; *Fair Work Regulations 2009* (Cth) regs 4.02–4.10.

123 Note also the 'no costs' jurisdiction of the *Fair Work Act* s 570. This is in contrast to taxation actions, where costs may be awarded against any party in a prosecution for a prescribed taxation offence: *Taxation Administration Act 1953* (Cth) s 8ZN.

124 According to the ATO's website, '[t]axpayers who fail to meet their tax obligations may be liable for penalties and interest charges. When we find an error or omission, we take into account your relevant circumstances.': ATO, *Penalties and Interest* (21 December 2012) <http://www.ato.gov.au/General/Correct-a-mistake-or-dispute-a-decision/In-detail/Instructions-and-guides/Penalties-and-interest/>. However, it appears that this refers to reductions of penalty rather than increases for repeat offences. *Superannuation Guarantee (Administration) Act 1992* (Cth) s 62(3) permits such a reduction.

VI RECOMMENDATIONS

A Detection

Due to the limitations inherent in the individual complaint/risk-based approach nexus outlined above, it is critical that information-gathering about superannuation non-compliance is strengthened. We recommend a number of alternative avenues for obtaining accurate and up-to-date data about who and what to target. This recommendation builds on those of the IGT, who similarly called for the ATO to play a more proactive role where there is a higher risk of employer non-compliance (ie, because of the vulnerability of the employees potentially affected).[125] The ATO has the ability to obtain information directly from superannuation trust fund trustees and from other sources,[126] as it has extensive legislative powers[127] to acquire and request information. The fact that all employers are, or should be, taxpayers, with identifying numbers, means that the ATO has an advantage in knowing about these employers. It has the computing capacity to track people and payments.[128] In addition, where the ATO has observed a failure to pay PAYG – traditionally the basis for a DPN notice – the ATO should ensure that superannuation remittance is also investigated.

The FWO can also make a valuable contribution here. It has its own unique sources of intelligence, which are often distinct from those available to the ATO. It is able to obtain useful, and different, information through its investigations into employer compliance with minimum wage, record keeping and payslip obligations. Although the FWO is responsible for enforcing the full range of civil remedy provisions under the *Fair Work Act*, much of its focus is on employer non-compliance with provisions relating to wages and conditions where the non-payment or underpayment of superannuation is likely to become apparent.[129] More recently, the FWO has sought to enhance its detection of employer non-

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125 *IGT Report*, above n 64, 5 [2.6(8)].

126 Streckfuss argues 'that the one advantage that the ATO has, or should have, over other regulators or agencies that receive complaints is data, information and processes. It needs to develop these with a view to decrease the dependence on EN complaints': Streckfuss, 'The Regulation of Unpaid Superannuation Contributions', above n 5, 293.

127 See, eg, *Income Tax Assessment Act 1936* (Cth) ss 263–4; *Taxation Administration Act 1953* (Cth) ss 13F–G.

128 See ATO, *Data Matching* (28 June 2013) <http://www.ato.gov.au/Tax-professionals/Prepare-and-lodge/Tax-Time-2013/Before-you-lodge/Data-matching/>. The ATO reports that '[l]ast year we cross-referenced information reported in tax returns against over 600 million transactions provided to us by third parties to identify omitted income and incorrectly claimed offsets'. See further ATO, *Matching Data from Many Sources* (31 May 2013) <http://www.ato.gov.au/General/How-we-check-compliance/Matching-data-from-many-sources/>; ANAO, 'The Australian Taxation Office's Use of Data Matching and Analytics in Tax Administration' (Audit Report No 30, 24 April 2008).

129 *ACTU Submission*, above n 52, 4:

> Because of the link between the correct calculation and payment of the employee's wage, and the proper calculation of the employer's superannuation liability, it is usually the case that an underpayment of wages automatically results in non-compliance with the employer's SG obligations. Moreover, the FWO's enforcement activities demonstrate that employers who deliberately underpay employees often deliberately avoid making superannuation payments to them (in whole or part).

compliance with provisions relating to wages and conditions through a number of innovative mechanisms, such as requiring employers to undertake self-audits in accordance with the terms of enforceable undertakings and/or proactive compliance deeds.[130] Compliance with superannuation obligations can and should be captured as part of these auditing activities.[131]

While the FWO and the ATO have overlapping responsibilities in relation to the detection of unpaid superannuation entitlements, there appears to be fairly limited coordination between their activities and the information they provide to employees.[132] Given the difficulties of detection, it seems that more could be done to coordinate the individual efforts of each agency. It is understood that there have already been some attempts to improve interagency collaboration in various respects.[133] These efforts are to be encouraged. However, we further urge both agencies to focus on future opportunities for information-sharing, for conducting coordinated campaigns and for cross-training or secondments in order to enhance their understanding of the risks of unpaid superannuation entitlements and the challenges of recovering these payments, particularly in the context of insolvency. This is especially important given that the categories of employees

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130 Both enforceable undertakings and proactive compliance deeds are relatively new compliance tools used by the FWO. These instruments differ in particular respects – eg, proactive compliance deeds are made under the common law, whereas enforceable undertakings are statutory instruments and must be made and authorised in accordance with the provisions of the *Fair Work Act*. These instruments are similar, however, in that they allow the FWO to shift some of the monitoring burden to firms. Proactive compliance deeds have been particularly helpful in this respect given that head franchisors, such as McDonalds, have agreed to undertake a sample audit of franchisee businesses throughout their vast fast food network. See, eg, Fair Work Ombudsman, *Proactive Compliance Deed between McDonald's Australia Ltd and The Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman)* (8 April 2011).

131 Eg, the most recent proactive compliance deed entered provides, amongst other things, that the signatory Contractor 'will undertake yearly audits to determine that correct wages, loadings, allowances and penalties have been paid and met, and if not, the Contractor will rectify this': see Fair Work Ombudsman, *Deed of Proactive Compliance between Asset Industries Pty Ltd ABN 97 112 795 552 and The Commonwealth of Australia (as represented by the Office of the Fair Work Ombudsman)* (2013). Superannuation is not expressly mentioned as an entitlement which needs to be either checked or paid as part of these annual audits.

132 Eg, a page on the ATO website summarises the key regulatory functions performed by the ATO, APRA, ASIC, the Department of Human Services and the Department of Veteran Affairs. No mention is made of the FWO: ATO, *Super, the Government and You* (1 May 2013) <http://www.ato.gov.au/Individuals/Super/In-detail/Your-situation/Super,-the-government-and-you/>. On a separate page, there is a brief mention of the FWO under the section: 'Other Ways to Obtain Unpaid Super': ATO, *Unpaid Super* (12 September 2012) <http://www.ato.gov.au/Individuals/Super/In-detail/Employer-contributions-and-salary-sacrifice/Unpaid-super/>. This section states that either the employee can seek an order from an eligible court under the *Fair Work Act*, or

> [a]lternatively, the Fair Work Ombudsman may be able to help you if you have not received all of your workplace conditions and entitlements. The Fair Work Ombudsman may get you to complete a Wages and Conditions Claim Form and pursue your entitlements on your behalf, including going to court, if necessary.

133 It is understood that a Memorandum of Understanding between the ATO and the FWO was executed in late 2012. Unfortunately, this is not available to the public, and therefore it is not known to what extent, if any, it deals with shared responsibility in relation to superannuation.

identified as high risk by the ATO bear a strong resemblance to the vulnerable groups identified by the FWO.[134]

Further, the FWO should consider including additional information about superannuation obligations and entitlements, and a link to the Employee Superannuation Guarantee Calculator Tool, in order to assist workers who need assistance. This online calculator could also be enhanced so that it takes into account any differences between the superannuation entitlements payable under modern awards and the minimum superannuation obligations prescribed by the SGC. This would not only provide a more complete service, but it would mean that the employee is receiving the most accurate information available. In addition, the FWO website and the ATO website could have links to relevant lost superannuation and lost wages and conditions search functions.

The FWO could also extend its own investigation mechanisms. For example, it could ensure that superannuation entitlements are always checked as part of its targeted education and audit campaigns. At present, during investigations by Fair Work Inspectors, it appears that the possibility of unpaid superannuation entitlements is not routinely explored. It will be critical for the FWO to adopt these sorts of measures to ensure that employers are complying with the new record keeping and payslip obligations in relation to superannuation.

Unions can assist the FWO and the ATO in this regard. The ACTU notes that '[u]nions often receive complaints from members about unpaid superannuation'.[135] The Textile Clothing and Footwear Union of Australia ('TCFUA') lodged a complaint with the FWO following the closure of Jaido Pty Ltd[136] (which traded as Scallywag Socks). The company had been left dormant with no major creditor seeking its winding up. The FWO lent support to the winding up proceedings to assist the employees in recovering their unpaid entitlements, which included unpaid superannuation contributions of $54 000. Given that detection is time and resource-intensive, it is difficult to understand why the ATO continues to adopt a guarded approach towards information supplied by unions.[137] As noted above, recovery of unpaid superannuation

134 Eg, the ATO's 2006 SG compliance survey revealed that those at a '[high] risk of having insufficient SG contributed on their behalf' included employees who were younger, those employed by a micro business, contractors and casual employees, and those working in particular sectors including recreation, accommodation, food services, warehousing and transport: *IGT Report,* above n 64, 4. While the FWO does not necessarily conduct a risk analysis in the same way as the ATO, it is clear that the labour inspectorate is seeking to prioritise its resources in order to assist employees in the most vulnerable groups, namely migrant workers and young people, as well as micro and small business employers: see Fair Work Ombudsman, *Annual Report 2012–13* (2013) 13.

135 See *ACTU Submission*, above n 52, 4.

136 See Fair Work Ombudsman, 'Regulator Helps Melbourne Factory Workers Gain Access to Over $500 000 Back Pay' (Media Release, 14 July 2010) <http://www.fairwork.gov.au/media-centre/media-releases/2010/07/pages/20100714-Jaido.aspx>.

137 The ACTU has previously commented that 'the ATO reportedly insists on only dealing with the employee complainant directly, and refuses to deal with their union or other representative': *ACTU Submission*, above n 52, 5. The ATO denies this, but acknowledges that their privacy obligations to individual employees limit what they can tell the unions about the progress of their complaints.

entitlements is enhanced where EN complaints are made by current rather than former employees. Unions can play a critical role in this respect insofar that they can act as a shield against victimisation. Unions may also be important sources of leverage given their links with industry superannuation funds. It is understood that the major fund administrators of industry funds maintain a database which automatically identifies arrears in superannuation accounts.[138] This is the type of information which is critical to early detection of unpaid superannuation and therefore central to maximising recovery of these amounts. Protocols can and should be established for fast-tracked reporting of these arrears to the ATO and/or the FWO.

B Enforcement

This section considers recommendations to boost enforcement mechanisms with an aim of improving deterrence and increasing recovery of unremitted contributions. Clearly, under the SGC legislation, the ATO has, and should retain, the primary enforcement and recovery role. By requiring employers to self-assess and pay their penalty without reference to court action or administrative sanction, the SGC fits within the revenue-raising mechanisms of other taxes payable to the ATO. In other words, the ATO can not only exact a penalty via the SGC legislation but that penalty is automatically imposed and acts as a recovery mechanism to the benefit of the employee.

No other organisation works in this manner, with any recovery or compensation remedy requiring a court order. For these reasons, any role played by the FWO in relation to superannuation entitlements arising under industrial instruments must remain complementary to the enforcement functions performed by the ATO. This is not to underplay the fact that the FWO's legislative mandate provides the agency with significant opportunities to assist the ATO with enforcement of superannuation obligations. While its jurisdiction to enforce provisions under the *Fair Work Act* means that the FWO cannot recover amounts levied under the SGC legislation, it can require compliance with superannuation entitlements insofar as they are set out in a relevant industrial instrument or contractual provision.[139] Contravention of the relevant provisions under the *Fair Work Act* attracts civil remedies, including pecuniary penalties in some instances.[140] In most cases, employees themselves, their unions and Fair Work Inspectors all have standing to initiate enforcement proceedings and orders of compensation can be made directly in favour of employees.

In light of this, the FWO is in a sound position to assist employees recover their unpaid superannuation entitlements. In addition, there is a small claims

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138 *ACTU Submission*, above n 52, 6.

139 See above n 35 and accompanying text. The FWO may be constrained in the exercise of its inspection and enforcement powers in relation to workplaces which are covered by an enterprise agreement that does not deal with superannuation entitlements, but it retains the power to inspect and enforce other civil remedy provisions, including those relating to recordkeeping and payslip requirements. These now require superannuation payments to be specified: see above n 43.

140 *Workplace Relations Act 1996* (Cth) s 407; *Fair Work Act* s 545.

procedure available under the *Fair Work Act*, which is designed to provide a quick and efficient avenue for employees to access these self-help remedies, although small claims proceedings are not without their own set of problems.[141] Employees, particularly those from vulnerable groups, are still likely to need assistance in making a claim in this jurisdiction.[142] Legal representation is only available in this forum with the leave of the court.[143] Where the employee is able to obtain legal assistance, such costs cannot generally be recovered.[144] As a result, labour market intermediaries, such as the FWO and unions, are critical to guiding employees through this process.

The FWO has a good track record in bringing enforcement proceedings involving relatively small amounts of unpaid or underpaid wages in cases involving serious contraventions, vulnerable workers or repeat offenders.[145] While its website indicates a reluctance to tackle superannuation claims, there have been a number of cases in which the FWO has pursued these on behalf of employees, along with their claims for wages and other entitlements.[146] In addition, it seems that the courts have been receptive to the FWO bringing enforcement proceedings in relation to unpaid superannuation contributions where they are expressly provided for in the industrial instrument.[147]

141 In small claims proceedings, the court may not award more than $20 000 (or such higher amount as prescribed by the regulations): *Fair Work Act* s 548(2).

142 Eg, the standard application form for small claims matters heard in the Federal Circuit Court of Australia does not expressly note that unpaid superannuation entitlements may be pursued as part of the proceeding: see Federal Circuit Court of Australia, *Form 5: Small Claim under the Fair Work Act 2009*. Cf Magistrates Court of Victoria, *Small Claims Form 5A* <http://www.magistratescourt.vic.gov.au/sites/default/files/Default/Industrial-Division-Small-Claims-Form-5A-Complaint.pdf>, which does expressly refer to superannuation entitlements.

143 *Fair Work Act* s 548(5).

144 *Fair Work Act* s 570.

145 The FWO's Litigation Policy provides that where the matter involves an amount less than $5000, and there is some vulnerability on the part of the worker, then it will be considered for litigation on the grounds that litigation is in the public interest. If, however, the relevant underpayment amount is less than $5000 and there is no such vulnerability present, FWO-sponsored litigation is unlikely: see Fair Work Ombudsman, *Guidance Note 1: FWO Litigation Policy* (4th ed, 3 December 2013) 11–13 [12.1].

146 See, eg, *Cotis v Macpherson* (2007) 169 IR 30; *Klousia v TKM Investments Pty Ltd* [2009] FMCA 208; *Liu v Neophone Pty Ltd* (Unreported, Chief Industrial Magistrate's Court NSW, Magistrate Hart, 14 October 2008); *Rajagopalan v BM Sydney Building Materials Pty Ltd* [2007] FMCA 1412; *Workplace Ombudsman v Saya Cleaning Pty Ltd [No 2]* (2009) 179 IR 358; *Fair Work Ombudsman v Bundy Meats Pty Ltd* (2009) 190 IR 180. Eg, in *Cotis v Macpherson* (2007) 169 IR 30, 43 [27], the Federal Magistrate commented: 'I regard all of the breaches identified as serious, particularly having regard to the circumstances, but I am particularly concerned about the breaches in relation to unpaid superannuation benefits over a period of about two years, and unpaid wages both for shift work and in relation to termination of employment without notice.'

147 But note the comments of Barnes FM in *Torpia v Empire Printing (Australia) Pty Ltd* (2009) 234 FLR 103, 119 [80]:

> The latter Award does not make provision for or impose an obligation to make superannuation payments. Rather, it simply states that superannuation is dealt with extensively by federal legislation, including certain specified Acts and s 124 of the *Industrial Relations Act 1996* (NSW). As the Award states, that legislation governs the superannuation rights and obligations of the parties … I am not satisfied that clause 46 is such as to impose an obligation on the employer to make superannuation payments such that a failure to do so would constitute a breach of the Award (now a NAPSA).

Any expansion of the compliance and enforcement role of the ATO and the FWO would need to be properly funded. Indeed, it is these resourcing limitations which have led to a decrease in the number of litigation matters that are being commenced by the FWO in the recent past.[148] In order to resolve matters more quickly and at less cost, the FWO is focusing greater efforts on dispute resolution measures, such as mediation, and referring more matters to the small claims jurisdiction.[149] The FWO should encourage employees to seek unpaid superannuation as part of negotiations in mediating a matter, or when they are completing and filing the relevant application to be heard in the small claims jurisdiction.[150] This is a particularly pertinent recommendation given Australia's current tight fiscal climate where cost cutting and cost savings are being espoused by the Federal Government.

In many of the enforcement proceedings initiated by the FWO in this context, the ability to pursue directors and officers 'involved in' contraventions under the accessorial liability provisions[151] has proven critical to obtaining pecuniary penalty orders against key individuals. Accessory liability achieves a similar outcome to the imposition of a DPN by the ATO, in that it looks behind the corporation to those individuals responsible for its management. Actions against company controllers are of particular importance where there exists a temptation for those controllers to liquidate the company. The limited liability enjoyed by shareholders creates an incentive to abandon a company to insolvency and set up a new business, without the burden of liabilities, such as unpaid superannuation. Deterrence of these deliberate 'phoenix' strategies can be achieved only through the imposition of meaningful penalties or compensation liability on company controllers. While the FWO is increasingly willing to pursue penalties against accessories, it has adopted a somewhat conservative approach to seeking compensation orders against individuals involved in contraventions under the accessorial liability provisions.[152] The FWO may seek to have the penalty amount paid to the affected employees in an attempt to recoup their losses, but there is

148 The number of enforcement proceedings initiated by the FWO (or its predecessors) has dropped from a peak of 77 in 2008–09 to 50 in the 2012–13 financial year: see Workplace Ombudsman, *Annual Report 2008–09* (2009) 28; Fair Work Ombudsman, *Annual Report 2012–13* (2013) 35. The former head of the FWO, Nicholas Wilson, commented that, on the basis of current resourcing levels, the maximum litigation capacity of the FWO is approximately 50 per year: see Nicholas Wilson and Lynda McAlary-Smith, 'The Fair Work Ombudsman Litigation Policy in Practice' (Paper presented at the Industrial Relations Commission NSW Annual Members Conference, 18 October 2012) 6.

149 FWO, *Change to Complaint Handling Process to Improve Cooperative Resolutions* (2 May 2013) <http://www.fairwork.gov.au/media-centre/media-releases/2013/05/pages/20130502-complaint-process.aspx>.

150 *Fair Work Act* s 548.

151 *Fair Work Act* s 550.

152 This conservative approach is believed to be attributable to the Explanatory Memorandum to the Fair Work Bill 2008 (Cth) [2177], which expressly states that compensation cannot be sought from accessories. However the orders provision in the *Fair Work Act* s 545 clearly allows for a compensation order to be made against accessories. See further Helen Anderson and John Howe, 'Making Sense of the Compensation Remedy in Cases of Accessorial Liability under the Fair Work Act' (2012) 36 *Melbourne University Law Review* 335.

often a shortfall between the penalty imposed and the underpayments owing.[153] To ensure that employees are not out-of-pocket, we encourage the FWO to seek compensation orders, including an amount for unpaid superannuation, against accessories in cases involving insolvent employers.[154]

Interestingly, neither the FWO nor the ATO has the capacity to bring proceedings for the disqualification of a director. Allowing this would make it easier to remove errant directors from the marketplace, through spreading the workload among agencies, and overcoming some of the difficulties with administrative and criminal penalties outlined above. ASIC has a power to disqualify for up to five years,[155] and may seek a disqualification order from the court for up to 20 years.[156] The Australian Competition and Consumer Commission ('ACCC') also has the ability to seek a disqualification from the court in appropriate circumstances, which illustrates that the right to apply to the court is not, and should not be, one exclusively reserved to ASIC.[157] We recommend that both the ATO and the FWO be given the power to seek disqualification, to augment the suite of enforcement actions available to them and to avoid unnecessary duplications between agencies where a referral to ASIC would otherwise be required.

It is not anticipated that there would be any practical difficulties in the shared responsibility for policing superannuation as outlined above. This is not a 'turf war'. Each agency could and should be able to bring their own actions, which can work in a complementary manner. To enhance coordination, however, a Memorandum of Understanding could be executed to clearly outline the procedures for complaint referral and information exchange, as well as addressing any other areas of potential overlap, conflict or inconsistency. For example, where the ATO has already commenced an action, the FWO could agree to discontinue, or not mount, its own. In an area of too little enforcement, it would be a great pity if an expanded jurisdiction for the FWO were dismissed on the basis of possible overlapping actions.

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153 This shortfall, and the problems it presents, has been the subject of recent judicial consideration: see *Fair Work Ombudsman v Bedington* [2012] FMCA 1133.

154 See *Automotive, Food Metals, Engineering, Printing and Kindred Industries Union v Beynon* [2013] FCA 390 [21], where Gray J indicated that compensation could be sought from a company director as an accessory to the company's breach of the *Fair Work Act*.

155 *Corporations Act 2001* (Cth) s 206F.

156 *Corporations Act 2001* (Cth) s 206D. In addition, ASIC can seek court disqualification for an unlimited period of time for directors who have breached their duties to the company, pursuant to s 206C of the same *Act*.

157 *Competition and Consumer Act 2010* (Cth) s 86E. The court may disqualify the director where there has been a contravention of the same *Act*, or an attempt or involvement in such a contravention, and it considers the disqualification justified.

VII CONCLUSION

Undoubtedly, the primary responsibility for policing the non-payment of the SGC lies with the ATO, and should remain so. However, the data on unremitted superannuation shows that more needs to be done to police and recover underpayments and non-payments. The ATO has a broad range of taxes to collect and programs to administer,[158] and it does on occasion fail to live up to expectations.

Superannuation is a vital component of employees' remuneration. A failure to adequately detect and enforce non-compliance with minimum superannuation entitlements arising under industrial instruments or the relevant legislation causes detriment to the employees and to the government through additional reliance on the aged pension. It is also unfair to those who do the right thing given that they must compete with businesses avoiding their obligations. Government investment in this problem now is likely to provide greater dividends in the future given that the loss suffered by employees through unpaid superannuation, whether in an insolvency or otherwise, is compounded by lost interest over the period of their working life.

Given the Government's commitment to revamping superannuation through its *Stronger Super* suite of measures, and the extension to the FWO of enforcement of the payslip reporting obligation, it is timely to consider whether the ATO could use some help as the 'super police'. The Government should not expect employees to be the primary monitors of superannuation remittance, especially since those most likely to be in danger of not having their superannuation remitted are those least likely to detect it. The FWO is well placed to supplement the efforts of the ATO, and should be encouraged, and appropriately resourced, to do so.

158 See ATO, *Annual Report 2012–13* (2013) 6.