



**Australian Government**  
**Inspector-General of Taxation**

# Review into the ATO's administration of the Superannuation Guarantee Charge

**A report to the Assistant Treasurer**

**Inspector-General of Taxation**

March 2010

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**Australian Government**  
**Inspector-General of Taxation**

18 March 2010

Senator the Hon Nick Sherry  
Assistant Treasurer  
Parliament House  
CANBERRA ACT 2600

Dear Minister

I am pleased to present to you my report on findings and recommendations in respect of the review into the ATO's administration of the Superannuation Guarantee (SG) Charge.

The review found that the SG system works well for the majority of Australians, with approximately \$71.1 billion in employer contributions being made to superannuation funds in 2008-09. However, this amount includes both mandated SG contributions and salary sacrifice amounts which made it difficult to quantify the level of SG non compliance as a means of determining the true financial impact on employees of non-compliant employers.

The review also found that people most at risk with the current SG system are the employees who are the least empowered 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 beyond the age pension.

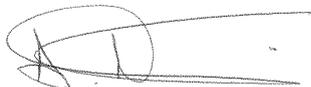
The package of recommendations outlined in my report seek to improve the SG system and its administration to ensure that the administrative framework better supports the underlying SG policy intent and optimises SG compliance through greater detection and deterrence mechanisms. The recommendations also emphasise the nature of employer superannuation contributions as an employee entitlement and seek to improve their protection, especially for those people most at risk. This is to be achieved by:

- Minimising the time period between the non payment of an SG entitlement and the ATO's awareness of it (either being triggered by an EN complaint or the ATO's own pro active work);
- Improving the ATO's ability to proactively identify high risk cases and trigger a compliance response where no employee complaint has been made;
- Improving aspects of the ATO's compliance and debt collection processes;
- Improving the deterrence or penalty effect on those who do not lodge SGC Statements and the delayed or non payment of SG entitlements; and
- Better protection of SG entitlements where an employer becomes insolvent.

Of the seven recommendations and three part recommendations directed to the ATO, they have agreed with nine and disagreed with one. Specifically, it has disagreed with my recommendation that the ATO significantly expands its proactive SG audit work to allow for more real-time monitoring and follow-up of high risk employers who have not paid superannuation.

I offer my thanks to the support and contribution of professional bodies, trade unions, superannuation associations and individuals to this review. The willingness of many to provide their time in preparing submissions and discussing issues with myself and my staff is greatly appreciated. I also thank relevant ATO officers for their professional cooperation and assistance in this review.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Ali Noroozi', written over a horizontal line.

Ali Noroozi  
Inspector-General of Taxation

# CONTENTS

<b>CHAPTER 1 — INTRODUCTION</b> .....	<b>1</b>
Acknowledgements .....	1
Structure of the Report .....	2
<b>CHAPTER 2 — SUMMARY OF FINDINGS AND RECOMMENDATIONS</b> .....	<b>3</b>
<b>CHAPTER 3 — BACKGROUND</b> .....	<b>17</b>
Development of employer superannuation contributions .....	17
Purpose of the SG system .....	17
Operation of the Superannuation Guarantee Charge .....	18
Statistics .....	27
ATO management of SG .....	28
<b>CHAPTER 4 — SUPERANNUATION GUARANTEE COMPLIANCE</b> .....	<b>31</b>
Types of non-compliance .....	31
Level of non-compliance .....	32
ATO compliance approaches .....	38
SG compliance results .....	39
Information flows between stakeholders .....	43
Risk identification .....	49
<b>CHAPTER 5 — EMPLOYEE NOTIFICATIONS</b> .....	<b>57</b>
Background .....	57
SG responsiveness project .....	57
Communication with employees .....	59
ATO performance regarding timeframes .....	62
End-to-end analysis .....	64
Changes in EN complaints handling processes .....	67
<b>CHAPTER 6 — SUPERANNUATION GUARANTEE ENFORCEMENT</b> .....	<b>73</b>
Application of Part 7 penalties .....	73
Prosecution action .....	78
<b>CHAPTER 7 — SGC DEBT COLLECTION PROCESSES AND OUTCOMES</b> .....	<b>83</b>
ATO SGC debt recovery function .....	83
ATO SGC debt collection results .....	85
Protection of SG entitlements .....	92



## CHAPTER 1 — INTRODUCTION

1.1 This is the report on the review conducted by the Inspector-General of Taxation (the IGT) into the ATO's administration of the Superannuation Guarantee Charge (SGC). This report is pursuant to section 10 of the *Inspector-General of Taxation Act 2003* (the IGT Act).

1.2 On 2 June 2009 the IGT announced terms of reference for this review. The terms of reference followed concerns expressed by stakeholders with the general level of Superannuation Guarantee (SG) compliance and, in particular, the ATO's timeliness and responsiveness to employee complaints regarding the non-payment of SG. Concerns were also expressed about the adequacy of the ATO's enforcement action and monitoring and the level of outstanding SGC collected.

1.3 This review examined the ATO's administration of SGC including identifying the level of non-compliance and assessing the ATO's non-compliance detection mechanisms and approaches following detection.

1.4 The IGT sought input and submissions from the community to understand employee, employer and superannuation funds experience and perspectives in relation to the administration of the SG system.

1.5 The review considered the ATO's:

- risk assessment strategies for SG and its implementation of strategies to improve compliance;
- communication strategies with employees raising concerns with their employer's compliance, the timeliness of actioning employee notifications and the level of information provided about the collection of unpaid superannuation; and
- timeliness in collecting unpaid SGC.

1.6 The aim of the review was to identify and recommend changes that will assist the ATO to improve the early identification of SG shortfalls, the timely handling of employee complaints and the prompt collection of outstanding SGC.

## ACKNOWLEDGEMENTS

1.7 Sincere thanks are extended to the Association of Superannuation Funds of Australia, the Australian Council of Trade Unions, Industry Super Network, Industry Funds Credit Control, Australian Institute of Superannuation Trustees, Construction Forestry Mining and Energy Union, Community and Public Service Union and the Taxation Institute of Australia who prepared written submissions for this review.

1.8 The IGT would also like to thank the Commonwealth Ombudsman, superannuation funds, tax practitioners, and individual taxpayers who prepared written submissions or participated in this review.

1.9 The IGT acknowledges the cooperation of the Commissioner of Taxation and his staff in this review.

## **STRUCTURE OF THE REPORT**

1.10 A summary of the key findings, conclusions and recommendations for this review is provided in Chapter 2.

1.11 A brief description of the development of employer superannuation contributions, the purpose and role of the SG system and the operation of the SGC are set out in Chapter 3. It also describes the ATO's current management approaches regarding SG.

1.12 SG compliance is discussed in Chapter 4 including an examination of the types and level of non-compliance, the ATO's SG compliance approaches and results and the interactions and information flow amongst key stakeholders in the SG system.

1.13 The handling of employee notification complaints, which are the primary source of ATO audit activity, are considered in Chapter 5 including the ATO's efforts to improve its timeliness and responsiveness in actioning these complaints.

1.14 The key leverage points in the SG system to enforce employers' SG obligations and deter non-compliance including Part 7 penalties and prosecution action are examined in Chapter 6.

1.15 Finally, the ATO's processes and timeliness in collecting unpaid SGC are set out in Chapter 7. It also examines the ATO's SGC debt collection results and discusses the IGT's findings for fieldwork undertaken in the course of the review.

## CHAPTER 2 — SUMMARY OF FINDINGS AND RECOMMENDATIONS

2.1 The SG system is one component of Australia's retirement income policy and compliments the age pension and voluntary superannuation contributions. Over time, SG is intended to reduce the need for future generations of taxpayers to pay more to fund age pensions for the increasing number of retired people. SG will be of particular importance to individuals who cannot afford to make voluntary superannuation contributions, who will mainly be lower to middle income taxpayers.

2.2 Importantly, the historical context of the SG system reinforces the framing of employer superannuation as an employee entitlement, no different to salary and wages apart from its age-based restrictions on its access.

2.3 Generally, the SG system works well for the majority of Australians. In 2008-09, \$71.1 billion in employer contributions were made to superannuation funds, a significant increase from 2001-02 where there were \$28.6 billion in such contributions.<sup>1</sup> It should be noted that this employer contribution amount includes both mandated SG contributions and salary sacrifice amounts. In 2007-08 the ATO's compliance activities raised a further \$390 million in SGC liabilities, with a slight decrease in 2008-09 to \$377 million.

2.4 However, there are a number of barriers in quantifying the level of SG non-compliance as a means of determining the financial impact of SG non-compliance on employees and the percentage of employees affected across market segments, in particular the quantum of the salary sacrifice component.

2.5 The people most at risk with the current SG system are the employees who are the least empowered 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.

2.6 The review made the following findings:

1. Over an eleven year period, the difference between SGC raised and SGC collected has accumulated to \$936.1 million, increasing substantially from 2000-01. Together with the current SGC debt relating to insolvent employers, approximately \$600.8 million in SGC raised by the ATO has not been recovered, with most of this debt having been written-off and representing known lost employee retirement savings.

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<sup>1</sup> Australian Prudential Regulation Authority (APRA), *Annual Superannuation Bulletin*, June 2009 (issued 10 February 2010).

2. The above amounts represent known SG non-compliance as they have been raised through the employer lodging a SGC Statement or the ATO issuing a default assessment. The actual SG non-compliance could actually be much greater than the figures suggest. If there is no Employee Notification (EN) complaint lodged by an employee then the non-payment may go undetected, again representing lost employee retirement savings and higher government outlays for social security payments.
3. The ATO's SG compliance survey in 2006 found that the employee segments that are a high risk of having insufficient SG contributed on their behalf were as follows:
  - employees of micro businesses;
  - contracted and casual employees;
  - younger employees; and
  - employees who work in particular sectors – the arts and recreation services; the transport, postal and warehousing sectors; accommodation and food services; and the agriculture, forestry and fishing sector.
4. An analysis of the SG 2006 survey data also revealed that the mean salary and wages across each of these high risk segments is less than \$30,000 a year, indicating that those most at risk of having insufficient SG contributed on their behalf by employers were low-income employees.
5. This survey concluded that the data matching approach was a better predictor of extensive non compliance. In addition it found that the analytics approach was a better predictor of the incidence of non-compliance, but risk scores alone were not sufficient to predict the extent of non compliance.
6. Submissions and evidence received by the IGT expressed concern with the growing practice of employers misclassifying workers as subcontractors, rather than employees, to avoid paying superannuation. The Australian Bureau of Statistics (ABS) Forms of Employment Survey found that there are now 967,000 independent contractors, with nearly a third of those in the construction industry. Nearly all of the businesses working in the construction industry are small businesses and collectively are responsible for 82 per cent of all employment in this industry.
7. The ATO is heavily reliant on EN complaints as a source of risk identification in the SG system – of the 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.

8. Any risk identification system that overly relies on employee engagement, despite the growing problem of member apathy or disengagement with their superannuation, is bound to have limited effect in driving systemic improvement in SG compliance. While the SG system is a self-assessment system, the types of employees that are most vulnerable to non-compliance, the market-specific nature of the risk and the impact on employees requires that the ATO play a more proactive role where there is a higher risk of non-compliance.
9. Over 70 per cent of such EN 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. This is particularly relevant in the micro-business sector where there are a greater proportion of groups that are more vulnerable to employer non-compliance, including casual, part-time and those from non-English speaking backgrounds.
10. There is a considerable timeframe, approximately 22 months, between when an SG shortfall arises (that is, the due date for when an employer should have paid their employee's superannuation) and when the employee lodges an EN complaint. This means that by the time the ATO begins an investigation into unpaid SG, more than 2 years may have elapsed from the time that the shortfall first arose.
11. Until very recently, there has been comparatively little ATO proactive work to identify potential SG non-compliance due to a combination of resourcing, availability of relevant data and the Commissioner's commitment to investigate every EN complaint. Proactive compliance work was confined to the ATO conducting SG audits as part of their high risk PAYG(W) and employer obligation audits. However, from 1 July 2009 the ATO has sought to use data matching to identify high risk employers for proactive audit although there are significant limitations on the ATO being able to undertake real-time monitoring and rapid follow-up of high risk employers.
12. Employees are still heavily reliant on annual reporting from superannuation funds for information whether superannuation contributions were actually made. In addition, employees may not know from their payslips whether an employer has actually paid their SG. This has the effect of increasing the timeframe between SG non-payment and the ATO's detection through employees lodging EN complaints.
13. A significant proportion of SG compliance risk and collectable debt is associated with micro-business and, to a lesser extent, the lower end of the SME segment, For instance, nearly 87 per cent of SGC raised related to micro-business and the lower end of the SME segment while 95 per cent of SGC collectable debt was associated with micro-business and SME employers.

14. Fieldwork indicates that about 30 per cent of debt recovery cases lead to the non-recovery of the SGC debt because the employer is insolvent or it is uneconomical to pursue the debt. In a further 30 per cent of cases the employer has paid the SGC debt as a result of ATO debt recovery action with the remaining cases still subject to debt collection activities.
15. Where a default assessment is raised (that is, the employer has not voluntarily lodged a SGC Statement even after an audit is initiated), then it is twice more likely that a SGC debt will be outstanding one year after the date of issue than where an employer lodges a SGC Statement. In addition, where a default assessment is raised, then it is six times more likely that a SGC debt will be written-off than where an employer lodges a SGC Statement during an audit.
16. Where an employer has entered into liquidation, the current SG system has not adequately protected unpaid SG entitlements. By law, the ATO is not able to recover unpaid SGC against the directors personally and employees have not been able to recover under the General Employee Entitlements and Redundancy Scheme (GEERS) suggesting that employees' superannuation is anything but 'guaranteed'.

2.7 The non-payment of SG impacts a number of persons including the affected employees, other businesses and government. Affected employees miss out on superannuation which has an impact upon their standards of living in retirement. Employers that do not pay SG obtain an unfair advantage over other compliant employers that meet their SG obligations and pay employees' superannuation on time. Finally, government is exposed to higher future age pension outlays.

2.8 There are also significant limitations on the ATO being able to undertake real-time monitoring and rapid follow-up of high-risk employers with the current information flows in the SG system. Without auditing individual employers, the ATO is not able to effectively and efficiently reconcile liabilities and payments in real time to proactively determine whether there has been potential non-compliance and undertake prompt follow-up action. This arises because:

- Superannuation funds provide information to the ATO (through the lodgement of Member Contribution Statements (MCS)) only annually and this information may not always include the employer's details against payments made to members.
- Employers are required to separately identify to the ATO where they have not met their SG obligations by the due date (through the lodgement of SGC Statements) – but the ATO has no way of knowing (until either it receives an employee complaint or undertakes data-matching of MCS and individuals' income tax returns) that an employer has failed to lodge a SGC Statement and that they have a SG liability.

2.9 A delay in triggering ATO audit activity significantly increases the likelihood of non-payment of SGC debt (requiring more costly debt recovery action) and 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.

2.10 Up until 2007-08 there were significant ATO delays in commencing and finalising its investigations following employee complaints. Employees also complained that they were not being kept informed of the progress of their complaint.

2.11 Following changes to the law and the government providing additional funding, the ATO has taken a number of positive steps to improve its responsiveness to employee complaints:

- It has reduced the backlog of EN complaints to 5,486 at the end of June 2009, although it has not reached its target of 5,000 cases on hand due the high volume of EN complaints received in the last two years.
- It has made significant progress in reducing the timeframes for actioning EN complaints. In 2005-06 only 38 per cent of EN complaint investigations were finalised within 12 months, while in 2008-09 the ATO achieved a 99 per cent finalisation rate.
- It has introduced processes based largely on sending letters to employees at defined times during the audit and debt collection process to ensure that employees are kept informed of the progress of their EN complaint.

2.12 The current penalty and prosecution regimes, and the ATO's administration of these regimes, do not have either a sufficient deterrence or behavioural effect on those who do not lodge a SGC Statement or on employers that do not make SG payments at all. For instance, Part 7 penalties for the non-lodgement of SGC Statements are remitted to nil even where a SGC Statement was lodged more than two years after the due date and after an EN complaint is lodged with the ATO.

2.13 There is significant scope to improve the integrity and equity of the SG system and its administration so as to maximise SG compliance and maintain a level playing field amongst employers. There are a range of recommendations to improve the SG system and its administration in order to:

- Minimise the time period between the non-payment of an SG entitlement and the ATO's awareness of it (either being triggered by an EN complaint or the ATO's own proactive work) – Recommendations 2 and 4.
- Improve the ATO's ability to proactively identify high-risk cases and trigger a compliance response where no employee complaint has been made – Recommendations 1 and 3.
- Improve aspects of the ATO's compliance and debt collection processes – Recommendations 5, 6, 7, 8 and 12.
- Improve the deterrence or penalty effect on those who do not lodge SGC Statements and the delayed or non-payment of SG entitlements – Recommendations 9 and 10.
- Better protection of SG entitlements where an employer becomes insolvent – Recommendation 11.

2.14 In framing the recommendations below the IGT sought to ensure that the administrative framework better supported the underlying SG policy intent and optimised SG compliance through greater detection and deterrence mechanisms. The recommendations emphasise the nature of employer superannuation contributions as an employee entitlement and seek to improve their protection, especially for the least empowered employees. At the same time, the administration of the SG should seek to minimise employer compliance costs and provide adequate education and support for employers that comply.

## **RECOMMENDATION 1**

Given the identified barriers to quantifying the level of non-compliance, to better detect SG non-compliance the ATO should determine the current and accessible information and data required for a more sophisticated analysis of the SG population so as ascertain a more complete picture in relation to the level of non-compliance and its impact on employees.

This should include the collection and analysis of data (including additional information that may be captured and available to the ATO in the future in line with Recommendation 3) to estimate the amount of money involved with SG non-compliance, the percentage of non-compliant employers and affected employees across market segments and the quantum of the salary sacrifice component.

### **ATO response**

Agree.

We understand this recommendation is for the Commissioner to use all readily available data and information (including reportable employer superannuation contributions data available from next financial year) to ascertain a fuller picture of SG compliance levels in various markets and industries. We will be initiating a project in the 2010/11 financial year in order to establish the parameters to complete this work. However, we will not be conducting random audits or surveys as we believe this places an unfair burden on compliant taxpayers and is not an efficient use of our resources.

Our ability to undertake the analysis envisaged in the second paragraph of this recommendation is contingent on Recommendation 3 being legislated and implemented.

## RECOMMENDATION 2

The Government consider providing employees with more timely information regarding whether their employer has paid SG by the due date, by having employers, on a quarterly basis, include on each employee's payslip their ordinary time earnings for SG purposes and the amount of SG actually paid to the employee's superannuation fund or the ATO. This will also assist in reducing the timeframe between when a SG shortfall arises and when an employee lodges an EN complaint with the ATO.

### ATO response

This is a policy matter for Government's consideration.

## RECOMMENDATION 3

The Government consider improving the current payment and information systems for SG obligations to allow the ATO to undertake more real-time monitoring and rapid follow-up of high-risk employers, particularly micro-businesses.

The payment and information systems should have the following features:

- Capturing the following details for each employee: name, tax file number, ordinary time earnings, amount of superannuation contribution paid by employer, superannuation fund and member number;
- ATO to have access to this data on a quarterly basis; and
- Compulsory requirement for all employers in high-risk segments to participate in the system rather than it being optional.

In a manner that minimises compliance obligations, the ATO should also engage superannuation funds and clearing houses to obtain information for the purposes of identifying potential SG non-compliance.

### ATO response

This is largely a policy matter for Government's consideration.

In relation to that part of the recommendation directed to the ATO, made in the last paragraph, we agree with the recommendation.

The ATO encourages people in the superannuation industry and others to provide information on employers at risk of non compliance with their SG obligations. This is done by encouraging representative bodies, through industry forums, etc, to utilise our 'third party referral' process.

The ATO is also one of the stakeholders involved in the consultation process undertaken by Medicare on their administration of the Clearing House initiative. Once appropriate legislation has passed we will explore with Medicare the feasibility for information sharing between the two agencies.

## **RECOMMENDATION 4**

To minimise the timeframe between SG non-compliance and the ATO's detection, the ATO should significantly expand its proactive SG audit work to allow for more real-time monitoring and rapid follow-up of high-risk employers, especially in the micro-business segment, who have not paid superannuation. This should include:

- Increased reliance on data-matching approaches; and
- Increased community presence through more targeted field work along the lines of the FWO campaigns.

This also requires the ATO to further develop its risk identification strategies to more effectively detect the different types of SG non-compliance as each requires different analysis techniques and detection mechanisms.

### **ATO response**

Disagree.

The ATO already uses data matching techniques to identify employers at risk of non compliance and will be able to do this with even more precision with the availability of Reportable Employer Superannuation Contributions data.

The ATO already targets high risk industries and employers. Approximately 95 per cent of our proactive audits are in the micro segment.

The ATO already has a high percentage of its proactive audit resources in field activities. Any further increase would have to be carefully considered due to the high costs of each field activity compared to a phone or desk audit.

The ATO is committed to addressing all employee SG complaints in a timely way and this necessarily constrains the resources available for proactive work. Nevertheless, 27 per cent of our compliance resources working on SG are doing proactive risk-based work.

Having regard to the overall level of risk in the SG system, and the range of other tax and superannuation risks that the ATO is required to address, we believe that the current level of resources allocated to addressing SG risks is appropriate.

## RECOMMENDATION 5

To improve the employee experience of ATO communications in relation to its investigation of EN complaints, the ATO should improve its communications by ensuring that:

- Employees receive appropriate and personalised letters in a timely manner that set out the following details:
  - SGC liabilities raised by the ATO on behalf of employees following an investigation;
  - SGC amounts collected by the ATO; and
  - Where the ATO has not been able to collect, the reasons for non-collection (for example, insolvent employer, uneconomical to pursue) and the amount written-off.
- Auditors correctly complete the case management system so as to allow ATO officers to appropriately respond to employee requests for updates on ATO action.

### ATO response

Agree.

We accept auditors should correctly complete case management systems and have already taken steps to minimise the likelihood of errors. We also write to employees who make complaints advising when an amount is collected on their behalf and the amount.

We are currently reviewing the whole framework of our letters to further improve our communication with employees.

However, the dissemination of information to employees must be reviewed in the context of:

- what the SG legislation allows us to disclose;
- what is sensible to provide given the substantial reverse workflows that can arise when amounts originally raised change, for example where the employer successfully objects to the amount owing or amends the SG assessment; and
- what our current systems and resources will allow us to change.

We will consider the IGT's recommendation as part of our review of SG letters to employees who lodge complaints. This review of letters is a part of our *SG End to End Review*. The second stage of this project is expected to be finalised within 12 months. At this time more information regarding our system capabilities will be available.

## **RECOMMENDATION 6**

To improve transparency of the time taken for the ATO to complete its compliance action in response to employee notifications, the ATO should also measure its performance with the 4-month and 12-month completion timeframes from the date that an employee lodges a valid complaint with the ATO.

### **ATO response**

Agree.

We understand this recommendation proposes the ATO to measure its performance with the 4-month and 12-month completion timeframes from the date an employee lodges a valid and complete complaint with the ATO. We classify a complaint to be valid and complete when all the required information necessary to commence compliance action is provided by the employee.

We will implement these new performance standards in the 2010/11 financial year.

## **RECOMMENDATION 7**

To ensure continuous improvement of the EN complaints process, the ATO should measure the time it takes for an employee to receive their SG entitlement from the time that they lodge an EN complaint.

Equally, the ATO should record and analyse the outcome of all debt recovery cases arising from EN complaints to measure the effectiveness of the EN complaints process.

### **ATO response**

Agree, subject to our system's capability.

Our current systems are unable to track in full the path of an EN complaint. Our ability to fully implement this recommendation is contingent on the implementation of SG systems into the new enterprise platforms, which is not expected to occur within the next 12 months.

## RECOMMENDATION 8

As a means to better measure performance around SG administration and increasing transparency, the ATO should report on the following:

- the number of SG complaints leading to an SGC liability being raised and those leading to no result;
- the total number of employees whose superannuation entitlements are checked and the number of employers whose records are checked;
- the percentage of superannuation complaints resolved in accordance with the service standards; and
- the total amount and basis for SGC written-off.

### ATO response

Agree, subject to the data being readily available from our systems.

We note that some of this information is already reported, but we will seek to fully implement this additional performance reporting in respect of 2009/10 outcomes.

## RECOMMENDATION 9

The Government consider whether the current multi-faceted and complex penalty system applying to SG (such as non-deductibility of SGC, the application of nominal interest and the administrative component from the beginning of each quarter and Part 7 penalties) should be streamlined and better targeted to improve voluntary compliance.

To bolster the Part 7 penalty regime as part of an effective deterrent against non-payment of SG entitlements, and give greater importance to the lodgement of SGC Statements, the ATO should revise its policy and administration of the penalty regime to ensure it strikes an appropriate balance between:

- Discouraging the non-lodgement of SGC Statements by imposing penalties at a more meaningful level; and
- Recognising the need for appropriate remission in circumstances where the non-lodgement was due to circumstances outside the employer's control.

The ATO should seek to more widely publicise the outcomes of its application of Part 7 penalties to deter non-compliant behaviour but in a way that protects taxpayer secrecy.

## **ATO response**

This recommendation is largely a policy matter for Government's consideration.

For the part directed at the ATO we agree to the recommendation, but note the following information:

- The ATO is currently reviewing its administration of Part 7 penalty. This review will look at the guide for audit officers for remission of penalties, and consider the imposition of penalties on employers who continuously lodge SGC Statements late.
- The SGC already incorporates significant financial disincentives, such as nominal interest from the beginning of the relevant quarter, administration charges and loss of tax deductions. Any increase in imposition of Part 7 penalties must be finely balanced to ensure we are not overly penalising or imposing an unreasonable burden on otherwise viable employers.
- We will also consider suitable communication activities regarding publicising the outcomes of the application of penalties.

## **RECOMMENDATION 10**

To bolster SG prosecution action as part of an effective deterrent against non-payment of SG entitlements the Government consider whether the ATO should be afforded greater prosecution powers (such as the ability to seek the imposition of civil pecuniary penalties) where an employer does not pay SG and fails to cooperate with the ATO.

In the event that the ATO is given greater prosecution powers, the ATO should implement a media strategy that is designed to maximise the compliance leverage effect by raising the coverage and profile of SG prosecution cases.

Notwithstanding being granted these further powers, the ATO should adopt a stronger prosecution strategy for the more egregious and high-risk employers and should also finalise and publicly release its revised SG prosecution strategy and implementation plan.

## **ATO response**

This recommendation is largely a policy matter for Government's consideration.

Should the Government proceed with providing us the recommended prosecution powers we will then undertake to review our media strategy on prosecutions in light of the legislative changes and operational results.

For the part of this recommendation directed at the ATO, we are currently reviewing our SG prosecution strategy and agree to publish the key elements of this strategy once the review is complete.

## RECOMMENDATION 11

To better protect employees' SG entitlements, improve deterrence against SG non-compliance and provide greater transparency of the cost of SG non-compliance on future age pension outlays, the Government consider:

- Expanding the director penalty regime to apply to unpaid SGC liabilities of the company; and
- Expanding GEERS to cover unpaid SGC liabilities where a company has been placed into liquidation and the ATO has not been able to recover against the directors personally.

### ATO response

This is a policy matter for Government's consideration.

## RECOMMENDATION 12

To minimise SGC debt defaulters, the ATO should improve its risk identification techniques to better target high-risk employers with firmer action sooner. For instance, the ATO's debt collection processes should place greater emphasis on employers' previous compliance behaviour in determining how a debt case is actioned.

Where an employer has defaulted in their payment arrangement, the ATO should require further information regarding the employer's financial and compliance position before entering into further payment arrangements.

### ATO response

Agree.

We have already implemented most parts of this recommendation. Recent changes to superannuation debt collection activities include:

- reducing the average handling time of cases;
- ensuring staff place a greater emphasis on the compliance history of the employer;
- referring debt for legal action in a timelier manner; and
- obtaining additional financial information (not previously recorded) in default arrangement cases.

We are currently exploring options to further improve our case risk assessment and differentiated approach to SGC debt collection.



## CHAPTER 3 — BACKGROUND

3.1 This chapter sets out a brief description of the development of employer superannuation contributions, the purpose of the SG system and the operation of the SGC. It also describes the ATO's current management approaches regarding SG.

### DEVELOPMENT OF EMPLOYER SUPERANNUATION CONTRIBUTIONS

3.2 Historically, institutionalised employee superannuation began in September 1985 when the Australian Council of Trade Unions (ACTU), as part of its National Wage Case claim with the Conciliation and Arbitration Commission, sought a 3 per cent employer superannuation contribution to be paid into an industry fund. The government supported the claim in pursuit of its inflation control objectives and, in February 1986, the Commission announced that it would approve industrial agreements that provided for contributions of up to 3 per cent to approved superannuation funds.<sup>2</sup>

3.3 Compliance problems associated with award superannuation prompted the Industrial Relations Commission in 1991 to reject an application, supported by both the ACTU and the Government, for a further 3 per cent of salary in award superannuation.

3.4 In 1992, a government desire to introduce a further 3 per cent of salary in award superannuation led to the introduction of the SG system, with the aim of ensuring that as many Australians as possible have access to superannuation and to provide higher standards of living in retirement for future generations.

3.5 Importantly, the historical context of the SG system reinforces the framing of employer superannuation as an employee entitlement, no different to salary and wages apart from its age-based restrictions on its access.

### PURPOSE OF THE SG SYSTEM

3.6 The SG system is one component of Australia's retirement income policy and complements the age pension and voluntary superannuation contributions.

3.7 It is a mechanism for increasing national savings and retirement income by employer superannuation support and, as a consequence, increasing the proportion of self-funded retirees. Over time, SG is intended to reduce the need for future generations of taxpayers to pay extra to fund age pensions for the increasing number of retired people. SG will be of particular importance to individuals who cannot afford to

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2 APRA Insight publication, *Celebrating 10 years of superannuation data collection 1996-2006*, available at [www.apra.gov.au](http://www.apra.gov.au).

make voluntary superannuation contributions, who will mainly be lower to middle income taxpayers.

3.8 The non-payment of SG impacts a number of persons including the affected employees, other businesses and government. Affected employees miss out on superannuation which has an impact upon their standards of living in retirement. Employers that do not pay SG obtain an unfair advantage over other compliant employers that meet their SG obligations and pay employees' superannuation on time. Finally, government is exposed to higher future age pension outlays.

## **OPERATION OF THE SUPERANNUATION GUARANTEE CHARGE**

3.9 The *Superannuation Guarantee (Administration) Act 1992* (SGAA) and the *Superannuation Guarantee Charge Act 1992* set the legislative framework for the SG system.

3.10 The SG system, administered by the ATO, requires employers to self-assess their liability to the SGC, and make payment of the charge, if any, by the due date. There is no requirement for employers to report to the ATO or lodge SGC Statements so long as they provide sufficient superannuation support for all eligible employees.

### **Application of SG system**

3.11 The SG system applies to all employers in respect of their full-time, part-time and casual employees, with only limited exemptions. The terms 'employer' and 'employee' have their ordinary common law meanings, but are also extended to include other persons who may not otherwise come within the terms. For instance, a person may also be an employee for SG purposes if they are engaged under a contract that is wholly or principally for labour even if an Australian Business Number (ABN) is quoted.

3.12 Superannuation Guarantee Ruling SGR 2005/1 explains when an individual is considered to be an 'employee' and discusses the various indicators the courts have considered in establishing whether a person engaged by another individual or entity is an employee within the common law meaning of the term.

3.13 SGR 2005/1 outlines which persons are employees under the extended definition and also considers the circumstances in which an individual who may otherwise be an employee is specifically exempted from the scope of the SGAA.

3.14 It also provides the ATO view on the implications of the alienation of personal services income measures for deciding whether an individual is an employee within the meaning of the SGAA. SGR 2005/1 further considers whether an individual who holds an ABN can be an employee for the purposes of the SGAA. The Ruling also discusses arrangements or relationships that do not give rise to an employer/employee relationship.

3.15 If an individual is not an employee as defined in the SGAA or is an employee but is otherwise exempted from the application of the SGAA by a specific provision, no liability for the SGC will arise.

## **Employer obligations**

3.16 Employers are required to make superannuation contributions into a complying superannuation fund or retirement savings account for the benefit of their eligible employees in accordance with minimum prescribed levels, which is currently 9 per cent of an employee's ordinary time earnings (OTE).

3.17 Contributions by an employer that may be counted for SG purposes are:

- compulsory contributions made under an award, an industrial law or the SGAA;
- additional voluntary contributions; and
- employer contributions after an employee enters into an effective salary sacrifice arrangement.

3.18 This means that amounts salary sacrificed by an employee may satisfy an employer's obligations under the SGAA. If the salary sacrificed superannuation contribution is more than the SG amount an employer is required to pay, then the employer would not be required to pay an additional amount on top of the salary sacrificed amount. However, salary sacrifice amounts may not reduce the employer's obligation to pay superannuation where the terms of an award or agreement require an employer to pay a certain amount of superannuation for an employee or may require superannuation to be paid on the employee's pre-sacrifice salary.

3.19 In evidence to the IGT, stakeholders noted the growing number of lower to middle income employees that were entering into salary sacrifice arrangements for superannuation. There is a risk that many may suffer unintended financial detriment given the complexity around these arrangements especially as many may believe that their employer superannuation contributions are additional to their salary and wages. Given the potential impact on employees, this issue will no doubt be considered by the Review into the governance, efficiency and structure and operation of Australia's superannuation system (otherwise known as the Cooper Review).

3.20 If an employer does not provide the minimum level of contributions in respect of their eligible employees by the prescribed dates, the employer will be liable to pay the SGC and must lodge a SGC Statement with the ATO.

3.21 Although the level of superannuation support required to be provided by an employer is calculated as a percentage of ordinary time earnings, the liability for the SGC is calculated with reference to an employee's 'salary or wages'. The individual SG shortfall for an employee is calculated to be 9 per cent of the total salary or wages paid by the employer to the employee for the quarter.

## Timing of contributions

3.22 Initially employer superannuation contributions were required to be paid annually in arrears. However, from 1 July 2003 contributions were required to be made on a quarterly basis, as was the requirement to lodge a SGC Statement where the employer was liable to pay the SGC.

**Table 3.1: Due dates for payment of SG contributions and lodgement of SGC Statements**

Quarter	Due date to make contribution	Due date to lodge SGC Statement
1 July — 30 September	28 October	14 November
1 October — 31 December	28 January	14 February
1 January — 31 March	28 April	14 May
1 April — 30 June	28 July	14 August

3.23 This change was to benefit employees in two main ways – employer contributions could be invested sooner and the incidence of unpaid employer contributions as a result of employer insolvency would be likely to be lower.

## Earnings base for SG purposes

### Ordinary time earnings

3.24 From 1 July 2008, the amount against which an employer is required to calculate the contributions necessary to satisfy their superannuation obligations in respect of their eligible employees was standardised to Ordinary Times Earnings (OTE).<sup>3</sup>

3.25 Superannuation Guarantee Ruling SGR 2009/2 outlines the ATO view on the meaning of the terms OTE and 'salary or wages' for the purposes of the SGAA.

3.26 OTE, for SG purposes, is the total of the employee's earnings for ordinary hours of work, over-award payments, shift loading and commission. Payments for work performed during hours outside an employee's ordinary hours of work (such as overtime) are not OTE.

3.27 Specifically excluded by the SGAA from being OTE include a payment in lieu of unused sick leave or an unused annual leave or long service leave payment made to the employee on termination of employment – although these amounts are not necessarily excluded from being 'salary or wages'.

3.28 Where an employer and employee enter into an effective salary sacrifice arrangement, this also has the effect of reducing an employee's OTE and the amount of SG an employer is required to pay.

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3 Previously employers used a 'notional earnings base' for this purpose.

3.29 The total of OTE in respect of an employee for a quarter cannot exceed the maximum contribution base for the quarter – for any quarter in the 2008-09 year, the maximum contribution base was \$38,180.

3.30 Paragraphs 27 to 46 of SGR 2009/2 provide further detail on the OTE classification of specific kinds of payments such as allowances and loadings, bonuses, paid leave and holiday pay.

### **Salary and wages**

3.31 Under the SGAA, salary and wages are generally any periodical payment made to a person in return for work or services and includes:

- commissions;
- directors fees;
- payments under a contract in respect of the labour of the person; and
- remuneration of a member of the Parliament of the Commonwealth or a State or the Legislative Assembly of a Territory; and
- specific payments to a person and remuneration of a person referred to in the SGAA, with further information on these payments set out in paragraphs 51 to 56 of SGR 2009/2.

3.32 Certain payments are specifically excluded from being salary or wages such as payments to people employed for not more than 30 hours per week in work that is wholly or principally of a domestic or private nature and fringe benefits.

3.33 In addition, the SGAA specifies salary or wages that are not to be taken into account for the purposes of calculating an individual SG shortfall, such as:

- salary or wages paid to an employee who is 70 years of age or over;
- salary or wages paid to a non-resident employee for work done outside Australia;
- salary or wages paid by a non-resident employer to a resident employee for work done outside Australia;
- salary or wages of less than \$450 paid to an employee in a month;
- salary or wages paid to a part-time employee who is under 18 years of age;
- pay and allowances for members of the Australian Defence Reserve Forces for service other than continuous full-time service; and
- other salary and wages prescribed by the SGAA or paid to an employee who is a prescribed employee.

3.34 Paragraphs 64 to 76 of SGR 2009/2 provide further detail on the salary and wages classification of specific kinds of payments such as allowances, bonuses, leave

payments, expense allowances and reimbursements, redundancy payments and workers' compensation payments.

## **Superannuation Guarantee Charge**

3.35 The SGC is composed of three parts:

- the total of an employer's individual SG shortfalls;
- the interest component; and
- the administrative component.

3.36 The nominal interest component for a quarter is a substitute for fund earnings that would have accrued if the employer had provided the prescribed minimum SG support during the quarter. This component is calculated by multiplying the total of the employer's individual SG shortfalls for the quarter by the interest rate of 10 per cent per annum. Interest is calculated on the employer's quarterly shortfall amount from the first day of the relevant quarter to the date on which the SGC is payable or the SGC Statement is lodged, whichever is later.

3.37 The SG shortfall and the interest component of the SGC are distributed by the ATO for the benefit of those employees in respect of whom the charge was paid.

3.38 The administrative component for a quarter is part of the ATO's cost of collecting and distributing the SGC back to individual employees and is \$20 for each employee for whom there is an SG shortfall.

3.39 The disadvantages involved in not making the minimum superannuation contributions on time are:

- The SGC is not deductible whereas the superannuation contribution may have been.
- The employer is liable to pay an administrative fee and interest from the start of the relevant quarter rather than from the date the contributions should have been made.
- Salary and wages being the basis of calculation of the SGC, rather than ordinary time earnings.

3.40 These aspects of the SGC apply automatically and, subject to the late payment offset provisions, apply even if the contributions are made shortly after the due date.

## **Late payment offset**

3.41 Previously, where an employer failed to meet its SG obligations by the due date, and subsequently paid the relevant contributions to a complying superannuation fund or retirement savings account, a double payment problem may have occurred. An SGC liability still arose, which included the full amount of any shortfall, even though contributions relating to the relevant period had subsequently been paid into an employee's superannuation fund or retirement savings account by the employer. The

introduction of the late payment offset rule has had a significant impact in mitigating the double payment problem and reducing the number of employer complaints.

3.42 From 26 March 2009, an employer can offset late contributions against SGC liability for a quarter for an employee if:

- the contribution is made into an employee's complying superannuation fund after the 28th day after the end of the quarter (it is a late payment);
- the employer elects in the approved form that the contribution be offset against their SGC for the quarter for the employee;
- the contribution is made before the employer's original assessment for the quarter is made; and
- the election is made within four years after the employer's original assessment for the quarter is made.

3.43 An employer's original assessment for a quarter is made at the earlier of:

- the day the Commissioner receives a SGC Statement from the employer for the quarter, where the employer has not previously lodged a SGC Statement for that quarter and the Commissioner has not assessed a SGC for the employer for that quarter; and
- the day the Commissioner makes a default assessment for the employer for the quarter.

3.44 An employer can only use late contributions to offset the nominal interest and SG shortfall components of the super guarantee charge and will not be able to offset the administration fee, or other interest or penalties. Also, penalties for failing to provide statements and information apply to the full amount of the SGC without the effect of the late payment offset.

3.45 If an employer elects to offset the late payment against their SGC liability, then:

- the late payment is not tax deductible for income tax purposes;
- the election to use a contribution as an offset cannot be revoked; and
- any late contribution used to reduce the amount of an employer's SGC cannot be used as a pre-payment for current or future periods.

### **Choice of funds**

3.46 From 1 July 2005 employers were required to offer choice of superannuation funds to eligible employees. An employer must:

- give employees the option to choose the superannuation fund that receives the SG contributions;

- action employees' valid choice nominations within two months;
- pay contributions to a fund that meets the choice requirements; and
- not charge employees a fee for making contributions to a superannuation fund.

3.47 The choice liability applies where an employer has paid SG contributions to a complying fund for employees but not to the fund chosen by them or where the employer has not given employees a standard choice form in the required timeframe. The choice liability is 25 per cent of the contributions that are paid into the superannuation fund although there is a \$500 cap on the amount of choice liability for an employee. There may be a cap for either a particular quarter, or a notice period, which can consist of multiple quarters.

### **SGC Statements and assessments**

3.48 The SGAA requires that an employer who has a shortfall must lodge a SGC Statement for the quarter.

3.49 The information that must be provided in the SGC Statement includes:

- the name, postal address and tax file number of each employee for whom the employer had an individual SG shortfall for the quarter;
- the amount of each such shortfall;
- the employer's nominal interest component for the quarter;
- the employer's administration component for the quarter;
- the total of the employer's individual SG shortfalls for the quarter; and
- the amount of the employer's SGC for the quarter.

3.50 The SGAA provides that where an employer lodges a SGC Statement for a quarter (and no previous statement for that quarter had been lodged and no previous assessment raised), then the Commissioner will be taken to have made an assessment of the employer's SG shortfall for quarter and of the SGC payable on the shortfall as specified in the statement.

3.51 If an employer has not lodged a SGC Statement for a quarter, and the Commissioner is of the opinion that the employer is liable to pay SGC for the quarter, then the Commissioner may make a default assessment of the employer's SGC payable.

### **When SGC becomes payable**

3.52 Where an employer lodges a SGC Statement on or before the lodgement day for the quarter, then the SGC is payable on the lodgement day. Where an employer lodges a SGC Statement after the lodgement day of the quarter, then the SGC is

payable on the day on which the statement was lodged. If the ATO issues a default assessment for a quarter, then the SGC is payable on the day the assessment was made.

3.53 Additional SGC, which may be imposed under Part 7 of the SGAA for failing to provide a SGC Statement or information, becomes payable on the date specified in the notice of assessment of the additional charge.

3.54 If the SGC (including the additional SGC) is not paid, or is not paid in full, by the due date for payment, the employer must pay the general interest charge (GIC) on the unpaid amount.

3.55 The GIC is worked out daily on a compounding basis and is imposed on the unpaid amount of the SGC (excluding the nominal interest and administration components) from the beginning of the day by which the SGC was due to be paid to the end of the last day on which any SGC or GIC on the SGC remains unpaid.

3.56 The Commissioner may remit all or part of the GIC, but only where special circumstances make that action fair and reasonable.

3.57 The shortfall component, any GIC in respect of non-payment of the SG shortfall and the nominal interest component of the SGC represent a debt to the employee. The administration component, any SGC penalty debts and any GIC relating to the late payment of Part 7 penalties represent debts to the Commonwealth.

## Order of payments

3.58 The SGAA requires the Commissioner to apply payments of the SGC so that the employer's liability to pay the nominal interest component is discharged before all other amounts.

3.59 Chapter 7 of the ATO Receivables Policy sets out in greater detail the priority of allocation in respect of a SGC liability. The ATO states that the order of allocation for quarterly debts reflects the clear intention to prioritise payment of employee entitlements ahead of monies due to consolidated revenue.

3.60 Payments received for a quarterly SGC liability (relating to periods after 1 July 2003) will be credited towards the earliest debt in the following the order:

**Table 3.2: Order of allocation of SGC payments received by the ATO**

Order of allocation	Payment	
1	Nominal interest component	Employee entitlement
2	GIC for the unpaid total of the individual SG shortfall	
3	Total of the individual SG shortfall	
4	Administrative component	ATO entitlement
5	GIC for the unpaid Part 7 penalty charges	
6	Part 7 penalty charges	

## Recovery action

3.61 The SGC (including any related penalties and GIC) payable by an employer is classified as a tax-related liability. It represents a debt due to the Commonwealth which the Commissioner may collect and recover. The Commissioner has authority to sue in a court of competent jurisdiction to recover an amount of SGC that remains unpaid after it has become due and payable.

3.62 The methods by which the Commissioner may collect and recover amounts of SGC are similar to other taxes and liabilities. This includes the power to defer the payment time, to permit payments by instalments and to recover from third parties (by issuing a garnishee notice). The Commissioner is also able to take formal legal action to recover the SGC, including the liquidation of companies or the bankruptcy of individuals.

3.63 Importantly, and unlike the treatment of amounts withheld under the pay as you go withholding system, the Commissioner is not able to taking action to recover unpaid SGC against directors of companies personally.

## Upcoming changes

3.64 On 6 November 2009, the Government announced that a free superannuation clearing house service, previously announced in the 2008-09 Federal Budget, will be delivered by Medicare Australia. The service will be available from 1 July 2010 for small businesses with less than 20 employees.

3.65 For the 2009-10 financial year and all future years, reportable employer superannuation contributions made for an employee must be reported on the employee's payment summaries. Reportable employer super contributions are those contributions an employer makes on behalf of an employee where all of the following apply:

- the employee influences the rate or amount of superannuation contributed on their behalf; and
- the contributions are additional to the compulsory contributions an employer must make under any of the following:
  - the superannuation guarantee law;
  - an industrial agreement;
  - the trust deed or governing rules of a superannuation fund; or
  - a federal, state or territory law.

3.66 Reportable employer superannuation contributions are not taken into account in calculating the employee's income tax liability for the year, but are taken into account in determining entitlement to certain tax concessions and social security benefits or liability to make certain payments.

## STATISTICS

3.67 The Australian Prudential Regulation Authority (APRA) statistics show that in 2008-09 superannuation contributions totalled \$112.2 billion. Employers contributed \$71.1 billion and members contributed \$39.9 billion. Other contributions, which include spouse contributions and government co-contributions, totalled \$1.1 billion.

3.68 It is evident from Table 3.3 that both employer and member contributions have grown strongly in the last seven years. The IGT notes that the employer contribution amount includes both mandated SG contributions and salary sacrifice amounts and a break-up of these amounts is not available from the APRA statistics.

**Table 3.3: Superannuation contributions**

(\$m)	2001-02	2002-03	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09
<b>Employer contributions</b>	28,584	34,641	40,285	43,265	49,293	67,092	67,909	71,125
<b>Member contributions</b>	23,020	18,839	18,486	24,606	33,584	96,458	48,441	39,946
<b>Other</b>			1,858	605	1,156	1,618	1,313	1,085
<b>Total</b>	51,604	53,480	60,630	68,477	84,034	165,168	117,663	112,157

Source: APRA Annual Superannuation Bulletin 2009 (issued 10 February 2010)

3.69 The APRA statistics also show that in June 2009 there were 415,252 separate superannuation funds in Australia with a total of 32 million superannuation account members, with self-managed superannuation funds accounting for 98 per cent of all superannuation funds.

**Table 3.4: Superannuation member account information by fund type**

	Number of entities	Number of member accounts ('000)	Assets (\$ billion)	Average account balance (\$'000)
<b>Corporate</b>	190	665	54	81.2
<b>Industry</b>	67	11,551	191.8	16.6
<b>Public sector</b>	40	3,095	153	49.4
<b>Retail</b>	166	16,591	304.7	18.4
<b>Small</b>	414,707	779	334.3	429.4
<i>Small APRA</i>	4,277	6	2	319.4
<i>Self-managed super funds</i>	410,318	722	332.3	430.3

Source: Source: APRA Annual Superannuation Bulletin 2009 (issued 10 February 2010)

Note: Small includes self-managed superannuation funds and small APRA funds. A break-up into employer, member and other contributions for self-managed superannuation funds and small APRA funds was not available.

3.70 While the quantum of employer contributions was fairly similar across different fund types, it is evident that the average employer contribution amount was significantly higher in small funds than all other funds. One reason for this may be the higher propensity for employees with self-managed super funds to salary sacrifice into their own super fund.

3.71 In turn, corporate and public sector funds had higher average employer contribution amounts when compared to industry and retail funds.

**Table 3.5: Superannuation contributions by fund type**

	<b>Employer contributions (\$ million)</b>	<b>Average contribution/ member account (\$)</b>	<b>Member contributions (\$ million)</b>	<b>Average contribution/ member account (\$)</b>	<b>Other contributions (\$ million)</b>
<b>Corporate</b>	4,001	6,016	354	532	36
<b>Industry</b>	21,123	1,828	2,374	205	380
<b>Public sector</b>	17,153	5,542	2,839	917	351
<b>Retail</b>	17,707	1,067	10,226	616	314
<b>Small and other funds</b>	11,141	14,301	24,152	31,003	5
<i>Small APRA</i>	NA	NA	NA	NA	NA
<i>Self-managed super funds</i>	NA	NA	NA	NA	NA

## **ATO MANAGEMENT OF SG**

3.72 The administration of SGC is managed mainly through the Superannuation business line, which is responsible for investigating employee complaints and undertaking audit activity, and the Operations business line, which is responsible for debt recovery activity.

3.73 A key priority of the Superannuation Line Plan 2009-10 is to ensure that employers meet their superannuation obligations, including the payment of superannuation entitlements and offering choice of super fund. The Plan notes that SG compliance is a strategic risk for the ATO and that if voluntary employer compliance with their SG obligations declines then it will result in lower retirement savings and loss of community confidence.

3.74 The ATO employs a range of tactics to ensure the delivery of this priority:

- Undertaking targeted communication and marketing activities to support employers in meeting their SG obligations – delivered through Communications, Projects and Liaison.
- Conducting audits and reviews via outbound calls, desk audits and field visits on all SG Employee Notifications received within the agreed timeframes to ensure employers have met their SG obligations and keep employees informed on the progress of their complaint – delivered through Active Compliance.
- Conducting audits via outbound calls, desk audits and field visits to follow up employers who hold tax file numbers of employees but fail to provide these to superannuation funds – delivered through Active Compliance.
- Conducting audits via outbound calls, desk audits and field visits on third party referrals and industries or employers identified as high risk according to ATO intelligence, risk identification and risk assessment processes to enforce SG obligations – delivered through Active Compliance and Employers Segment.

- Support employers in meeting their SG obligations - delivered through the provision of publications, enquiry services, website materials, on-line tools and calculators.

3.75 End-to-end issues in the identification, enforcement and recovery of SG spanning different business lines are managed through the SG Product Forum.

3.76 In 2008-09, the Superannuation business line had a total of 994 Full Time Equivalent (FTE) staff, with 385 FTE working on SG (down from 441 FTE in 2007-08). In addition, there were a further 570 FTE working on SG (predominantly in the debt collection area) from a total of 2,513 FTE that work on all superannuation products, including SG. This means that approximately 38 per cent of the ATO's superannuation budget is allocated to the administration of SG.



## CHAPTER 4 — SUPERANNUATION GUARANTEE COMPLIANCE

4.1 During this review, the IGT received submissions and evidence relating to the ATO's approach in addressing employer non-compliance. In particular, employees, superannuation funds and industry groups expressed concern with the action taken by the ATO to identify and pursue employers who have defaulted on their SG obligations.

4.2 This chapter examines the types and level of non-compliance, the ATO's SG compliance approaches and results, interactions and information flow amongst key stakeholders in the SG system.

### TYPES OF NON-COMPLIANCE

4.3 The IGT has identified three different categories of SG non-compliance:

- Where the employer is non-compliant with their SG obligations but the employee is compliant with their tax obligations and lodges an income tax return.
- Where the employer is non-compliant with their SG obligations and the employee is also non-compliant with their tax obligations by failing to declare salary and wages – this is predominantly found in the cash economy.
- Where a person is incorrectly categorised as a contractor, rather than an employee so as to avoid a range of employer obligations including SG payment.

4.4 Each of the above categories requires different analysis techniques and detection mechanisms. For instance, the first category requires the ATO to detect instances where a taxpayer reports salary and wages but the employer fails to make any superannuation contributions and also fails to lodge a SGC Statement. The second category requires more intensive investigation and audit activity as the ATO does not always have the requisite information – however, following up on an employer's SG non-compliance would also involve addressing the employee's non-compliance with their income tax obligations. Finally, the third category requires the ATO to assess the employment conditions so as to determine whether the relevant person is an employee or a contractor.

4.5 The ATO advises that it addresses the first category of non-compliance by actioning EN complaints and proactive work identified through data matching. The second and third categories of non-compliance are being addressed by the level playing field project and the third party referral process. Employers working in the cash economy are referred to the appropriate specialised teams for further investigation.

## LEVEL OF NON-COMPLIANCE

4.6 The ACTU in their submission to this review stated that there was limited public information on the extent of employer non-compliance with their SG obligations. However, the ACTU estimated that:

- more than 500,000 employees are not receiving their full superannuation entitlements (assuming that the average private sector business employs 6 employees, and that there are about 840,000 employing businesses and that 30 per cent of businesses are non-compliant);
- more than \$900 million is outstanding in unpaid superannuation entitlements; and
- more than 50,000 employees are working without accruing any superannuation and fewer than 5 per cent of employees who have not received their full superannuation entitlements make a complaint to the ATO.

4.7 The ATO believes that there are very high levels of voluntary compliance by employers with their SG obligations. As evidence of this, the ATO points to the following:

- SGC raised by the ATO is less than 1 per cent of the total superannuation paid by employers to complying superannuation funds.
- APRA reported that employer superannuation contributions in 2007-08 totalled \$69.8 billion and ATO data indicates that employer contributions significantly exceeded 9 per cent of total salary and wages. The ATO states that over four years (2003-04 to 2006-07) employment had increased by 8.4 per cent while salary and wages increased by 19.8 per cent and employer superannuation contributions increased by 43.1 per cent.
- The ATO has estimated the salary sacrifice amount at \$6.8 billion in 2005-06 suggesting that the bulk of the employer contribution amount relates to mandated SG contributions.

## IGT observations and findings

4.8 The IGT found that there were a number of barriers to quantifying the level of non-compliance. It is not currently possible to disaggregate the employer contribution amount into the mandated SG contributions and salary sacrifice components. However, from 2009-10 and onwards the ATO will have information on reportable salary sacrifice contributions and the ATO anticipates that it will be able to ascertain a more accurate level of non-compliance. Incomplete employer details from MCS reports also prevent an estimation of the number of employers and the number of eligible employees across each market segment.

4.9 Equally, the IGT is not convinced that the ATO's macro picture is representative of the true level of compliance, particularly where ATO compliance results indicate increasing SGC liabilities being raised, increasing numbers of employee

complaints and the limited available information on the quantum of the salary sacrifice component.

4.10 Likewise, in its 1999/2000 performance audit, the Australian National Audit Office (ANAO) also commented that the ATO's information on employer compliance was not complete. The ANAO recommended that the ATO should collect more data and improve its performance monitoring strategies, relating particularly to the amount of money involved with SG non-compliance, and the percentage of employees affected by employer SG non-compliance.<sup>4</sup>

## **RECOMMENDATION 1**

Given the identified barriers to quantifying the level of non-compliance, to better detect SG non-compliance the ATO should determine the current and accessible information and data required for a more sophisticated analysis of the SG population so as ascertain a more complete picture in relation to the level of non-compliance and its impact on employees.

This should include the collection and analysis of data (including additional information that may be captured and available to the ATO in the future in line with Recommendation 3) to estimate the amount of money involved with SG non-compliance, the percentage of non-compliant employers and affected employees across market segments and the quantum of the salary sacrifice component.

### **ATO response**

Agree.

We understand this recommendation is for the Commissioner to use all readily available data and information (including reportable employer superannuation contributions data available from next financial year) to ascertain a fuller picture of SG compliance levels in various markets and industries. We will be initiating a project in the 2010/11 financial year in order to establish the parameters to complete this work. However, we will not be conducting random audits or surveys as we believe this places an unfair burden on compliant taxpayers and is not an efficient use of our resources.

Our ability to undertake the analysis envisaged in the second paragraph of this recommendation is contingent on Recommendation 3 being legislated and implemented.

### **SG compliance surveys**

4.11 Notwithstanding the absence of information and data to allow a quantitative analysis of the level of SG non-compliance, the IGT noted the results from the ATO's most recent SG compliance surveys.

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4 Australian National Audit Office, *Superannuation Guarantee*, Audit Report No. 16, 1999-2000, at 18.

4.12 Since the introduction of SG in 1992, the ATO has conducted compliance surveys in 1994, 1996, 1998, 1999 and 2000. The key objectives of the survey were to:

- assess compliance with SG, estimate the overall level of compliance and determine if and how the level of compliance has changed over time;
- examine the nature and extent of non-compliance;
- educate employers about SG and thus increase compliance; and
- develop a more detailed understanding of employer's attitudes towards SG.

4.13 The broad parameters of the survey methodology were as follows:

- employers were randomly selected for the audit from ATO database records and the sample was stratified by geographical and payroll criteria;
- employers received a survey questionnaire requesting specific information about the business and its employees – importantly, employers received the survey questionnaire two weeks prior to the deadline for making SG contributions; and
- completion of the survey was compulsory for employers.

4.14 The ATO stopped commissioning these surveys in 2000 as they were showing consistent results from year to year and were imposing a burden on compliant employers. In 2006 the ATO commissioned another SG compliance survey, although with a different focus to the previous surveys. The ATO also made a commitment in 2006 not to undertake these types of surveys in the future as they impose a burden on compliant employers.

### **The 2000 SG compliance survey (SG 2000)**

4.15 The sample size for SG 2000 comprised 927 employers from capital cities with annual payrolls of between \$35,000 and \$50 million. Unlike previous surveys, the SG 2000 did not include regional employers in the sample and the capital city sample population was significantly lower than previous surveys. The SG 2000 survey had an effective response rate of 79 per cent.

4.16 The key findings of the SG 2000 survey include:

- 72 per cent of capital city employers were fully compliant – this compares to 71 per cent in the two previous surveys and a finding in SG 1998 that only 59 per cent of regional employers were fully compliant.
- 28 per cent of employers were partially compliant.
- Only six of the 727 employers who completed the survey were fully non-compliant (that is, they made no superannuation contributions on behalf of their employees).
- Approximately 10 per cent of eligible employees received insufficient SG support, higher than in previous years, with half of those receiving no superannuation.

- The average level of shortfall in SG contributions identified for each employer was \$1,470, with approximately five employees adversely affected per employer.

4.17 In terms of the degree of non-compliance, the SG 2000 survey found that 30 per cent of non-compliant employers displayed a low degree of non-compliance (a small percentage of employees adversely affected and proportionally small amounts under-contributed for those employees). In addition, only 5 per cent of non-compliant employers performed poorly in meeting their SG obligations.

4.18 The SG 2000 survey also found that while a higher percentage of employers were assessed as having received insufficient SG support in SG 2000, the mean under-contributed amount per employee was lower than in SG 1999.

4.19 Table 4.1 sets out the findings for the last three SG compliance surveys.

**Table 4.1: ATO SG compliance survey findings**

	SG 1998	SG 1999	SG 2000
Total salary and wages	\$3,620,161,357	\$2,385,829,382	\$272,834,589
Total earnings base for SG purposes	\$3,149,413,865	\$2,094,457,539	\$237,333,392
Total employer contributions	\$232,912,191	\$177,205,925	N/A
Total employer contributions for non-exempt employees	\$231,863,931	\$171,806,865	\$24,337,380
Total shortfall	\$3,278,247	\$2,549,625	\$310,124
Mean contribution shortfall	\$1636	\$1874	\$2,361
Mean employee shortfall	\$274	\$329	\$291
Number of employees	159,467	108,793	12,288
Number of employees excl exempt employees and defined benefit members	141,767	91,703	10,306
Number (and percentage) of eligible employees with no or insufficient contributions	11,958 (8.4%)	7,747 (8.4%)	1066 (10.3%)
Percentage of all employees with no or insufficient contributions	7.5%	7.1%	8.6%
Mean percentage of earning base contributed	7.4%	8.5%	10.3%
Mean percentage of salary and wages contributed	6.4%	7.4%	8.9%

Note: Sample bases: SG 1998 (Capital city sample) — 1695; SG 1999 (Capital city sample) — 2,179; SG 2000 — 727

4.20 The IGT notes that while the mean percentage of earnings and salary and wages increased from SG 1999 (indicating that more employer superannuation was being paid), the percentage of eligible employees with no or insufficient contributions also increased.

4.21 The SG 2000 survey made a number of comments regarding the extent of under-contribution at the employee level. It found that 49 per cent of employees who received insufficient SG support were reported as having had less than 1 per cent of their earning base contributed as superannuation. The respective finding from SG 1999 was that 24 per cent of those employees with insufficient contributions had less than 1 per cent contributed.

4.22 The SG 2000 survey also found that only 35 per cent of employees had contributions within 1 per cent of the required SG contribution rate, a reduction from previous years. In the SG 2000 survey 27 per cent of non-compliant businesses reported that insufficient contributions had been made. A further 13 per cent of non-compliant businesses failed to respond to this question. Thus it is likely that up to 40 per cent of all non-compliant businesses were aware of their non-compliant status (or became aware of this during the course of preparing the audit return).

### **The 2006 SG compliance survey (SG 2006)**

4.23 In order to better understand the incidence of, and reasons for, non-compliance and to inform mitigation strategies to address non-compliance, the ATO commissioned the *Superannuation Guarantee Review: 1 April – 30 June 2006* program.

4.24 The audience for this survey comprised micro businesses, SMEs, not-for-profit organisations and government agencies that had been identified by the ATO as being potentially non-compliant.

4.25 The key objectives of the SG 2006 survey were as follows:

- to assess compliance and the reasons for non-compliance among a sample of businesses identified as having a compliance risk;
- to assess the compliance risk for different employee groups; and
- to appraise the utility of three ATO employer risk profiling tools (a data-matching approach, an analytics approach and a hybrid approach).

4.26 The data matching approach comprised businesses that had paid less than 4 per cent superannuation. This was ascertained by matching a range of data sources including member contribution statements, payment summary statements, salary and wages expenses and claimed superannuation deductions. The analytics approach comprised businesses whose 'risk scores' generated from a regression model were above 0.68 (risk scores ranged between 0 and 1, where 0 indicates low probability of non-compliance and 1 indicates high probability of non-compliance). The hybrid approach comprised businesses that had paid less than 2 per cent superannuation and had a risk score greater than 0.5.

4.27 The sample size for analysis comprised 788 employers from an original 1,268 businesses included in the project. Of those 788 employers, 445 were micro-businesses, 245 were SMEs, with a further 83 not-for-profit organisations and only 15 government employers.

4.28 The key findings of the SG 2006 survey included:

- 43 per cent of all businesses were fully compliant, with a further 45 per cent partially compliant with their SG obligations.

- 12 per cent of all businesses were fully non-compliant with their SG obligations, with a higher incidence of full non-compliance among micro businesses (18 per cent) than not-for-profit organisations (7 per cent) and SMEs (4 per cent).
- A higher degree of non-compliance among micro businesses (29 per cent) than SMEs (18 per cent).
- Nearly 60 per cent of all non-compliant businesses said they were aware they were not complying with the most common reasons being cash-flow problems, administrative error, forgetting to pay superannuation and not having all the employee details needed to set up a superannuation account.

4.29 The SG 2006 survey also considered the impact of non-compliance on employees across different market segments, employment category and age group for whom SG was payable during the review period.

4.30 For employers the ATO identified as being potentially non-compliant with their SG obligations, it found that employee segments most at risk of having insufficient SG contributed on their behalf were as follows:

- Employees of micro businesses (compared to other market segments): Over a quarter of employees in micro businesses were assessed as having an average shortfall of about \$280 for the quarter (mean figure) which represented on average about 82 per cent of the SG that should have been contributed.
- Contracted and casual employees (compared with full and part time employees): Almost 40 per cent of assessed contract workers were assessed as having a shortfall (mean shortfall \$459). Among assessed casual employees, the incidence of under contribution was 30 per cent, with smaller amounts involved but representing about 83 per cent of the amount that was required to be contributed.
- Younger employees: Almost a quarter of the 18 to 25 year old employees assessed in the survey had a shortfall. The nature of the shortfall was similar to that of casual employees with relatively low amounts being involved (mean shortfall \$159) but representing a proportionally high level of under contribution (mean 70 per cent).
- Employees who work in the following industry sectors: arts and recreation services; transport, postal and warehousing; accommodation and food services; agriculture, forestry and fishing. Approximately a third of assessed employees in these industry sectors were assessed as having a SG shortfall. Across these four industry sectors the mean amounts involved ranged from \$39 to \$416. However in all four sectors this represented more than three quarters of the amount that should have been contributed for these employees.

4.31 An analysis of the SG 2006 survey data revealed that the mean salary and wages across each of these high risk employee segments is less than \$30,000 a year, indicating that those most at risk of having insufficient superannuation contributed on their behalf were low-income employees. These are the very employees that are most reliant on the SG system for a higher standard of living in retirement.

4.32 In terms of the three ATO employer risk profiling tools, the SG 2006 survey concluded that the data matching approach was a better predictor of extensive non-compliance. In addition it found that the analytics approach was a better predictor of the incidence of non-compliance, but risk scores alone were not sufficient to predict the extent of non-compliance.

## ATO COMPLIANCE APPROACHES

4.33 The ATO advises that ensuring that employers meet their SG obligations is a key priority and strategic risk.

4.34 In 2008-09 the ATO set out the following priorities in relation to SG compliance:

- to meet the ATO's undertaking to action every EN complaint;
- to achieve the timeliness commitments to government in relation to actioning EN complaints; and
- to undertake a proactive compliance program to audit high risk employers who do not meet their SG and Choice obligations. The ATO notes that it has not had the capacity to undertake a proactive risk based auditing program in the past.

4.35 As is evident in Table 4.2, the ATO currently mitigates risk primarily by undertaking to action all EN complaints.

**Table 4.2: ATO SG compliance activities**

	Risk rating	Market	Delivery	Cases (2008/09)	Cases (2009/10) up to 18 Dec 2009
<b>SG EN complaints</b>	High	Micro/SME	Phone	20,199	9,881
<b>SG study</b>	High	Micro	Phone	108	n/a
<b>Non-EN proactive referrals</b>	High	Micro/SME	Phone	125	171
<b>Employer Obligations SG audits</b>	High	Micro/SME	MEI Field	3,763	2,020
<b>Proactive Desk Audits</b>	High	Micro/SME	Phone	n/a	233
<b>Total</b>				24,195	12,305

4.36 Of the total 24,195 SG audit activities, 20,199 related to actioning EN complaints by phone or letter. The field audits planned by the Superannuation business line were to action high risk EN complaints. The handling and outcomes of EN complaints is considered in greater detail in Chapter 5 of this report. The remaining 3,996 audit activities relate to ATO proactive work to detect SG non-compliance.

4.37 The ATO notes that proactive audit work by the Employer Obligations team incorporating SG audits have occurred for the last five years. The ATO acknowledges that it has not previously undertaken extensive risk-based auditing however in 2009-10 it estimates that 27 per cent of its SG compliance activities will be proactive work, an

increase from 2008-09 where proactive work comprised 16 per cent of its overall SG compliance work.

4.38 Of the 22,242 SG audit activities planned for 2009-10, 16,316 relate to actioning EN complaints, with 4,460 employer obligation SG audits conducted by MEI and 1,648 proactive audits undertaken by the Superannuation business line.

## SG COMPLIANCE RESULTS

4.39 Table 4.3 outlines the ATO's compliance results across each type of audit activity.

**Table 4.3: ATO SG compliance results**

	EN complaints 2008-09		EN complaints 2007-08		EN complaints 2006-07	
		%		%		%
<b>SGC raised (\$m)</b>						
Default assessment raised	102	58.1	159.9	68.6	187.7	82.2
Voluntary	73.4	41.9	73.3	31.4	40.7	17.8
Total	175.4	100	233.2	100	228.4	100
<b>Outcome – cases</b>						
Default assessment raised	6,170	31.2	4,754	29	4,814	44.2
SGC Statement lodged	4,665	23.6	3,770	23	2,084	19.1
Nil outcome	8,947	45.2	7,843	48	4,000	36.7
Total	19,782	100	16,367	100	10,898	100
<b>Strike rate – cases</b>						
SGC liability raised	10,835	54.8	8,524	52.1	6,898	63.3
No SGC liability raised	8,947	45.2	7,843	47.9	4,000	36.7
<b>Average per case</b>						
Default assessment raised	\$16,526		\$33,645		\$38,994	
SGC Statement lodged	\$15,734		\$19,436		\$19,542	
All debt cases	\$16,185		\$27,360		\$33,117	
All debt cases + GIC	\$19,429		\$32,189		\$41,298	

	MEI SG audits		SG study		Non-EN referrals	
SGC raised (\$m)		%		%		%
Default assessment raised	23.5	45.5	0.68	71.9	3.1	85.6
Voluntary	28	54.5	0.26	28.1	0.53	14.4
Total	51.5	100	0.94	100	3.6	100
<b>Outcome – cases</b>						
Default assessment raised	799	21.2	48	44.4	52	41.6
SGC Statement lodged	1,572	41.8	13	12.1	19	15.2
Nil outcome	1,392	37	47	43.5	54	43.2
Total	3,763	100	108	100	125	100
<b>Strike rate – cases</b>						
SGC liability raised	2,371	63	61	56.5	71	56.8
No SGC liability raised	1,392	37	47	43.5	54	43.2
<b>Average per case</b>						
Default assessment raised	\$29,349		\$14,151		\$59,913	
SGC Statement lodged	\$17,845		\$20,837		\$27,688	
All debt cases	\$21,722		\$15,480		\$51,289	

4.40 In relation to EN complaints, the IGT notes there has been a significant increase in the amount of SGC raised voluntarily, constituting nearly 42 per cent of SGC liabilities raised in 2008-09 (up from approximately 18 per cent in 2006-07). There has been a corresponding decrease in the amount of SGC raised by the ATO having to issue a default assessment (down from approximately 82 per cent in 2006-07 to 58 per cent in 2008-09).

4.41 This is primarily due to a change in ATO practice where employers are encouraged to lodge outstanding SGC Statements during the audit. This is further encouraged by the remission of penalties where an employer voluntarily lodges a SGC Statement, even if it was prompted by an EN complaint and audit activity.

4.42 In addition, there has been a considerable decrease in the average amount of SGC raised by the issuing of a default assessment, from \$38,994 per case in 2006-07 to \$16,526 in 2008-09. Average amounts of SGC raised voluntarily have remained fairly steady over this same period.

4.43 The ATO advises that the drop in the average SGC liabilities from 2006-07 to 2008-09 can be attributed to streamline procedures being introduced in November 2007 to further reduce the backlog of EN complaints and case times. While the ATO does not have definitive data, it asserts that one consequence of reduced case times is that the quantum of SGC liabilities is also reduced.

4.44 The IGT also notes that MEI SG audits had the best strike rate, with 63 per cent of cases leading to an SGC liability being raised, whereas 56 per cent of EN complaints resulted in an SGC liability being raised.

4.45 The ATO advises that generally MEI SG audits will have better strike rates than EN complaints as they are identified through data-matching activities. Also, the

ATO found that many EN complaints relate to entities that are insolvent whereas MEI SG audits are almost always of solvent entities.

4.46 Table 4.4 seeks to provide further detail on the break-up of the SGC raised into that arising from direct ATO compliance activity and that arising through voluntary compliance.

**Table 4.4: SGC raised by ATO compliance activities and voluntary statements**

(\$m)	2005-06	2006-07	2007-08	2008-09
<b>Audit activity</b>	229.8	238.2	172.2	175.6
<b>Voluntary statement due to audit activity</b>	15.7	42.6	85.5	101.4
<b>Voluntary statement</b>	95.1	90.8	131.2	100
<b>Total</b>	340.6	371.6	389.9	377

4.47 This confirms that the increase in the amount of SGC raised voluntarily is mostly attributable to employers lodging a SGC Statement after the ATO has commenced audit activity.

**Table 4.5: SGC raised by market segment**

(\$m)	2006-07	2007-08	2008-09	2009-10 (up to 18 Dec 2008)
<b>Government</b>	3.9	2.2	2.5	1.3
<b>Individuals</b>	2.0	0.9	0.9	0.5
<b>Micro-business</b>	234.9	237.5	225.7	140.5
<b>SME all</b>	114.1	124.3	134.3	83.3
SME 1	90.1	92.3	90.1	57
SME 2	19.4	28	39.4	20.4
SME 3	4.6	4	2.3	3
SME 4	n/a	n/a	2.5	2.9
<b>Large business</b>	7.1	12.7	10.8	4.1
<b>Not-for-profit organisations</b>	10.1	8.1	10.1	6

Note: SME 4 is a new sub-segment introduced in 2008-09

4.48 It is evident that most of the SG compliance risk is associated with the micro-business segment and, to a lesser extent, the lower end of the SME segment.

**Table 4.6: Components of the SGC raised in 2006-07, 2007-08 and 2008-09**

(\$m)	2006-07			2007-08			2008-09		
	Vol	Audit	Total	Vol	Audit	Total	Vol	Audit	Total
<b>SG Shortfall</b>	112.1	134.8	246.9	184.5	94.6	279.2	207.8	93.2	301
<b>Nominal interest</b>	16.9	25.5	42.4	26	20	46	27.5	18.1	45.6
<b>GIC</b>			52.6			38.2			34.1
<b>LPP</b>	0	2.5	2.5	0	-0.5	-0.5	0	-0.4	-0.4
<b>SG Offset Credit</b>	0	0	0	0	-3.6	-3.6	0	-22.4	-22.4
<b>Admin component</b>	4.4	5.9	10.3	6.9	4.2	11.1	7.4	3.5	10.9
<b>Part 7 penalty</b>	0	13.9	13.9	0	12.4	12.4	0	14.1	14.1
<b>GIC-Part 7 penalty</b>	0	3.8	3.8	0	3	3	0	2.3	2.3
<b>Total</b>	133.4	239	372.4	217.4	168.3	385.7	242.7	142.4	385.1

Note: Due to systems limitations, the ATO is not able to separate GIC into that which is attributable to voluntary lodgements and audit activity.

4.49 The ATO advised that it is not able to provide a breakdown of the statements and amounts identified as voluntary into those arising from an EN complaint being investigated by the ATO and completely voluntary. Amounts identified as arising from audit are where the ATO has had to prepare the SGC Statement as a result of an EN complaint.

4.50 It is evident that the majority of the SGC imposed on employers relates to SG shortfall (72 per cent) and that, on average, the administrative component and nominal interest represent only 15 per cent of the SGC.

4.51 Table 4.7 reconciles the various components of the SGC raised with collections in 2006-07, 2007-08 and 2008-09.

**Table 4.7: Reconciliation of components of the SGC raised with collections in 2006-07, 2007-08 and 2008-09**

(\$m)	2006-07		2007-08		2008-09		2009-10 (up to 18 Dec 2009)
	Raised	Collections	Raised	Collections	Raised	Collections	Raised
<b>SG Shortfall</b>	246.9	171.3	279.2	233.6	301	164.6	197.7
<b>Nominal interest</b>	42.4	31.7	46	38.6	46	26.2	27.9
<b>GIC</b>	52.6	16	38.2	22.5	34.1	15.2	12.9
<b>Admin component</b>	10.3	6.7	11.1	8.5	10.9	6.6	6.8
<b>Part 7 penalty</b>	13.9	7.2	12.4	7.6	14	4.1	10.2
<b>GIC-Part 7 penalty</b>	3.8	1.0	3	1.6	2.3	0.8	0.9

Note: Collections data for 2009-10 is not currently available.

4.52 It is evident that, by value, most SGC collections are allocated to the employee entitlement components, namely SG shortfall and nominal interest rather than those monies collected by the Commonwealth (administration component and Part 7 penalty).

## INFORMATION FLOWS BETWEEN STAKEHOLDERS

4.53 The SG system has a number of stakeholders – namely, the employer, the employee, the SG contribution receiver (complying superannuation fund, retirement savings account) and the ATO. Each stakeholder has a certain responsibility and role in the system, with its effective operation dependent upon the interactions and flow of information between each of them.

4.54 Employers have an obligation to make SG contributions for eligible employees each quarter or, if they fail to do so, to lodge a SGC Statement with the ATO.

4.55 Employees have a responsibility to monitor their superannuation and follow-up on any SG shortfall with their employer or the ATO. To do so, employees must know whether the employer has made the required SG contribution to their nominated superannuation account.

4.56 Superannuation funds should process employer contributions and comply with the various lodgement requirements, such as the requirement to lodge MCS with the ATO. Some superannuation funds have also played an active role in enforcing the payment of superannuation contributions, the frequency of those payments and the requirement for employers to furnish sufficient information to allow for the timely and efficient allocation of contributions to individuals' superannuation accounts. The Industry Funds Credit Control (IFCC), which manages superannuation arrears for a wide range of industry superannuation funds, indicated that it pursues approximately 400 employers through the legal system each year and recovered approximately \$75 million in unpaid superannuation last year.

4.57 However, the IFCC states that the advent of choice of fund in 2005 has significantly eroded the legal relationship between employers and superannuation funds and diminished the ability of superannuation funds to follow-up on unpaid superannuation.<sup>5</sup>

4.58 Finally, the ATO has a responsibility to ensure the timely follow-up of non-lodged SGC Statements, the handling of EN complaints and collection of unpaid SGC.

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5 Before 2005 employers were bound as participating employer to particular superannuation funds, either through the trust deed of the fund, through a separate participation agreement, through the industrial award system, or in the case of public sector funds, through Acts of Parliament.

## **Submissions and consultation**

4.59 Concerns were raised that there is no legislated requirement for an employer to provide information about SG contributions to employees. Without a requirement to provide such information an employee has no basis to confirm that their employer has paid their SG entitlement until the employee receives their annual statement from the superannuation fund. For contributions due to be paid by the end of the September quarter, information from the superannuation fund might not be received until December the following year.

4.60 It has been asserted that this makes the ATO's task more difficult and, in some cases, results in the ATO being notified that there might be a compliance issue only after the employer has gone out of business.

4.61 Individuals, the Association of Superannuation Funds of Australia (ASFA) and superannuation funds have suggested that there should be a reintroduction of reporting quarterly SG payments and shortfalls on employee pay slips.

4.62 ASFA have also noted concerns with the high level of incomplete or inaccurate information that superannuation funds receive, often resulting in payments not being associated with an employee's superannuation account. One submission stated that despite a mandatory requirement for an employer to provide an employee's Tax File Number (TFN) to a superannuation fund within 28 days of the first contribution, some funds are reporting that up to 30 per cent of new fund enrolments are made without an accompanying TFN.

4.63 The ATO advises that MCS reporting reflects a steady increase in TFN quotation, with 2008-09 data showing that 95 per cent of employee details had a TFN reported.

4.64 A number of improvements have been suggested including:

- Mandating minimum information requirements for enrolling an employee in a superannuation fund. There is currently no mandated minimum set of information that must be provided prior to issuing an interest in a superannuation fund.
- Mandating the reporting to the ATO of employees who do not provide a TFN and improving the TFN validation process.
- Introducing a requirement that an employer has not fulfilled their SG obligations until they provide a superannuation fund with not only the correct monies but also sufficient employee details.

## **IGT observations and findings**

4.65 The IGT considers that there is scope for improving the information flows between the various stakeholders as a means of minimising the time frame between an SG shortfall arising and the ATO's awareness of it (either being triggered by an EN complaint or the ATO's own proactive work). This is through providing more information regarding the payment of SG on payslips and providing the ATO with

information so as to allow it to reconcile an existing liability to pay SG with any actual payments made in a real-time environment.

### **More information on pay slips**

4.66 In 2002 the Senate Select Committee on Superannuation and Financial Services considered that there was a need for more information to be provided by employers to employees regarding the payment of SG contributions, such as through pay slips. It believed that this would improve the information flow to employers, thereby increasing employees' awareness of whether their employers are complying with their SG responsibilities, and empowering employees to hold their employers more accountable.<sup>6</sup>

4.67 The previous reporting requirement came into effect from 1 July 2003 and was repealed from 1 January 2005. It required an employer who contributed to a complying superannuation fund for the benefit of an employee to report that contribution to the relevant employee within 30 days of making the contribution. At the time of repeal, employers expressed concerns in relation to the cost of compliance of this measure especially the time frame for reporting and further SG red tape.

4.68 The removal of the reporting requirement was supported by the following:

- Most employees already received information about employer superannuation contributions on payslips.
- Superannuation funds reported to members on an annual basis, allowing employees to be apprised of their entitlements. Also employees could contact their superannuation fund to make queries at any time, so there would seem to be little value in employers duplicating this process;
- It would provide the most significant improvement in reducing compliance costs for small business.
- The ATO had been funded in the 2004-05 Budget to raise the level of voluntary compliance and to undertake more intensive audit activity. The government indicated that this was particularly important and the need for effective compliance activity had to be emphasised in an environment of reduced reporting.

4.69 The Fair Work Regulations 2009 specify that a pay slip must include:

- the amount of each superannuation contribution that the employer made during the period to which the pay slip relates, and the name, or the name and number, of any fund to which the contribution was made; or
- the amounts of superannuation contributions that the employer is liable to make in relation to the period to which the pay slip relates, and the name, or the name and number, of any fund to which the contributions will be made.

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6 Senate Select Committee on Superannuation and Financial Services, *Enforcement of the Superannuation Guarantee Charge*, April 2001, at 31.

4.70 The *Fair Work Act 2009* covers all private sector employers in Victoria, Northern Territory and the Australian Capital Territory, and, in other States, employers that are constitutional corporations.<sup>7</sup>

4.71 Employers can satisfy the pay slip reporting requirement even if they do not subsequently pay the superannuation contributions to employees' superannuation funds. This means that employees have no way on knowing whether the amount included in the pay slip has been paid to the superannuation fund and are still reliant on the annual reporting from funds for information of the payment of superannuation, even though this may be more than 15 months after the event.

4.72 The IGT supports the introduction of reporting quarterly SG payments and shortfalls on employee pay slips. It will assist in minimising the timeframe between a SG shortfall arising and the employee becoming aware of the unpaid SG. It would provide employees with timely information that allows them to readily follow-up with the employer or the ATO where there has been non-payment of superannuation. It may also encourage employees to be better engaged with their superannuation.

4.73 In addition, the reintroduction of employee notification would not significantly increase employers' compliance costs if it is linked to pre-existing reporting processes. For instance, on a quarterly basis employers are required to either make contributions to their employees' superannuation funds or lodge a SGC Statement. This requires a reconciliation of an employer's SG liabilities and payments so at this point in time employers will have the requisite details that would be reported on employee payslips.

## **RECOMMENDATION 2**

The Government consider providing employees with more timely information regarding whether their employer has paid SG by the due date, by having employers, on a quarterly basis, include on each employee's payslip their ordinary time earnings for SG purposes and the amount of SG actually paid to the employee's superannuation fund or the ATO. This will also assist in reducing the timeframe between when a SG shortfall arises and when an employee lodges an EN complaint with the ATO.

### **ATO response**

This is a policy matter for Government's consideration.

### **Better information flows to the ATO**

4.74 There is also a need to improve the quality and timeliness of information received by the ATO so as to allow it to proactively monitor and detect non-compliance. This is most relevant where employees are reluctant to lodge an EN complaint with the ATO for fear of repercussions.

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<sup>7</sup> Constitutional corporations include bodies incorporated under the Corporations Act of a state or territory that are trading or financial corporations, and foreign corporations. Sole traders, partnerships and family trusts are not constitutional corporations.

4.75 The IGT found that the ATO is not able to effectively and efficiently reconcile liabilities and payments to proactively determine whether there has been potential non-compliance and undertake prompt follow-up action. In particular, it lacks timely information on whether an employer has paid superannuation by the due date, representing a significant limitation in the ATO's ability to enhance its proactive audit strategy. MCS reports and individuals' income tax returns are only lodged annually (and for some individuals quite long after the end of the income year), meaning that the ATO can only first respond to potential non-compliance more than a year after the SG shortfall first arises. MCS reports may not always provide complete employer information, making them difficult to reconcile with other data to determine whether an employer has met their SG obligations.

### **Options for change**

4.76 The IGT notes that there are a range of options available to improve the information flows to the ATO. In any option adopted it is important that:

- The requirement for employers to provide information is confined to those in high-risk categories – for example micro-businesses or employers of certain industry sectors.
- All employers in high-risk categories are required to report rather than it being optional (either directly to the ATO or indirectly through clearing houses or superannuation funds) so as to allow the ATO to identify non-compliant employers.

4.77 Option 1 would be to have the ATO act as the clearing house for high-risk employer superannuation contributions with reporting and payment effected through the Business Activity Statement (BAS). This would provide the ATO directly with information on whether an employer has paid SG and be able to identify those employers that need to lodge a SGC Statement for follow-up action. However, the requirement for all micro-business employers to have to direct payment to the ATO and then for the ATO to distribute these payments to superannuation funds will increase the ATO's cost of administration and have a significant impact on private sector clearing houses.

4.78 Option 2 would be to require high-risk employers to use the services of a clearing house (either a private sector clearing house or Medicare Australia) in fulfilling their SG obligations. The ATO would then engage and utilise information from these clearing houses for the purposes of identifying potential non-compliance. Again, the ATO would have indirect access to information on the payment of SG while employers could potentially reduce their compliance costs through using the free superannuation clearing house service. It could also be argued that this requirement could actually assist such employers by supporting the ATO and government in maintaining a level-playing field and ensuring that competitors also meet their SG obligations.

4.79 A potential disadvantage is that it may impose an increased burden on those employers who are already doing the right thing and meeting their SG obligations by requiring them to use the services of a clearing house.

4.80 Option 3 would only require all high-risk employers to provide the ATO with a consolidated quarterly report setting out the name and TFN of their employees, the amount of contributions paid and the superannuation funds or retirement savings accounts that contributions were made to. To minimise employer compliance costs, this could be achieved through the BAS given that most micro-businesses are on a quarterly reporting for BAS. Employers are already required to either make quarterly payments to superannuation funds or lodge a SGC Statement with the ATO when they fail to pay the superannuation on time. The requirement to report to the ATO should not impose a significant burden on employers but will provide the ATO with crucial information to detect non-compliance and undertake prompt follow-up action in high risk segments.

4.81 Option 4 would be to require all superannuation funds and retirement saving account providers to lodge MCS reports with the ATO on a quarterly basis. However, superannuation funds and retirement saving account providers would have to increase the integrity of the information on these MCS reports, in particular employer details.

4.82 As an interim measure, the ATO could target high-risk employers by engaging and establishing information flows with superannuation funds and superannuation clearing houses. For instance, clearing houses would have data and information that would allow the ATO to adopt a real-time monitoring role. This would include lists of employers that have started or stopped contributing or employers that have reduced their contribution amounts.

### **RECOMMENDATION 3**

The Government consider improving the current payment and information systems for SG obligations to allow the ATO to undertake more real-time monitoring and rapid follow-up of high-risk employers, particularly micro-businesses.

The payment and information systems should have the following features:

- Capturing the following details for each employee: name, tax file number, ordinary time earnings, amount of superannuation contribution paid by employer, superannuation fund and member number;
- ATO to have access to this data on a quarterly basis; and
- Compulsory requirement for all employers in high-risk segments to participate in the system rather than it being optional.

In a manner that minimises compliance obligations, the ATO should also engage superannuation funds and clearing houses to obtain information for the purposes of identifying potential SG non-compliance.

4.83 The IGT believes that the above two recommendations will have a number of benefits. First, it will minimise the timeframe between SG non-compliance and detection, helping to increase the likelihood of recovery of outstanding SGC. It will allow for more real-time ATO monitoring and rapid follow-up of high-risk employers. Together with other available data from employee declarations and income tax returns,

the ATO could determine whether a potential shortfall exists without relying on an EN complaint. Second, increased employee awareness and ATO monitoring will help promote and maintain a level playing field amongst employers and ensure that compliant employers do not face a financial disadvantage against non-compliant competitors.

4.84 While these recommendations may increase the burden on some businesses, the IGT has sought to minimise this impact by framing recommendations that tie into pre-existing reporting processes. In addition, compliant employers would be significantly advantaged by the ATO being able to detect and follow-up on competing non-compliant employers.

4.85 The IGT believes that the suggestions for improving the quality of information being provided by employers to superannuation funds has merit and has referred these to the Super System Review for consideration.

### **ATO response**

This is largely a policy matter for Government's consideration.

In relation to that part of the recommendation directed to the ATO, made in the last paragraph, we agree with the recommendation.

The ATO encourages people in the superannuation industry and others to provide information on employers at risk of non compliance with their SG obligations. This is done by encouraging representative bodies, through industry forums, etc, to utilise our 'third party referral' process.

The ATO is also one of the stakeholders involved in the consultation process undertaken by Medicare on their administration of the Clearing House initiative. Once appropriate legislation has passed we will explore with Medicare the feasibility for information sharing between the two agencies.

## **RISK IDENTIFICATION**

4.86 In its 2000 performance audit, the ANAO noted that the ATO was moving away from following up individual EN complaints, toward a more risk-based approach where high-risk groups of employers are targeted and strategies such as reminder notices and telephone calls are used. The ANAO endorsed this risk-based approach as a more effective use of resources that was more likely to lead to improvements in overall compliance levels. The ANAO also recognised that this risk-based approach could result in problems for some employees whose individual complaints may not be actioned.<sup>8</sup>

4.87 During the course of this review, and similar to the evidence before the Senate Select Committee inquiry, the IGT heard that an underlying concern with SG

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<sup>8</sup> Senate Select Committee on Superannuation and Financial Services, *Enforcement of the Superannuation Guarantee Charge*, April 2001, at 32.

enforcement is that the detection of non-compliance depends on individual complaints being made by employees about apparent shortfalls.

4.88 Individuals assert that the ATO appears to wait until an employee complains before starting compliance action despite the superannuation fund receiving no SG contributions for almost a year. Many, if not most employees, will either not notice that SG contributions are not being made, or if they do, they may be hesitant to make a complaint, especially in the case of small businesses.

4.89 Submissions have suggested that the ATO should implement and improve their data matching to better identify non-compliance.

4.90 A number of submissions also suggested that the lack of resources available to the ATO to adequately deal with SG non-compliance is an issue that should be addressed as a matter of urgency. The ACTU, Industry Super Network (ISN), IFCC and the Australian Institute of Superannuation Trustees (AIST) believed that the ATO does not have the resources to perform thorough investigations and debt collection activities. The joint submission asserts that the ATO does not send auditors into workplaces to investigate SG complaints and it is unclear the degree to which the ATO cooperates with the Fair Work Ombudsman (FWO), if at all.

4.91 The Taxation Institute of Australia submitted that the ATO should use all the specific additional funding for the purpose of improving the enforcement of the SG system so as to increase the overall level of SG compliance. In addition, the ATO should take all reasonable steps to ensure that other resources at its disposal are also used to improve the effectiveness of the SG system.

4.92 The ATO states that it has developed a number of support tools to assist employees determine if they have an SG shortfall and to easily lodge their complaint. It has also developed tools for employers including:

- SG online calculator – this tool enables employers to prepare SGC Statements electronically and 10,943 voluntary SGC Statements have been received from employers using the SG calculator. There has also been an increase in the number of users, with around 35 per cent of SGC Statements now lodged by employers using the calculator.
- Online employee/contractor decision tool – this is to assist employers work out whether their new or existing workers are employees or contractors for tax and SG purposes

4.93 The ATO notes that it also provides a range of practical assistance options for small business at all times of the business lifecycle, including free seminars and business assistance visits.

4.94 An individual taxpayer's submission set out a case study of his former employer going into liquidation in November 2008 owing him and his former colleagues over \$50,000 in superannuation. In early 2006 he lodged an EN complaint with the ATO and the ATO commenced an audit resulting in a SGC Statement being lodged for period up to the end of the September quarter of 2006. Despite the lodgement of the SGC Statement, no actual payments were actually made until after

September 2007. In addition, no ongoing superannuation payments were made nor were further SGC Statements lodged. The employee ceased employment with this employer and subsequently lodged another EN complaint with the ATO. Soon after, the payments from the ATO to the employee's superannuation fund in relation to the September 2006 SGC Statement ceased. In June 2008 the business was sold and in November 2008 the company went into liquidation. In June 2009 the employee received a letter from the ATO informing him that the ATO will no longer pursue the SGC debt.

### **Proactive compliance work**

4.95 The ATO advises that it undertakes a wide range of proactive compliance work utilising data matching processes to audit high risk employers who do not meet their SG obligations. This includes its SG high risk marketing strategy, the employer obligation audits performed by MEI, the SG study and its recent identification of high risk employers for proactive audit.

4.96 The ATO estimates that in 2009-10 approximately 27 per cent of its SG compliance activities will be proactive work, an increase from 2008-09 where its proactive work comprised 16 per cent of the ATO's overall SG compliance work.

### **Employer obligation audits and referrals**

4.97 The Superannuation business line funds the MEI business line to undertake SG and Choice audits as part of their high risk PAYG(W) and employer obligation audits.

4.98 In 2008-09, the ATO conducted 4,825 employer obligation audits, of which 3,763 included an SG audit. Of those cases, an SGC liability was raised in 2,371 cases totalling \$51.5 million. SGC Statements were lodged in 1,549 cases (\$27.2 million) while default assessments had to be issued in the remaining 822 cases (\$23.4 million).

4.99 The ATO also investigates all referrals received from third parties (other business lines, superannuation funds, the Ombudsman and trade unions) although the overall number of referrals received is fairly small. These referrals provide general information indicating that an employer is not meeting their SG obligations, but where there has been no EN complaint received by the ATO.

### **SG high risk marketing strategy**

4.100 This strategy was first developed in late 2007 to direct targeted education messages to high risk industries. These industries were identified by obtaining data on employers who had multiple EN complaints, been subject to an MEI employer obligation audit and had SGC debts.

4.101 These employers were then grouped by sub-industry, and the three industries identified as having the highest risk were:

- hairdressing and beauty services;

- engineering design and engineering consulting services; and
- building and other industrial cleaning services.

4.102 The ATO then directed promotional material and information to the selected sub-industries through their industry bodies, associations and agencies. The ATO measured the effectiveness of this marketing campaign by comparing the voluntary lodgement of SGC Statements and the number of EN complaints lodged before and after the campaign.

4.103 The ATO believed that this strategy was successful as the average monthly voluntary SGC Statements doubled during the campaign period although there was an underlying increase in the number of default assessments. There was also an increase in the number of EN complaints received from employees working in the selected industries, suggesting a greater awareness of their SG obligations.

4.104 As a continuation of its 2008-09 high risk marketing strategy, the ATO has identified over 500 cases for proactive audit work in the three industries identified above as having the highest risk of SG non-compliance.

### **SG study**

4.105 The ATO's SG study involved analysing employer non-compliant behaviour with SG obligations arising from the SG 2006 survey. The study took the form of a questionnaire that required selected employers to complete and return to the ATO. Each questionnaire was treated as an audit and the SG study involved further investigation of those employers that did not respond to the questionnaire despite repeated contact attempts.

### **Data matching to identify high risk employers for proactive audit**

4.106 From 1 July 2009 proactive audits commenced on employers who were identified by an analysis of:

- MCS reports which show the employer contributions to a member's fund for a financial year.
- PAYG payment summary statements produced by the employer and identifying their employees and TFNs.
- Employers' income tax returns to allow the ATO to identify whether a particular employer has any salary and wages deduction or claimed any superannuation expense deductions.
- Individual income tax return information showing their TFN, salary and wages and employer's ABN.

4.107 By matching this data the ATO is seeking to identify employers who are not paying SG for their employees for potential audit action.

## IGT observations and findings

4.108 To date, and despite a number of ANAO and Senate Select Committee recommendations to undertake more data-matching and proactive work to identify potential SG non-compliance, the ATO still places too much emphasis on EN complaints as a source of risk identification in the SG system. This arises from a combination of factors including the lack of relevant data and information, the Commissioner's commitment to investigate every EN complaint and limited resources.

4.109 The onus is placed on employees to be aware of their SG entitlements (despite complexities around employee/contractor distinction and the impact of salary sacrifice on SG entitlements), to follow up on any potential SG shortfalls and, if necessary, lodge EN complaints.

4.110 While this approach may be effective with particular classes of employees (higher income, better informed and those in stronger bargaining position) it does not adequately support or protect the least empowered employees. This is especially relevant in the micro-segment due to particular features:

- Employers: hampered by lack of time and resources and may struggle to meet their tax and superannuation obligations. More prone to cash flow issues, especially in the current economic environment, than other employers. About 95 per cent of micro enterprises lodge their returns through tax agents.
- Employees: low to medium income earners, more vulnerable, non-English speaking background, more hesitant to lodge EN complaints.

4.111 The IGT believes that the ATO's recent emphasis on data-matching as a part of its proactive SG audit work is a positive step forward. However, the IGT notes that 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. There are also significant limitations on the ATO being able to undertake real-time monitoring and follow-up with the current information flows in the SG system. As already noted the ATO receives MCS reports annually meaning that the ATO can only first respond to potential non-compliance more than a year after the SG shortfall first arises. Also, MCS reports may not always provide complete employer information, making them difficult to reconcile with other data to determine whether an employer has met their SG obligations.

4.112 The IGT considers that proactive data-matching work utilising timely and quality information regarding SG payments should be the key source of risk identification in high-risk segments.

## RECOMMENDATION 4

To minimise the timeframe between SG non-compliance and the ATO's detection, the ATO should significantly expand its proactive SG audit work to allow for more real-time monitoring and rapid follow-up of high-risk employers, especially in the micro-business segment, who have not paid superannuation. This should include:

- Increased reliance on data-matching approaches; and
- Increased community presence through more targeted field work along the lines of the FWO campaigns.

This also requires the ATO to further develop its risk identification strategies to more effectively detect the different types of SG non-compliance as each requires different analysis techniques and detection mechanisms.

### ATO response

Disagree.

The ATO already uses data matching techniques to identify employers at risk of non compliance and will be able to do this with even more precision with the availability of Reportable Employer Superannuation Contributions data.

The ATO already targets high risk industries and employers. Approximately 95% of our proactive audits are in the micro segment.

The ATO already has a high percentage of its proactive audit resources in field activities. Any further increase would have to be carefully considered due to the high costs of each field activity compared to a phone or desk audit.

The ATO is committed to addressing all employee SG complaints in a timely way and this necessarily constrains the resources available for proactive work. Nevertheless, 27 per cent of our compliance resources working on SG are doing proactive risk-based work.

Having regard to the overall level of risk in the SG system, and the range of other tax and superannuation risks that the ATO is required to address, we believe that the current level of resources allocated to addressing SG risks is appropriate.

### Contractor status

4.113 In its joint submission, the ACTU suggested that employers in some industries regularly engage workers as sham contractors to avoid having to pay superannuation. It referred to one study that found that as many as 45 per cent of workers in the construction industry are sham contractors. The joint submission advocated that sham contracting should be addressed by deeming a contractor who performs more than 80 per cent of their work for one 'client' to be an employee for the purposes of the superannuation guarantee laws, as is the case for personal services income.

4.114 The Construction Forestry Mining and Energy Union expressed similar concerns about the avoidance of SG by employers through the misclassification of employees as subcontractors. It suggested that there was a need for greater ATO scrutiny of SG compliance especially in the construction industry and the classification of workers.

4.115 Other stakeholders noted the various definitions of 'employee' under the SGAA, the *Fair Work Act 2009* and the common law test of the determining whether a person is an employee or independent contractor and the complexity it introduces for businesses, workers and regulators.

4.116 The ABS Forms of Employment Survey found that there are now 967,000 independent contractors, with nearly a third of those in the construction industry. Nearly all of the businesses working in the construction industry are small businesses and collectively are responsible for 82 per cent of all employment in this industry.

4.117 The IGT believes that the sham contractor issue represents a significant systemic risk in the SG system, given that it potentially affects those most reliant upon SG as a source of retirement income. In evidence to the IGT, a number of stakeholders indicated that some employers now use the ABN as the touchstone of whether a person is an employee or independent contractor. In many instances, persons who would ordinarily be considered employees under the common law tests or under the expanded definition of employee under the SGAA, are nevertheless treated as independent contractors on the basis that they have provided an ABN.

4.118 The IGT also found that audit activity and enforcement action on this issue is resource intensive given the factual nature of the determining whether a person is an employee or independent contractor. This imposes significant costs on employers, employees and the ATO, especially where there is a dispute regarding the classification of a person for SG purposes, and uncertainty given the numerous factors that need to be considered.

### **Greater interaction with the Fair Work Ombudsman**

4.119 The joint submission from ACTU, ISN, IFCC and AIST noted that in March 2009, the FWO completed an audit of the hospitality industry and found that 34 per cent of employers were in breach of their employment obligations. The majority of these breaches were underpayment matters (83 per cent), while 17 per cent were breaches of record-keeping obligations, including the failure to record the amount of superannuation contributions and the name of the superannuation fund on payslips. Audits suggest that approximately one third of employers underpay employees and therefore fail to meet their SG obligations.

4.120 The ATO advises that its high risk marketing strategy did consider the inclusion of cafes, restaurants, takeaway food services, adult entertainment industries and sporting clubs for potential review. However, these industries were excluded from selection as they were subject to review as part of other ATO compliance programs making it difficult to gauge the level of impact of the SG high risk marketing strategy. In relation to the identified underpayment of salary and wages, the ATO notes that SG is not payable until such time as the payment of salary and wages is actually made.

4.121 The joint submission notes that an underpayment of salary and wages will also mean that an employer has not complied with their SG obligations. It also suggests that the FWO's enforcement activities demonstrate that employers who deliberately underpay employees often deliberately avoid making superannuation payments. The joint submission recommends that because of the link between underpayment of wages and non-compliance with SG obligations, the ATO and FWO should work far more closely together.

4.122 The IGT believes that this suggestion has significant merit and the sharing of information and intelligence should happen as a matter of course. This could be aided by the establishment of a FWO liaison officer within the ATO, with responsibility for the ongoing sharing of relevant information to maximise enforcement of superannuation obligations.

4.123 The ATO advises that it had an ongoing relationship with the FWO, at least since October 2008, and has established a formal liaison officer who is based in the GST business line. Some examples of the interactions are:

- The FWO inspectors assist the ATO by distributing of the ATO's SG publication *Super – What employers need to know* during field visits.
- Links to the ATO website were included in the Workplace Ombudsman website, but it seems that those links have been removed when the site was updated to the FWO site. The ATO has been advised that although direct links are no longer available (although ato.gov.au is available) superannuation information is available on their internal website.
- In 2008 an email mailbox address, managed by the Employer Obligation segment, was made available to the FWO. This allowed the FWO to direct third party complaints to the ATO for investigation.

4.124 The ATO notes that previously its ability to share information with the FWO was restricted by privacy legislation. In November 2009 a Bill was introduced (the Taxation Laws amendment (Confidentiality of Taxpayer information) Bill 2009) which provides for the sharing of compliance information between the FWO and the ATO. A Memorandum of Understanding is being developed, and once the Bill has been passed compliance information will be able to be shared between the agencies.

## CHAPTER 5 — EMPLOYEE NOTIFICATIONS

5.1 This chapter examines the ATO's handling of Employee Notification (EN) complaints received from employees about their employer not meeting their superannuation obligations. It looks at the ATO's timeliness in actioning and its communication strategies with employees raising concerns with their employer's compliance including how it informs employees about its investigations.

### BACKGROUND

5.2 Where an employer has not fulfilled their SG obligations (by either not making sufficient contributions, or the employer not making contributions in compliance with the Choice of Fund rules) then an employee may lodge an EN complaint with the ATO.

5.3 As part of the 2006-07 Budget, the then Government announced it would provide the ATO with an additional \$19.2 million over four years to improve the ATO's responsiveness to inquiries about employer compliance with the payment of superannuation contributions required under the SG arrangements. The ATO was to provide enhanced services to employees with concerns about the payment of employer superannuation contributions by addressing the backlog of inquiries and providing more timely completion of future investigations.

5.4 The ATO was also to provide employees with more advice on the progress of EN complaints. This was following the legislative change that allowed the ATO to inform an employee about its investigation following a complaint or about the employer's compliance with their SG obligations.

5.5 The initiative was in response to the ATO's inability to finalise investigations within a reasonable timeframe and provide information to employees on the progress of investigations, which were said to represent significant community irritants around the administration of the SG system.

### SG RESPONSIVENESS PROJECT

5.6 In response to the Budget announcement, the ATO initiated its SG responsiveness project. The stated intent of the project was to improve responsiveness to EN complaints about unpaid SG by providing progress updates to employees for the duration of their case and implementing sustainable end-to-end processes that reduced the time taken for an employee to receive any recovered SG entitlement.

5.7 The ATO set out a number of objectives for improving SG responsiveness:

- From 1 July 2007, employees were to be provided with progress updates for the duration of their EN complaint. This was to be measured by the development of a

service standard or charter that identified the frequency, timing and nature of the correspondence to be issued. The ability to report on this information was to be incorporated into the Siebel case management system.

- The number of EN complaints on hand would be reduced to a manageable level and the cycle time taken to address and resolve EN complaints be improved.
- The end-to-end process, from when an employee makes an EN complaint to the resolution of their complaint, would be improved. This was intended to ensure that employees would receive their SG entitlements sooner.
- Awareness and knowledge of the amendments to the secrecy provisions affecting SG was promoted.

5.8 At the time of commencement of the project the ATO indicated that its handling of EN complaints were characterised by the following features:

- Approximately 9,000 EN complaints either registered for action or in progress.
- Lengthy EN complaint resolution time, with 50 per cent of EN complaints actioned in eight months and the remainder taking up to two years.
- Employees only advised when they are ineligible for SG, the employer has met their SG obligations for the employee, the contributions have been received and paid into the employee's superannuation fund or the employer is insolvent or has been deregistered.

5.9 The ATO stated that all this led to a negative employee experience and community frustration, leading to a perception that the ATO was unwilling or unable to resolve EN complaints. All this led to complaints to the Ombudsman and Members of Parliament. In addition, it also contributed to a low level of community confidence in the ATO's ability to enforce the SG laws.

5.10 As part of the SG responsiveness project the ATO committed to meeting the following timeframes in actioning employee complaints:

- 100 per cent of new ENs were to be commenced within 28 days of receipt;
- 50 per cent of ENs were to have compliance action completed within four months; and
- 90 per cent of ENs were to have compliance action completed within 12 months.

5.11 These specific timeframe targets were to be achieved for all cases by 1 March 2008. In addition, the ATO committed to reduce the number of ENs on hand to 5,000 by 30 June 2008. The ATO was also to provide automated updates and information to employees on the progress of their EN complaint.

5.12 These changes were intended to improve community confidence that the ATO was taking appropriate action regarding EN complaints and in the ATO's ability to enforce the SG laws. All this was to alleviate complaints to Members of Parliament and

the Ombudsman, give more successful debt collection rates, reduce repeat employee enquiries and improve end-to-end process timeframes.

5.13 The improvement of the ATO's administration of SG, particularly responsiveness and timeliness to action employee enquiries and information from reliable third parties, remains a key priority in the Superannuation line delivery plan.

## COMMUNICATION WITH EMPLOYEES

5.14 The IGT found that the ATO has made significant progress in ensuring that employees are kept informed of the progress of their EN complaint.

5.15 As part of the SG responsiveness project, the ATO introduced processes from 1 July 2007 based largely on sending letters to employees at defined times during the audit and debt collection process. The nature of the correspondence covers a wide range of key events in the end-to-end progress of an EN complaint including: on receipt of an EN complaint; when the audit was commenced; the conclusion of the audit; and at the finalisation of the debt collection process.

5.16 Overall, the ATO has designed a suite of 23 letters to be sent to employees at various stages of an investigation and in 2008-09 issued over 83,000 letters. The timing and delivery of letters is determined by specific trigger points during particular steps in the end-to-end EN process. Letters are both automatically and manually generated.

5.17 However, employees have expressed concern that the letters sent by the ATO, especially around those regarding the audit finalisation and debt recovery processes, are not personalised and often contain generic information. For example, a number of individuals referred the IGT to the ATO's 'Query closed-no payment' letter which simply refers to four different possibilities why the ATO was not able to collect superannuation and then suggests that employees may take their own debt recovery action.

5.18 Employees would like to see these letters better tailored to their individual circumstances and provide more detailed information on the liabilities raised and amounts collected by the ATO on their behalf.

5.19 In 2008-09 the ATO initiated an end-to-end review to explore ways to more efficiently progress an EN complaint through the ATO's processes and various business lines. As part of this review the ATO analysed 5,444 EN complaints received between 1 July 2008 and 30 September 2008 to ascertain the success of the SG responsiveness project.

5.20 The ATO found that while its overall approach was sound, it identified a number of shortcomings suggesting that it is not always meeting its commitment of keeping employees informed of the progress of their EN complaint. These shortcomings included:

- Employees not receiving any letters, or the wrong letter, because of incorrect actions by auditors in completing Siebel cases.

- It was not possible to update employees who contact the ATO seeking an update of the progress of their EN complaint as the Siebel case management system had not been updated correctly by auditors.
- Employees receiving the wrong letter, or at the wrong time due to Siebel not adhering to the business rules that determine when letters should issue.

5.21 The ATO found that of the 5,444 EN complaints examined, nearly 1,000 had some form of procedural inconsistency with the bulk of these due to auditors not following procedures. Most of these cases had some impact on the employee experience.

5.22 Specifically, the ATO review found notable differences between the accuracy of outcomes between early exit letters generated manually and those generated automatically. The majority of manually generated early exit letters failed to achieve the correct outcome while the accuracy of those generated automatically was significantly higher. However, the ATO found that the documented procedures on how to action EN complaints were not consistently followed by auditors in relation to both types of letters. In addition, auditors rarely uploaded the required notes outlining the handling of an EN complaint onto the Siebel case management system. The ATO notes that it has recently updated its work processes with new checks for our audit team leaders before a case can be finalised in order to remedy this situation.

5.23 The ATO's review concluded that without an adequate quality assurance and reporting process there is too much scope for inconsistency. It also concluded that the identified gaps in the systems and adherence to audit procedures need to be addressed before employees can be assured a timely and accurate response to their EN complaint.

5.24 The ATO advises that with all new projects it undertakes a post implementation review, to identify issues and improvement with the new process. The SG end-to-end review process commenced to meet this requirement and it has identified some issues to date. The end-to-end review is now on hold, waiting the conclusion and recommendations of the Cooper Review and the Australia's Future Tax System Review (otherwise known as the Henry Review) before it embarks on further work in this area.

## RECOMMENDATION 5

To improve the employee experience of ATO communications in relation to its investigation of EN complaints, the ATO should improve its communications by ensuring that:

- Employees receive appropriate and personalised letters in a timely manner that set out the following details:
  - SGC liabilities raised by the ATO on behalf of employees following an investigation;
  - SGC amounts collected by the ATO; and
  - Where the ATO has not been able to collect, the reasons for non-collection (for example, insolvent employer, uneconomical to pursue) and the amount written-off.
- Auditors correctly complete the case management system so as to allow ATO officers to appropriately respond to employee requests for updates on ATO action.

### ATO response

Agree.

We accept auditors should correctly complete case management systems and have already taken steps to minimise the likelihood of errors. We also write to employees who make complaints advising when an amount is collected on their behalf and the amount.

We are currently reviewing the whole framework of our letters to further improve our communication with employees.

However, the dissemination of information to employees must be reviewed in the context of:

- what the SG legislation allows us to disclose;
- what is sensible to provide given the substantial reverse workflows that can arise when amounts originally raised change, for example where the employer successfully objects to the amount owing or amends the SG assessment; and
- what our current systems and resources will allow us to change.

We will consider the IGT's recommendation as part of our review of SG letters to employees who lodge complaints. This review of letters is a part of our *SG End to End Review*. The second stage of this project is expected to be finalised within 12 months. At this time more information regarding our system capabilities will be available.

## ATO PERFORMANCE REGARDING TIMEFRAMES

5.25 Table 5.1 sets out the number of EN complaints received by the ATO in the 2006-07, 2007-08 and 2008-09 income years.

**Table 5.1: Number of EN complaints received**

Complaint type	2006-07	2007-08	2008-09
Choice of fund only	105	130	93
SG and choice	2,687	7,961	7,766
SG only	10,653	12,793	10,575
<b>Total</b>	<b>13,445</b>	<b>20,884</b>	<b>18,434</b>

5.26 The ATO advises that approximately 80 per cent of EN complaints are lodged via its contact centre, with about 17 per cent through the SG online calculator). The ATO indicates that many of these EN complaints are missing mandatory information needed to enable it to commence compliance action. Subsequently, further contact is required with the employee to obtain missing information prior to commencing any audit.

5.27 Table 5.2 details the status of all SG cases including EN complaints, insolvencies, referrals and amendment requests in the 2006-07, 2007-08 and 2008-09 income years. An average of 1.3 complaints is received for each EN case created by the ATO.

**Table 5.2: Number of SG cases received and finalised in 2006-07, 2007-08 and 2008-09**

Case status	2005-06	2006-07	2007-08	2008-09	2009-10 (up to 18 December 2009)
Cases on-hand at start of income year	9,114	9,187	7,284	8,526	5,486
Cases received	13,450	11,462	18,373	17,392	10,236
<b>Total cases closed</b>	<b>13,377</b>	<b>13,365</b>	<b>17,131</b>	<b>20,432</b>	<b>10,285</b>
Cases on-hand	9,187	7,284	8,526	5,486	5,437

5.28 The IGT notes that the ATO has yet to reduce the number of SG cases on hand to 5,000 although this has been influenced by the significant increase in the number of EN complaints received by the ATO in 2007-08 and 2008-09. The IGT also notes the ATO's efforts to reduce the cases on-hand through its backlog strategy.

**Table 5.3: ATO's performance in meeting the SG responsiveness timeframes in 2006-07, 2007-08 and 2008-09**

Commitment timeframes	2006-07		2007-08		2008-09	
	Number of cases	%	Number of cases	%	Number of cases	%
<b>Commenced within 28 days – target 100 per cent</b>						
Yes	763	7	2,039	13	2,913	14.7
No	10,135	93	10,719	68.6	16,764	84.7
N/A	0	0	2,868	18.4	105	0.6
<b>Completed within 4 months – target 50 per cent</b>						
Yes	1,605	15	11,704	74.9	14,305	72
No	9,293	85	3,922	25.1	5,477	28
<b>Completed within 12 months – target 90 per cent</b>						
Yes	6,714	62	15,370	98.4	19,662	99
No	4,184	38	256	1.6	120	1
<b>Total finalised</b>	<b>10,898</b>	<b>100</b>	<b>15,626</b>	<b>100</b>	<b>19,782</b>	<b>100</b>

Note: In 2007-08, there were 2,868 EN complaint cases with no recorded receipt date on the data provided to the IGT. The reason was that these cases were affected by the ATO's transition to its Siebel case management system, which also coincided with the change in the way EN complaints were being captured. Therefore, the only means of identifying the EN receipt date for these cases was to open each case individually.

5.29 It is evident that the ATO has made significant improvements in investigating EN complaints. In 2006-07 only 62 per cent of EN complaint investigations were finalised within 12 months, while in 2008-09 the ATO achieved a 99 per cent finalisation rate. However, before the start of the current financial year, the ATO has not been able to meet its commitment to commence all EN complaint investigations within 28 days – with only 15 per cent of cases meeting that timeframe last year.

5.30 Table 5.4 lists the outcome of finalised EN complaints for the 2006-07, 2007-08 and 2008-09 income years.

**Table 5.4: Outcome of finalised EN complaints**

Outcome	2006-07		2007-08		2008-09	
	Number of cases	%	Number of cases	%	Number of cases	%
<b>SGC liability raised</b>	6,898	63	9,032	57.8	10,835	54.8
<b>Nil outcome</b>	4,000	37	6,421	41.1	8,739	44.2
<b>Early exit</b>	0	0	173	1.1	208	1
<b>Total</b>	<b>10,898</b>	<b>100</b>	<b>15,626</b>	<b>100</b>	<b>19,782</b>	<b>100</b>

5.31 The IGT notes that, on average, about 40 per cent of EN complaints are finalised with no SGC liability being raised.

5.32 The ATO advises that about one third of nil outcome cases were due to an employee having already received adequate superannuation support.

5.33 In a further 25 per cent of cases, the employee was not eligible for superannuation support and in 20 per cent of cases the employer was found to be

already insolvent with no monies to pay creditors. The remaining nil outcome cases were due to the employee withdrawing their complaint.

## END-TO-END ANALYSIS

5.34 Table 5.5 provides information on the status and progress of 8,167 EN complaints that were in progress at 30 June 2006 over a 14 month period. The IGT notes that the end-to-end analysis of EN complaints (from the audit through to the debt stage) is important in better understanding the effectiveness of EN complaints in ensuring employer compliance.

**Table 5.5: Status and progress of EN complaints**

Age range	NUMBER OF CASES IN PROGRESS			NUMBER OF CASES COMPLETED			
	Not commenced	Insolvent employer	Ongoing audit	No outcome	Employer compliant	SGC liability raised — assessment not yet issued	SGC liability raised — assessment issued
0-365 days	0	0	0	1075	240	15	1804
1-1.5 years	0	0	50	749	255	109	2,256
1.5-2 years	0	0	19	123	86	79	719
2-3 years	0	0	15	56	42	37	379
3 + years	0	0	1	8	9	1	40
<b>Total</b>	<b>0</b>	<b>0</b>	<b>85</b>	<b>2,011</b>	<b>632</b>	<b>241</b>	<b>5,198</b>

5.35 Table 5.6 shows the status of the 5,198 EN complaints where the compliance action determined that the employer had an SGC liability to pay and an assessment was issued to the employer.

**Table 5.6: Debt recovery action arising from EN complaints**

Event	Number of cases	Event	Number of cases
SGC liability raised — assessment issued	5,198	Legal action	114
Payment received — no debt action	508	Dispute	379
New debt case	183	Insolvent employer	233
Contact with employer	1960	Debt written off	0
Payment arrangement	556	Finalised — payment received	1265

Notes: Payment received: where the employer has paid the SGC with no ATO debt recovery action required.

New debt case: a debt case has been created in the ATO's receivables management system but no action taken.

Contact with the employer: The employer has been contacted regarding their outstanding SGC debt and could be at various stages in the debt collection process.

Payment arrangement: where the employer is in a payment arrangement with the ATO.

Legal action: the ATO has initiated legal action (garnishee, winding-up or bankruptcy action) to recover the outstanding SGC debt.

Debt written off: where the SGC debt is considered to be uneconomical to pursue or irrecoverable at law.

Dispute: the SGC debt is being disputed by the employer.

Finalised: where the employer has paid the SGC debt as a result of ATO debt recovery action.

5.36 In examining the above two tables, the IGT makes the following remarks:

- Approximately 67 per cent of all EN complaints led to a determination that the employer had an outstanding SGC obligation and an assessment was issued to the

employer. This is consistent with the earlier finding that approximately 40 per cent of EN complaints are finalised with no SGC liability being raised.

- Of the 5,198 EN complaints where an assessment was issued, 508 led to the employer having paid the SGC with no further debt recovery action required. A total of 3,425 (or 65 per cent) of these EN complaints continued to have an outstanding SGC debt. Of these, only 1,049 of these cases were under payment arrangement, legal action or under dispute and in 233 cases the employer was determined to be insolvent. In the remaining 2,143 cases the ATO was maintaining contact or in negotiation with the employer. The ATO states that it actively seeks to engage employers in the payment of the outstanding SGC debts. Where the employer makes no attempt to engage, then the ATO is left with no alternative but to refer these employers to the next stage of the legal collection process.
- The ATO reported that over \$180 million of SGC was raised relating to the 5,198 cases where an assessment was issued to the employer, with an average of \$35,628 per case. Notwithstanding this significant amount of collected SGC, a substantial number of EN complaints had not led to the recovery of outstanding SGC even after 14 months.

5.37 The ATO states that it is important to recognise the collection problems when dealing with micro-businesses with financial difficulties. It advises that the average debt reported above is made up of a small number of high value debts, with the majority being debts of small value. These small value debts often cost more to pursue through legal action than the debt is worth, so negotiations with the employer may continue over a longer period of time than is the case with high value debts.

## IGT fieldwork

5.38 The IGT also undertook fieldwork to better examine aspects of the ATO's handling of EN complaints and the effectiveness of the current EN process in ensuring that employees recover their unpaid SGC. Specifically, the IGT looked at the timeframes around the lodgement of an EN complaint, the time taken for the ATO to commence an investigation and the time taken to complete an investigation. The IGT also sought to build a profile of employees that lodge EN complaints.

5.39 Table 5.7 sets out the IGT's analysis of data from the ATO's Siebel case management system.

**Table 5.7: Timeframes for lodgement and actioning EN complaints**

	2007-08 (Elapsed days)	2008-09 (Elapsed days)
SG shortfall — EN complaint lodgement	693	692
EN complaint lodgement — allocation	138	84
EN complaint lodgement — completion	217	175

5.40 The IGT found that there is a considerable timeframe, approximately two years, between when an SG shortfall arises (that is, the due date for when an employer should have paid their employee's SG) and when the employee lodges an EN complaint.

5.41 The IGT also found that a large number of EN complaints are from ex-employees suggesting that employees are waiting to leave employment before they lodge an EN complaint. This is consistent with the observations made by superannuation funds that most employees lodged complaints after they have stopped working for the employer or when the employer is close to liquidation. This delay in lodging EN complaints is often critical in achieving a successful outcome.

5.42 In addition, the IGT found that it has taken approximately three months for an EN complaint investigation to be commenced, far beyond the 28-day timeframe commitment. However, the ATO advises that it is now meeting the 28-day timeframe commitment for 2009-10, indicating on going improvements.

5.43 For the purposes of measuring performance with the 4-month and 12-month completion timeframes, the ATO takes as the relevant start time the date the EN complaint was allocated to a tax officer not the date of receipt of the EN complaint. Therefore, a delay in commencing the actioning of an EN complaint will not be reflected in the ATO's performance regarding its completion timeframes.

5.44 Table 5.8 outlines the ATO's performance in meeting the SG responsiveness timeframes in the 2007-08 and 2008-09 income years taking the date of the EN complaint as the start date for measuring performance.

**Table 5.8: ATO performance in meeting the SG responsiveness timeframes**

Commitment timeframes	2007-08		2008-09	
	Number of cases	%	Number of cases	%
<b>Completed within 4 months from receipt of EN - target 50 per cent</b>				
Yes	3,029	23.7	6,512	33.1
No	9,731	76.3	13,184	66.9
<b>Completed within 4 months + 28 days from receipt of EN - target 50 per cent</b>				
Yes	4,316	33.8	8,883	45.1
No	8,444	66.2	10,813	54.9
<b>Completed within 12 months from receipt of EN - target 90 per cent</b>				
Yes	10,990	86.1	18,623	94.6
No	1,770	13.9	1,073	5.4
<b>Completed within 12 months + 28 days from receipt of EN - target 90 per cent</b>				
Yes	11,349	88.9	18,878	95.9
No	1,411	11.1	818	4.1
<b>Total finalised</b>	<b>12,760</b>	<b>100</b>	<b>19,696</b>	<b>100</b>

5.45 When using the EN receipt date as the reference point, it is evident that the ATO does not meet its 4-month standard, with approximately 28 per cent of EN complaints finalised within 4 months of receipt as compared to 73 per cent under the ATO's measurement. Even where an allowance is made for the 28 days the ATO has to commence an investigation, it only finalised 39 per cent of EN complaints within the

4-month timeframe. The IGT acknowledges that a significant proportion of the complaints received are incomplete (not valid) and require follow up action by the ATO before compliance action can commence.

5.46 In addition, the IGT found that the ATO first met the 12-month timeframe in the 2008-09 year, with approximately 95 per cent of EN complaints having been finalised within 12 months of receipt.

5.47 The IGT believes that from a taxpayer perspective, the more appropriate measure of performance with the commitment timeframes is from the time that an employee lodges a valid complaint with the ATO not the date that the ATO allocates the case for actioning.

## **RECOMMENDATION 6**

To improve transparency of the time taken for the ATO to complete its compliance action in response to employee notifications, the ATO should also measure its performance with the 4-month and 12-month completion timeframes from the date that an employee lodges a valid complaint with the ATO.

### **ATO response**

Agree.

We understand this recommendation proposes the ATO to measure its performance with the 4-month and 12-month completion timeframes from the date an employee lodges a valid and complete complaint with the ATO. We classify a complaint to be valid and complete when all the required information necessary to commence compliance action is provided by the employee.

We will implement these new performance standards in the 2010/11 financial year.

## **CHANGES IN EN COMPLAINTS HANDLING PROCESSES**

5.48 In September 2007 the ATO implemented streamlined processes for actioning EN complaints in an effort to improve productivity. This was in response to the growing number of EN complaints and the prospect that the ATO could not meet its commitment timeframe targets.

5.49 Under the previous SuperG case management system, incomplete or invalid EN complaints did not flow through to the SG audit teams. Rather, such complaints were eventually removed from the system if the employee did not respond to a further information request. The ATO found that employees would only re-contact the ATO in a third of cases where there was outstanding information required to finalise the complaint, with the remaining employees not making further contact with the ATO. The ATO assumed that this was because they had checked their records or spoken to their employer to confirm their SG entitlements, although this assumption is not based on any research or analysis.

5.50 As part of the new Siebel case management system, incomplete or invalid EN complaints were allocated to staff for more personalised follow-up, leading to more employees providing further information on their EN complaint. The ATO states that its follow-up and rectification of incomplete and invalid EN complaints resulted in a 65 per cent increase in actionable EN complaints.

5.51 In response, the ATO implemented a number of procedures to streamline the actioning of EN complaints. The ATO advises that the following process improvements led to a 35 per cent reduction in case times and ensured that the ATO met two of the three timeliness targets.

- Improving the client profiling case plan to better identify low and medium to high risk employers.
- Actioning only the EN complaint in low risk cases and potentially all employees in medium to high risk cases.
- Better streaming of cases, with less experienced staff handling calls to employers and employees, which allowed the timely resolution of some cases. Where the EN complaint is identified as one that requires further audit action then the case is allocated to more experienced staff.
- Non-compliant employers are offered the opportunity to voluntarily disclose their SG shortfall by lodging a SGC Statement.
- Desk audit form is not longer used in the EN audit process. Rather, employers are asked to detail the number of employees, their ordinary time earnings, whether superannuation contributions have been paid on behalf of these employees and, if so, the amount of these contributions. Employers are not required to provide verification that the contributions have been paid to a superannuation fund.
- For non-response (to the opportunity to voluntarily lodge a SGC Statement) low risk employers, a default assessment is only raised for complainant or a sample of employees but not all employees.
- For non-response medium to high risk employers the default assessment is raised for all employees.

5.52 The ATO also modified its practice of rectifying incomplete or invalid EN complaints. It now sends a letter to employees advising them that the EN had missing or incorrect information and requesting that they contact the ATO with the mandatory information. At the same time, the ATO provides information to such employees about SG eligibility and recommends that they speak with their employer and superannuation fund to check that the employer has met their SG obligations.

### **Improvements to commencement timeframe processes**

5.53 In 2008-09 the ATO established a 'Pre-Audit' team as a means of improving the EN end-to-end process. This was following the ATO not being able to meet its commitment to commence all audit action within 28 days of receiving the complaint, with only 15 per cent of EN complaints meeting this timeframe.

5.54 The ATO advised that the actioning of nil outcome cases as a full audit case required extensive processes to be followed by audit staff, including several quality control points being signed off by team leaders. Although these processes can be lengthy and time consuming to complete in even a normal case, they become particularly onerous where it is a simple no further action (NFA) case, especially where 40 per cent of EN complaints are finalised with no SGC liability being raised.

5.55 The Pre-Audit team is primarily focussed on identifying these NFA cases early to avoid unnecessary administrative delays by undertaking pre-audit checks on all ENs received. The team assesses whether a case is to be escalated to full audit or whether it is a NFA case. NFA cases are finalised by the Pre-Audit team while those cases that are to go on to a full audit are handled by specialised audit staff.

5.56 The ATO anticipates a number of benefits from this process, including:

- Allowing the resolution of NFA cases quicker and with less work involved.
- Assisting the ATO to meet its commitment timeframe to commence all audit action within 28 days of receiving the EN complaint.
- Allowing specialist audit staff to concentrate on cases that are more suited to the full audit approach.
- In the event of a rapid rise in EN complaints being received (due to changing economic conditions) this dedicated team could more easily be boosted by staff to maintain the 28 day commitment and finalise the NFA cases.
- Fewer cases will flow through the EN process alleviating the procedural problems and reducing the possibilities of incorrect letters being sent.

### **ATO's end-to-end review**

5.57 As part of its internal end-to-end review the ATO examined its overall processes to see where efficiency gains could be made. While noting that there had been significant improvements in the handling of EN complaints and that the current EN process and systems were working, it identified a number of shortcomings:

- Once an audit case is created, then the current procedures do not focus on quickly finalising no further action cases. However, the introduction of the pre audit team has assisted in quickly identifying those EN complaints that should not progress to compliance action.
- There is no facility to distinguish simpler EN investigations from more complex cases, so all cases follow a similar path which is unnecessary for the simpler type cases and does not stream complex cases to high level staff. The ATO indicates that profiling of EN complaints by auditors determines the level of complexity of the case and more complex SG cases are streamed to high level staff for compliance action.

- The current Siebel audit case product is not well suited to the handling of EN complaints, which are a high volume SG product. There are lengthy work processes with five quality control points contributing to increased timeframes.
- SG auditors have decision support tools but there is scope to provide more electronic based tools as a way to improve efficiency in the handling of EN investigations.
- There is some evidence of staff disengagement from the EN audit processes, with staff not always following procedures or establishing other alternate processes.
- As standard exception reporting has not been developed then it is difficult to identify scope for improvement and training and learning opportunities. The ATO advises that it has established exception reporting for its SG responsiveness project and is currently following up with its data area on the feasibility of issuing this report on an ongoing basis.

5.58 The ATO review concluded that improvements needed to be made to the EN audit processes to improve how it keeps employees informed of the progress of their complaint and make productivity gains. The review recommended the introduction of a high volume case product along with a streamlined processing approach to the handling of EN complaints. This involves restructuring the EN procedures to develop a more prescriptive or 'production line' approach that will treat most EN complaints in a processing rather than audit approach. The aim of this approach is to efficiently stream EN cases, with simple cases being able to be finalised quickly whereas more difficult and complex work will be handled by higher level staff. The restructure will also involve:

- Fewer Siebel case management steps and fewer quality assurance checks.
- Developing more user friendly support tools which could help to reduce the administrative burdens imposed by the Siebel case management system and provide assistance and training to new staff – although any changes to the Siebel case management system cannot occur for approximately 12 months due to Change Program commitments.

5.59 The ATO anticipates that these improvements will introduce greater consistency in the EN process, procedures, audit sites and teams. This would also allow for better reporting and the more efficient finalisation of EN complaints, especially those requiring no further action.

5.60 The ATO's review also recommended the further promotion and use of the existing SG Product Forum as the optimal vehicle through which any further efficiency and refinements to the EN processes can be instigated.

## **IGT observations and findings**

5.61 As acknowledged by the ATO in its end-to-end review, there are risks associated with a move away from the current Siebel audit processes to a high volume case product. First, it would lead to fewer cases that need to be assessed under the

ATO's integrated quality framework, from 30 per cent of all cases to only 1 per cent of open cases. Even with a comprehensive audit process, which involves numerous steps that must be completed by auditors and five quality control points, errors have been identified in the classification of outcomes and decisions. It could also mean that there is a greater likelihood of incorrect results being recorded in Siebel leading to inaccurate management reporting.

5.62 Second, it could further undermine the ATO's commitments to government in relation to providing employees with more advice on the progress of SG complaints, especially if staff does not follow the required procedures in handling EN complaints.

5.63 While the IGT supports the ATO's efforts to improve the timeliness and efficiency by adopting a more differentiated approach, it is important that the ATO maintains adequate quality assurance checks around the handling of investigations and the issuing of letters.

5.64 In addition, the IGT believes that any efforts to improve the end-to-end EN complaints process needs to ensure that the end-to-end timeframes and outcomes are also measured and analysed. As noted by the ATO, the end-to-end process is contingent on efficiency gains being achieved in multiple areas across the ATO in parallel. The areas involved are Active Compliance (audit and EN complaint investigation), Operations (issuing assessments, processing payments received from employers and forwarding payments to superannuation funds), Provision of Written Advice (responding to employer objections) and Debt Collection.

5.65 There is a real risk that if SGC debts are not able to be collected (due to employer insolvency or because it is uneconomical to pursue the debt) or the ATO takes too long to collect the SGC debt, then the intent of the SG responsiveness project will not be met even if the commitment timeframes are improved. The IGT believes that the SG Product Forum needs to take a strong role in co-ordinating and analysing this information and instigating changes in the end-to-end process.

5.66 Currently, the ATO measures and reports on a number of deliverables including the number of SG complaints leading to employer checks, the dollar value of SGC raised and collected and the dollar value of penalties and interest. The IGT believes that the ATO should expand on the number of deliverables that the ATO uses to measure its performance and also reports to the public.

## **RECOMMENDATION 7**

To ensure continuous improvement of the EN complaints process, the ATO should measure the time it takes for an employee to receive their SG entitlement from the time that they lodge an EN complaint.

Equally, the ATO should record and analyse the outcome of all debt recovery cases arising from EN complaints to measure the effectiveness of the EN complaints process.

### **ATO response**

Agree, subject to our system's capability.

Our current systems are unable to track in full the path of an EN complaint. Our ability to fully implement this recommendation is contingent on the implementation of SG systems into the new enterprise platforms, which is not expected to occur within the next 12 months.

## **RECOMMENDATION 8**

As a means to better measure performance around SG administration and increasing transparency, the ATO should report on the following:

- the number of SG complaints leading to an SGC liability being raised and those leading to no result;
- the total number of employees whose superannuation entitlements are checked and the number of employers whose records are checked;
- the percentage of superannuation complaints resolved in accordance with the service standards; and
- the total amount and basis for SGC written-off.

### **ATO response**

Agree, subject to the data being readily available from our systems.

We note that some of this information is already reported, but we will seek to fully implement this additional performance reporting in respect of 2009/10 outcomes.

## CHAPTER 6 — SUPERANNUATION GUARANTEE ENFORCEMENT

6.1 Apart from undertaking audit activity, other strategies available to the ATO to address the non-compliant behaviour of employers include the application of Part 7 penalties and prosecution action. All three represent crucial leverage points in the SG system and the ATO's administration will have an important bearing on encouraging and maintaining compliance.

6.2 In the course of the Senate Select Committee inquiry a number of submissions suggested that the penalty system for SG non-compliance was too inflexible and can lead to inappropriate outcomes. One submission stated that the penalties in relation to late payments were harsh and a disincentive to employers to voluntarily disclose non-payments or difficulties in paying.<sup>9</sup>

6.3 During the current review, the ACTU and ISN expressed the view that employers are deliberately avoiding their SG obligations because of the low risk of detection and the lack of tough penalties for non-complying employers. They suggested that the underpayment of superannuation should be treated the same as the underpayment of wages under the *Fair Work Act 2009* and penalised with a civil pecuniary penalty of up to \$33,000. The ACTU also suggested that in the interest of general deterrence, the ATO should direct additional resources towards compliance activities like high-profile blitz campaigns in high risk industries to identify and prosecute businesses that are not complying with their SG obligations.

6.4 ASFA submitted that there is a need for greater powers to allow for the prosecution of employers who fail to pay superannuation. It observed that there is no provision to prosecute employers for failing to actually pay an employee's superannuation to a fund and suggest that an enhancement to the ATO's compliance capabilities where an employer fails to pay superannuation on behalf of an employee.

6.5 Submissions have raised concerns that the ATO is significantly reducing failure to lodge penalties where an employer fails to lodge a SGC Statement. Some employees believe that this suggests that the ATO is not giving their SG compliance obligations the same importance that it gives to tax revenue collection.

### APPLICATION OF PART 7 PENALTIES

6.6 Part 7 of the SGAA imposes, by way of administrative penalty, an additional SGC (referred to as 'Part 7 penalty') where the employer fails to provide when and as required:

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<sup>9</sup> Senate Select Committee on Superannuation and Financial Services, *Enforcement of the Superannuation Guarantee Charge*, April 2001, at 43.

- a SGC Statement; or
- information relevant to assessing the employer's liability to pay the SGC for a quarter.

6.7 This penalty effectively applies in two situations. The first situation is where a SGC Statement is lodged after the due date for lodgement (late lodgement). The second situation is when an employer fails to lodge a SGC Statement and the Commissioner assesses the employer's liability for SGC (default assessment).

6.8 The Part 7 penalty an employer is liable to pay is an amount equal to double the SGC payable by the employer. The Commissioner may remit all or part of the additional SGC payable by an employer.

6.9 In addition, an employer who makes a false or misleading statement which results in a reduced SGC being payable for a year is liable for a penalty. The amount of the penalty varies according to the amount of the 'tax shortfall' resulting from the statement.

6.10 Guidelines for ATO staff who are considering remission of additional SGC or administrative penalties imposed under s 284-75 are contained in Practice Statement Law Administration PS LA 2006/1.

6.11 The guidelines state that ATO staff:

... should bear in mind that the purpose of imposing penalties is to ensure employees' superannuation entitlements are protected and to encourage future voluntary compliance and continuing co-operation from employers. Genuine attempts to comply will be treated differently from situations where an employer does not make an effort to comply. This approach accords with principles of the Taxpayers' Charter and with the Compliance Model.

6.12 The guidelines provide that the Part 7 penalty should be remitted to some extent in all but the most extreme situations. This is because the SG regime already has significant disadvantages for employers who fail to comply with their obligations, including:

- The employer is not entitled to an income tax deduction for the SGC (while contributions to a complying superannuation fund, if made on time, are deductible).
- The SGC is calculated on salary and wages (while contributions to a fund, if made on time, are calculated by reference to an employee's notional earnings base which can be less than actual salary or wages because of additional payments made to an employee such as overtime earnings). However, the IGT notes that since 1 July 2008, an employee's notional earning base is the employee's ordinary time earnings, which includes salary and wages, shift loading, commissions and some bonuses.
- The SGC includes additional amounts – the administration and nominal interest components.
- GIC accrues on the SGC if it is not paid by the due date.

6.13 Table 6.1 outlines the basic level of remission, having regard to a number of situations.

**Table 6.1: ATO Part 7 penalty remission policy**

An employer self-assesses the liability for SGC after the due date for lodgement of the SGC Statement but prior to any action being taken by the Commissioner requiring lodgement of the statement or other information	Nil
An employer self-assesses the liability for SGC after the due date for lodgement of the SGC Statement in response to action taken by the Commissioner requiring lodgement of the statement or other information	Nil
Commissioner assesses the employer's liability for SGC based on information provided by the employer in response to the Commissioner's request.	10% of SGC
Commissioner assesses the employer's liability for SGC in circumstances where the employer has failed to provide information as requested.	20% of SGC

6.14 The guidelines also set out additional factors that must be considered in determining whether a lower or higher level of remission is appropriate. For instance, a lower level of remission could be warranted where an employer has a history of failing to contribute superannuation for employees or to lodge SGC Statements on time or has prevented or obstructed the Commissioner from determining the employer's liability for the SGC.

6.15 The existence of one or more of the following factors might justify a higher level of remission:

- A new employer will not generally be penalised in the employer's first year of operation provided the employer made a genuine attempt to comply with the SG obligations.
- An established employer with an otherwise good compliance history (a whole of client perspective should be taken) or the employer made a genuine attempt to comply but made an honest mistake in fulfilling their obligations.
- The employer has taken steps to mitigate the circumstances that caused the failure to fulfil the obligations or the employer provided a high level of co-operation to the ATO.

## **IGT observations and findings**

6.16 The lodgement of a SGC Statement by the due date is an important part of the SG system, demonstrated by Parliament imposing a penalty of double the SGC payable by the employer. SGC Statements inform the ATO that an employer has not met their SG obligations and allows the ATO to promptly follow-up and ensure compliance and payment.

6.17 The IGT considers that ATO's current administration of the Part 7 penalty system does not promote the timely lodgement of SGC Statements.

6.18 The IGT found that the average Part 7 penalty rate in audit cases (those finalised by way of the ATO issuing a default assessment) was 10 per cent of the SGC. No Part 7 penalty was applied in cases treated as voluntary by the ATO, even where a SGC Statement was lodged more than two years after the due date and after an EN

complaint was lodged with the ATO. The average Part 7 penalty rate across all cases was approximately 4 per cent of the SGC.

6.19 The IGT notes that the Part 7 penalty regime, and its administration, differs significantly from other agencies which are also responsible for protecting employee entitlements. For example, the FWO can and does seek the application of civil pecuniary penalties in the order of \$50,000 even for a \$5,000 underpayment in wages.

6.20 While it is important to encourage employers to comply, the IGT believes that the current administrative approaches, especially where an employer lodges a SGC Statement after an employee has lodged an EN complaint, do not provide an appropriate deterrent effect. Nor does it place sufficient importance on the need to protect employees' SG entitlements through the timely lodgement of SGC Statements.

6.21 The IGT believes that there is significant scope for the ATO to increase the penalties imposed on employers that fail to lodge a SGC Statement on time, especially for the more egregious and consistently non-compliant employers. This will encourage employers to lodge on time and better protect the superannuation of employees through the timely lodgement of SGC Statements. It will also help maintain a level playing field amongst employers by discouraging the unfair competitive advantage obtained by using unpaid SGC amounts as working capital or otherwise.

6.22 The ATO advises that a review of PS LA 2006/1 commenced in November 2009. This review will look at the guidance for audit officers for remission of penalties, and consider the imposition of penalties on employers who continuously lodge SGC Statements late.

6.23 The ATO states that aspects of the SG system (non-deductibility of the SGC and the imposition of the nominal interest charge and administrative component) constitute a package of penalties.

6.24 The IGT has found that penalty effect of the non-deductibility of the SGC and the imposition of the nominal interest charge and administrative component has resulted in the ATO exercising a far broader remission of the Part 7 penalty.<sup>10</sup>

6.25 The IGT believes that aspects of the current SG system that have a penalty effect on employers may not be the most effective deterrent against the non-payment of SG entitlements and the non-lodgement of SGC Statements. Many employers become aware or understand the financial impact of the current penalty system only after the ATO has issued an assessment raising doubts of how effective the penalty system currently is in encouraging voluntary compliance, especially around the lodgement of SGC Statements.

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10 The IGT estimates that if an employer paid SG on time for four workers on \$63,000, the net cost to the employer in a year is \$15,876. If the same employer was to pay SG one month late each quarter during the year the net cost to the employer is \$23,390 (without Part 7 penalties). If the ATO was to impose Part 7 penalties at a rate of 10 per cent then the net cost to the employer is \$26,323. Clearly, for small delays in paying SG most of the additional cost to the employer is attributable to the non-deductibility of the SGC. However, the nominal interest component would impose a more significant cost to employers for longer delays in paying SG.

6.26 The Taxation Institute of Australia (TIA) submitted that the SGC, especially its non-deductibility, is disproportionate to non-compliance. It believes that there would be a positive impact on SG compliance if the SGC was deductible for voluntary disclosures where the failure to comply with the SG obligations did not result from intentional disregard of the law.

6.27 The IGT also found it difficult to measure the deterrent effect of the non-deductibility of the SGC as there was no way to determine whether the amount claimed by an employer as a superannuation deduction includes SGC amounts without a detailed review.

6.28 From an administrative perspective, this makes it problematic for the ATO to utilise the non-deductibility of the SGC as a strong leverage point in punishing undesirable behaviour (the non-payment of superannuation by the due date) and promoting the desired compliant behaviour. It also means that the ATO would subject employers to higher compliance costs if it wants to examine whether an employer has inappropriately claimed a deduction for SGC amounts.

6.29 The administration of the SG system, and the ATO's ability to maximise voluntary compliance and deter non-compliance, may be improved if there was a simpler and more transparent penalty regime applying to the non-lodgement of SGC Statements and the non-payment of SG.

## **RECOMMENDATION 9**

The Government consider whether the current multi-faceted and complex penalty system applying to SG (such as non-deductibility of SGC, the application of nominal interest and the administrative component from the beginning of each quarter and Part 7 penalties) should be streamlined and better targeted to improve voluntary compliance.

To bolster the Part 7 penalty regime as part of an effective deterrent against non-payment of SG entitlements, and give greater importance to the lodgement of SGC Statements, the ATO should revise its policy and administration of the penalty regime to ensure it strikes an appropriate balance between:

- Discouraging the non-lodgement of SGC Statements by imposing penalties at a more meaningful level; and
- Recognising the need for appropriate remission in circumstances where the non-lodgement was due to circumstances outside the employer's control.

The ATO should seek to more widely publicise the outcomes of its application of Part 7 penalties to deter non-compliant behaviour but in a way that protects taxpayer secrecy.

## **ATO response**

This recommendation is largely a policy matter for Government's consideration.

For the part directed at the ATO we agree to the recommendation, but note the following information:

- The ATO is currently reviewing its administration of Part 7 penalty. This review will look at the guide for audit officers for remission of penalties, and consider the imposition of penalties on employers who continuously lodge SGC Statements late.
- The SGC already incorporates significant financial disincentives, such as nominal interest from the beginning of the relevant quarter, administration charges and loss of tax deductions. Any increase in imposition of Part 7 penalties must be finely balanced to ensure we are not overly penalising or imposing an unreasonable burden on otherwise viable employers.
- We will also consider suitable communication activities regarding publicising the outcomes of the application of penalties.

## **PROSECUTION ACTION**

6.30 Prosecution is a powerful instrument of deterrence and accountability and is the firmest of the compliance strategies available to the ATO. A prosecution is an action brought against an employer in a court for a breach of the law of the Commonwealth.

6.31 In 2002, the Senate Select Committee heard a number of consumer and industry groups critical of the ATO's lack of prosecutions.<sup>11</sup> Some suggested that the lack of prosecutions by the ATO can act as an incentive for non-compliance. In response the ATO indicated that it had developed a detailed prosecution policy and it had prosecuted a number of employers for failing to comply with SG requirements. It also stated that it did not believe that prosecution action was always the most appropriate method to address non-compliance as, in certain cases, it could have detrimental consequences for employers and employees without necessarily resulting in the recovery of the SGC liability.

### **Current ATO prosecution approaches**

6.32 In deciding whether to investigate or prosecute, the ATO is required to have regard to the guidelines set out in the Commonwealth Prosecution Policy. The policy provides that, as a general rule, the more serious an alleged offence is, the more likely it is to be prosecuted rather than dealt with by some other process. The ATO states that its investigative resources are limited and should be focussed on the most appropriate cases in accordance with the ATO's policies.

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<sup>11</sup> Senate Select Committee on Superannuation and Financial Services, *Enforcement of the Superannuation Guarantee Charge*, April 2001, at 28.

6.33 Prosecutions for breaches of the SG law are primarily for failure to provide information under section 77 of the SGAA. However, the ATO may also prosecute for failing to respond to a request for information under section 34 of the SGAA.

6.34 The maximum prosecution penalties for failure to comply with a requirement of a tax law to furnish information or a statement is a fine of:

- \$2,200 for a first offence;
- \$4,400 for a second offence for both natural persons and corporations; and
- a third offence for a natural person of \$5,500 and/or 12 months imprisonment, and \$27,500 for a corporation

6.35 In 2006-07 a decision was made to focus on raising default assessments (and impose Part 7 penalties) rather than prosecute. The reasoning behind this decision at that time was that resources were concentrated on reducing the number of SG EN complaint cases on hand. Prosecution cases took significant resources and these resources were utilised in clearing the backlog of EN complaint cases.

6.36 The ATO believed that by raising default assessments (and imposing Part 7 penalties) there was an advantage of raising the liability sooner, and improving its chances of collection. The ATO also found that previous prosecution results indicated relatively small fines.

6.37 Figures in Table 6.2 reflect the number of successful prosecutions as a result of non compliance with section 77 notices and the value of fines applied for the period from 1 January 2004 to 31 December 2006.

**Table 6.2: Number and outcome of previous ATO prosecution actions**

Period	Number of fines	Total value (\$)	Average value (\$)
1 January 2004 — 30 June 2004	177	109,665	619
1 July — 30 June 2005	241	198,700	824
1 July 2005 — 30 June 2006	242	232,188	959
1 July 2006 — 31 December 2006	17	21,050	1,238

6.38 In 2006-07, Part 7 penalty per cases averaged \$4,300 whereas court imposed fines averaged \$1,200 for the same period.

6.39 In early 2008 the ATO decided to consider recommencing prosecutions to enable a higher profile to be given to SG compliance action. The ATO sought advice in respect to possible prosecutions under section 8C of the *Taxation Administration Act 1953* utilising sections 33 or 34 of the SGAA.

6.40 The advice received was to continue to utilise section 77 of the SGAA to capture the failure to provide SGC Statements given the vulnerability of successful challenge in attempting to utilise either sections 33 or 34 SGAA.

6.41 In 2008 the ATO commenced a pilot project to select cases for potential prosecution, identifying non-compliant employers in February and July 2008. As part

of this project the ATO revised its procedures, support tools and scripting on issuing section 77 notices. The combined results were as follows:

**Table 6.3: Results from prosecution action for February — July 2008 period**

Event	Number of cases
Cases selected	64
Finalised from initial audit letter	33
Insolvent employers or no further action	17
Section 77 notices issued	24
<b>Of the 24 section 77 notices issued:</b>	
Responded to section 77 notice	11
Intention to prosecute letter issued	13
<b>Of the 13 intent letters issued:</b>	
No further action due to various reasons	9
<b>Referred to prosecution</b>	4
Successful prosecution (in 2009)	4
Total penalties imposed in 4 cases	\$2,700 plus \$466 in costs

6.42 The ATO advises that the project was successful in obtaining responses from employers and therefore fewer non-response default assessments being raised leading to fewer disputes. The ATO adopted this process to all high risk employers identified through data matching or third party referrals. High risk employers were selected on the basis of the following criteria:

- Four or more default assessments issued over the previous four years;
- SGC debt greater than \$10,000 or had other debt; or
- Outstanding income tax returns and BAS.

6.43 Table 6.4 sets out the project results from July 2008 to date:

**Table 6.4: Results from prosecution action from July 2008 to date**

Event	Number of cases
Section 77 notices issued	39
Response to section 77 notice or insolvent employer	36
In progress	2
Referred to prosecution	1
<b>Successful prosecution</b>	1
Penalties imposed in 1 case	\$500 plus \$122 in costs

## IGT observations and findings

6.44 The IGT agrees that prosecution action should be reserved for the more egregious employers. However, the current use of prosecution action has not had a significant deterrent effect due to the low number of cases selected for prosecution, the relatively small fines imposed and the absence of any wider community

communication of successful prosecution action (such as the ATO media campaigns accompanying successful prosecution action for GST and income tax fraud).

6.45 This is to be contrasted to the much greater range of graded penalties available to the FWO and its emphasis on civil pecuniary penalties as a means to achieve both specific and general deterrence.

6.46 Offences under the *Fair Work Act 2009* are punishable by a maximum fine of \$33,000 for a corporation. Responses and penalties available to the FWO consists of: mediation referral, advice to employees to refer matter to small claims court, issuing a letter of caution, issuing infringement notices, accepting an enforceable undertaking, issuing a compliance notice and commencing litigation proceedings for the imposition of civil pecuniary penalties.

6.47 The FWO website contains a comprehensive list of all legal action taken from 2006-07 onwards in imposing penalties for the breach of award conditions. This provides a strong message to employers and their advisers that breaches of working conditions and entitlements will be penalised.

6.48 The FWO has also received strong support from the Federal Magistrates Court and Federal Court in placing importance on the protection of employee entitlements. In the context of civil pecuniary penalties, the authorities have emphasised the significance of deterrence, both specific and general, in setting pecuniary penalties, stating that '[f]or a penalty to have the desired effect, it must be imposed at a meaningful level'.<sup>12</sup>

6.49 The IGT would support the introduction of civil pecuniary penalties where an employer fails to pay superannuation on behalf of an employee. The IGT believes that the operation of these penalties under the *Fair Work Act 2009*, together with the FWO's approaches and leverage strategies, have provided a strong deterrent effect. The administration of the SG system would similarly benefit with the inclusion of such a penalty regime and ensure that employer superannuation contributions are provided the same protection as other employee entitlements.

6.50 It would also allow the ATO to adopt a far stronger and effective prosecution strategy, especially given the relatively small fines previously achieved by the ATO where it sought to prosecute employers for failing to provide information.

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<sup>12</sup> *Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited* [2001] FCA 383 at [13], Finkelstein J.

## **RECOMMENDATION 10**

To bolster SG prosecution action as part of an effective deterrent against non-payment of SG entitlements the Government consider whether the ATO should be afforded greater prosecution powers (such as the ability to seek the imposition of civil pecuniary penalties) where an employer does not pay SG and fails to cooperate with the ATO.

In the event that the ATO is given greater prosecution powers, the ATO should implement a media strategy that is designed to maximise the compliance leverage effect by raising the coverage and profile of SG prosecution cases.

Notwithstanding being granted these further powers, the ATO should adopt a stronger prosecution strategy for the more egregious and high-risk employers and should also finalise and publicly release its revised SG prosecution strategy and implementation plan.

### **ATO response**

This recommendation is largely a policy matter for Government's consideration.

Should the Government proceed with providing us the recommended prosecution powers we will then undertake to review our media strategy on prosecutions in light of the legislative changes and operational results.

For the part of this recommendation directed at the ATO, we are currently reviewing our SG prosecution strategy and agree to publish the key elements of this strategy once the review is complete.

## **CHAPTER 7 — SGC DEBT COLLECTION PROCESSES AND OUTCOMES**

7.1 This chapter considers the ATO's processes and timeliness in collecting unpaid SGC. The ATO's failure or inability to collect unpaid SGC will have a direct impact on taxpayers' retirement benefits. The underlying policy behind SG is to ensure that as many Australian employees as possible have access to superannuation for their retirement. It is therefore important that the ATO's administration of SG optimises voluntary compliance as well as the detection and collection of unpaid SGC to the benefit of taxpayers.

7.2 Ultimately, raised SGC liabilities that the ATO is unable to recover represent lost retirement income for Australian employees, who in many instances represent those that are most reliant upon SG for retirement support. It also increases the financial burden on future governments in having to make larger outlays for age pension payments.

7.3 As part of the 2007-08 Commonwealth Budget the ATO received an additional \$125.7 million over four years to reduce the existing stock of taxation debt and outstanding SGC payments owed by employers. The budget papers state that the enhanced debt recovery will ensure that the level of collectable taxation debt is manageable over the longer term and is expected to result in additional revenue collection of \$140 million over four years.

### **ATO SGC DEBT RECOVERY FUNCTION**

7.4 All SG compliance activities are managed through the ATO's Siebel case management system. Once a SGC assessment is raised (either through the ATO issuing a default assessment or the employer lodging a SGC Statement) then the SGC debt is recorded on a separate SG accounting system.

7.5 Following the issuing of an SGC assessment to the employer, a letter is also sent to the employee informing them of the outcome of the ATO's investigation. The case is then closed on the Siebel case management system. As part of finalising the investigation, SG auditors do not actively seek to promote payment of the outstanding SGC debt such as having employers enter into a payment arrangement.

7.6 The ATO advises that auditors, at the commencement of compliance action, do actively encourage employers to pay any shortfalls immediately or as soon as possible and even offer to send them payment slips, if requested. In addition, the standard letter issued upon the finalisation of an audit sets out the penalties associated with the non payment of SGC. However, the ATO is currently reviewing its processes surrounding the negotiation of payment arrangements by SG auditors to determine if they can be aligned to similar payment arrangements entered into by other compliance areas.

7.7 If a SGC debt remains unpaid for more than 28 days beyond the due date, then a case is created in the ATO's Receivables Management System, its debt collection case management system. The ATO's SGC debt recovery action is handled within the Operations area, separate from the SG compliance area.

7.8 Where the SGC debt is below a certain threshold then it may be referred to the ATO's external debt referral mercantile agents for collection. All other SGC debts are risk assessed and actioned in accordance with the ATO's SGC debt collection strategy. Key elements of this strategy involve:

- Where employers are having difficulty paying their SGC debt, then the ATO will work with them to find a payment solution that fits their individual circumstances to ensure that viable businesses are not forced into liquidation.
- Early intervention for employers with new SGC debt, including pre-emptive action at the time of issuing the SGC assessment, the use of reminder and demand letters and the greater use of dialler technology.
- Preferred use of payment arrangements as the most efficient and cost effective way to recover SGC debt for both the employer and the ATO.
- Firmer action on employers who continually fail to meet their obligations, those who continually default on agreed payment arrangements or who do not have the capacity to pay. Firmer action includes negotiation, garnishee action, the use of tax credits to offset SGC debt, the issuing of notices of intended legal action and the issuing of creditor's statutory demands under the corporations law. The ATO remains willing to negotiate with taxpayers even after the commencement of legal or firmer action.
- Referral to legal action including the issuing of summons, bankruptcy action and liquidation proceedings.

7.9 The ATO advises that it also has specific debt collection approaches for higher levels of SGC debt including the use of campaigns and case ownership of debt cases.

7.10 Throughout the debt collection process, write-off may be identified as the most appropriate and cost effective course of action. A SGC debt may be written-off where it is either irrecoverable at law or uneconomical to pursue. Irrecoverable debts mainly relate to circumstances associated with insolvency. On the other hand, a debt may be treated as uneconomical to pursue if:

- it is probable that the total cost of recovery action will exceed the return to the Commonwealth; or
- the taxpayer has no assets or funds and there is little chance of their financial circumstances improving.

7.11 The ATO states that the decision not to pursue a SGC debt on the grounds of being uneconomical to pursue is governed by an assessment of the impact upon employees on whose behalf the SGC is owed. The ATO indicates that this approach will often result in the pursuit of a debt where the cost of recovery may exceed the

amount of SGC owed as it is mindful of its role in protecting retirement incomes and the broader effect on voluntary compliance.

7.12 The ATO also advises that work is underway to improve its SGC debt collection processes including:

- Reviewing case selection for early intervention using dialler technology and referral to external debt collection mercantile agents.
- Decreasing the average handling time of cases and increasing legal action.
- Collaboration between the Debt and Superannuation business lines to better identify assessments arising from audit activity and implement a differentiated strategy from voluntary assessments.
- Developing a more sophisticated forecast tool to identify high risk employers, including taking into account the impacts of insolvency and associated PAYG debts.

## ATO SGC DEBT COLLECTION RESULTS

7.13 Table 7.1 sets out the liabilities and collections in relation to SG compliance from 1998-99 to 2008-09, with Figure 7.1 providing a diagrammatic representation of these results.

**Table 7.1: Liabilities and collections in relation to SGC**

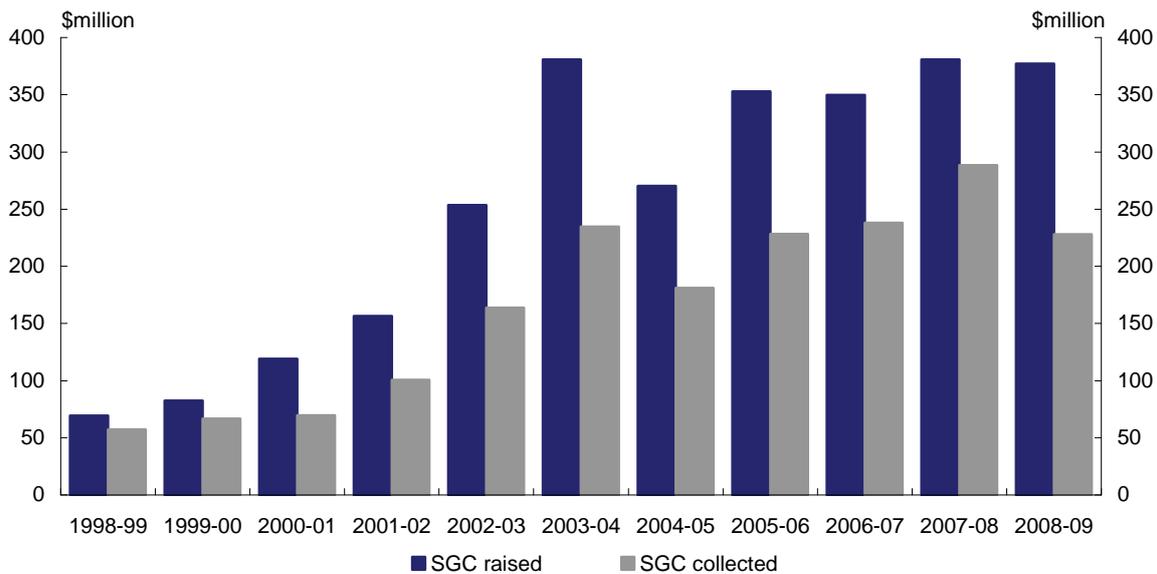
(\$m)	1998-99	1999-2000	2000-01	2001-02	2002-03	2003-04
<b>SGC raised</b>	69.4	82.5	119	156.4	253.5	380.8
<b>SGC collected</b>	57.2	66.7	69.8	100.7	163.6	234.6
<b>SGC debt</b>	12.2	15.8	49.2	55.7	89.9	146.2

(\$m)	2004-05	2005-06	2006-07	2007-08	2008-09	Total
<b>SGC raised</b>	270.2	352.9	349.8	380.8	377	2792.3
<b>SGC collected</b>	181.1	228.3	237.8	288.3	228	1856.1
<b>SGC debt</b>	89.1	124.6	112	92.5	149	936.1

Note: SGC raised refers to liabilities raised in a particular income year. SGC collected refers to superannuation guarantee charge collected in an income year and may include liabilities raised in previous income years. Both SGC raised and SGC collected reported include voluntary disclosures. SGC collections would include SG shortfall amounts, nominal interest, the administrative component, Part 7 penalty amounts and GIC, where the SGC was not paid by the due date.

7.14 The IGT notes that SGC raised increased substantially from 1998-99 to 2003-04, with a levelling-off from 2003-04 onwards.

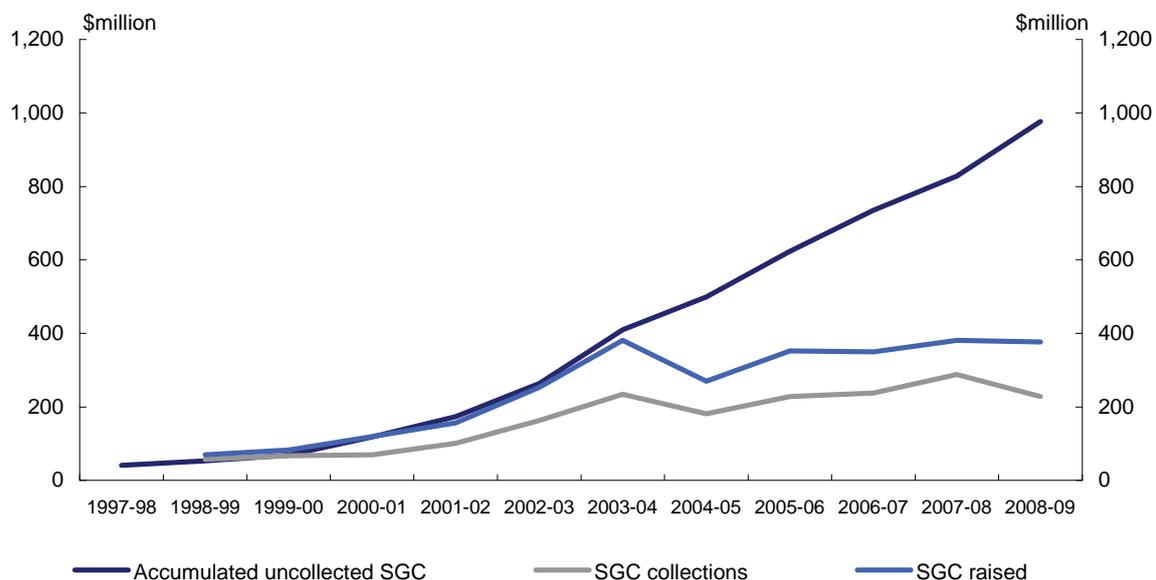
**Figure 7.1: Liabilities and collections in relation to SGC**



Note: In 1994-95 SGC raised totalled approximately \$20 million, rising to \$40 million in 1995-96 and approximately \$60 million in 1996-97 and 1997-98.

7.15 Figure 7.2 illustrates the accumulated amount of uncollected SGC at the end of each of the last eleven years. The IGT notes that accumulated uncollected SGC has increased substantially from 2000-01 while SGC collections have remained fairly steady (and in fact have dropped in 2008-09). The IGT found that uncollected SGC has accumulated to \$936.1 million (the difference between SGC raised and SGC collected).

**Figure 7.2: Accumulated uncollected SGC**

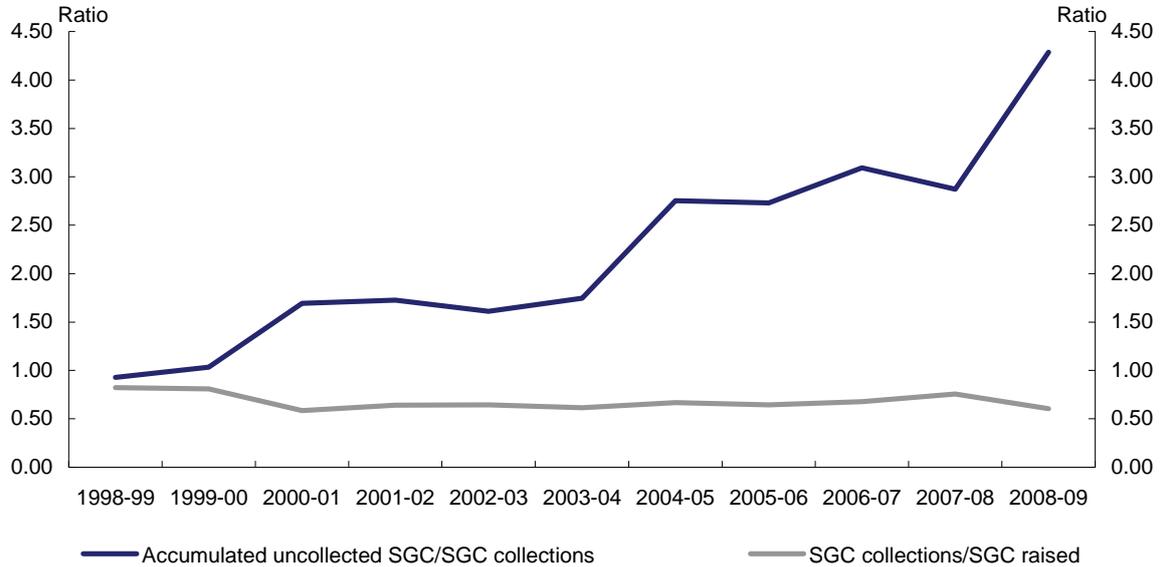


7.16 Figure 7.3 sets out the accumulated amount of uncollected SGC debt as a proportion of SGC collections. It is evident that from 1998-99 onwards there has been an upward trend, with SGC debt accumulating faster than SGC collections.

7.17 Figure 7.3 also illustrates SGC collections as a proportion of SGC raised. The IGT considers that the continuing decline suggests that SGC collections, while also

increasing over this period of time, have not kept pace with the increase in SGC raised. This has led to the escalation in SGC collectable debt.

**Figure 7.3: Accumulated uncollected SGC debt as a proportion of SGC collections and SGC collections as a proportion of SGC raised**



7.18 Table 7.2 sets out the ATO’s SGC collectable debt position. The ATO reports that in 2008-09 it achieved an 18 per cent reduction in SGC collectable debt and a 20 per cent reduction in SGC collectable cases. The ATO finalised 15,131 debt cases while 12,490 new SGC debt cases were referred to the ATO’s receivables management system for debt collection action.

**Table 7.2: SGC collectable debt amounts and cases**

	2004-05	2005-06	2006-07	2007-08	2008-09
<b>SGC collectable debt (\$m)</b>	237.3	287.3	325	281.53	231.4
<b>% change from previous year</b>	Up 52.8%	Up 21.1	Up 13.1%	Down 13.4%	Down 17.8%
<b>SGC collectable debt cases</b>	20,809	25,315	22,958	12,898	10,281
<b>% change from previous year</b>	Up 26.6%	Up 21.7%	Down 9.3%	Down 43.8%	Down 20.3%

7.19 In addition to the \$231.4 million in SGC collectable debt, the ATO advised that there was \$36.4 million (327 cases) in disputed SGC debt (subject to objection or litigation) and a further \$143.2 million (2,463 cases) relating to insolvent employers. A total of \$67.5 million was barred from legal action as it was attributable to the late payment offset.

7.20 The ATO advises that approximately 7 per cent of SGC debt cases raised in 2008-09 were for debts exceeding \$50,000. The combined value of this debt comprised about half of the total SGC debt raised for that income year. Nearly 40 per cent of all SGC debts cases were for amounts less than \$2,500 and the total SGC debt owed by this population comprised approximately 2 per cent of the total SGC debt raised for 2008-09.

## Market segment

7.21 Table 7.3 provides further detail on SGC collectable debt cases by market segment as at 30 June 2009.

**Table 7.3: SGC collectable debt cases by market segment**

Market segment	Number of cases	Value (\$m)
Micro enterprises	8,795	150.1
Small to medium enterprises	962	69.39
Large business	39	1.2
Government organisations	29	1.7
Not for profit organisations	167	5.4
Individuals	289	3.6
<b>Total</b>	<b>10,281</b>	<b>231.4</b>

## Debt levels

7.22 Table 7.4 provides a break-up of SGC collectable debt into each of the debt levels as at 30 June 2009.

**Table 7.4: SGC collectable debt by debt levels**

Debt level	\$m	Number of cases	Average debt/case
1	2.5	2,512	\$987
2	12	2,512	\$4,773
3	43.6	3,050	\$14,228
4	42.1	1,209	\$34,846
5	43.2	634	\$68,201
6	88	364	\$241,703
<b>Total</b>	<b>231.4</b>	<b>10,281</b>	<b>\$22,507</b>

## Age of collectable debt

7.23 The ATO advises that in 2008-09 it has reduced the number of aged SGC collectable debt cases (defined as debt cases greater than two years old) by 55 per cent and a corresponding 41 per cent reduction in debt relating to these aged cases. Table 7.5 provides an age profile of SGC collectable debt across 2007-08 and 2008-09.

**Table 7.5: SGC collectable debt by age of debt**

Age	2007-08		2008-09		2007-08		2008-09	
	Value (\$m)	% of collectable debt	Value (\$m)	% of collectable debt	Cases	% of collectable cases	Cases	% of collectable debt
0-12 months	119.1	42.3	135.4	58.5	5,606	43.5	6,341	61.7
1-2 years	68.9	24.5	40.7	17.6	2,057	16	1,594	15.5
2-5 years	86	30.5	42.4	18.3	4,439	34.4	1,535	15
5-10 years	7.3	2.6	12.5	5.4	751	5.8	783	7.6
10+ years	0.3	0.1	0.3	0.2	45	0.3	28	0.2

## Debt write-off

7.24 Table 7.6 provides detail on SGC collectable debt that has been written-off by the ATO in 2006-07, 2007-08 and 2008-09.

**Table 7.6: SGC collectable debt write-off**

	\$m	Number of cases
2006-07	135.6	7,848
2007-08	184.1	12,019
2008-09	180.2	7,716

Note: The ATO is not able to provide a breakdown of the amounts written off by the year to which the liabilities relate. Consequently, the period indicates the time that the debt was written off, not the period to which the liabilities written off relate.

7.25 The ATO advises that approximately 50 per cent of SGC write-off cases are irrecoverable at law although they account for 75 per cent of the total SGC write-off value, with the remaining 50 per cent of cases being uneconomical to pursue and account for 25 per cent of the total SGC write-off value. The ATO also believes that the value and proportion of SGC write-off is inflated (as compared to income tax and activity statement debts) due to progressively clearing the backlog of SGC write-off cases and the additional funding that has allowed it to action older and smaller cases.

## IGT observations and findings

7.26 The ATO's reported current debt holdings (\$478.5 million) are significantly lower than the accumulated uncollected SGC amount (\$936.1 million) over the eleven year period. This suggests that approximately \$457.6 million of SGC debt has been written off during this period (difference between accumulated uncollected SGC and current SGC debt holdings).

7.27 Together with the current \$143.2 million relating to insolvent employers, the IGT found that \$600.8 million in SGC raised by the ATO has not been recovered, with most of this debt having been written-off and representing known lost employee retirement savings.

7.28 The IGT considers that the current level of SGC collectable debt, and its reduction since 2006-07 by approximately \$94 million (including the reduction of SGC collectable debt cases by 12,677 cases), has been significantly influenced by the uncollected SGC that has been written off over the last three years.

7.29 The ATO advises that a significant component of SGC collectable debt is recorded for businesses that are already in severe financial difficulty (and in some cases insolvent). This means the cost to pursue and collection rate is considerably less favourable than for other business taxes where businesses' capacity and propensity to pay down their debts is more positive.

7.30 The \$94 million reduction of SGC collectable debt also includes late payment offset claims totalling around \$70 million.

7.31 The IGT notes that SGC debt will be more difficult to collect than other debts (such as income tax and activity statement) given that a large proportion of SGC raised,

approximately 73 per cent in 2008-09, arises from audit activity rather than voluntary statements.

## IGT fieldwork

7.32 As part of the field work, IGT staff examined 120 SGC debt recovery cases that had an associated EN complaint finalised in the 2007-08 income year. The results of the fieldwork analysis are presented in Table 7.8.

**Table 7.8: Debt status of SGC cases and the amount of outstanding debt**

Event	Number of cases	Amount of outstanding debt (\$m)	Event	Number of cases	Amount of outstanding debt (\$m)
Payment received — no debt action	10	0	Late Payment Offset lodged	3	0.25
Early collection action	9	0.18	Dispute	5	0.13
Payment arrangement	13	1.89	Insolvent employer/ bankruptcy	34	1.3
Notice of Intended Legal Action issued	4	0.41	Finalised — payment received	36	0
Legal action	6	0.19	<b>Total</b>	<b>120</b>	<b>4.35</b>

7.33 Across these 120 employers, the ATO raised a total of \$10.38 million in SGC and issued 1001 assessments, 610 of which were default assessments raising \$6.8 million while 397 were categorised as voluntary raising \$3.6 million.<sup>13</sup>

7.34 The IGT found that approximately 30 per cent of the debt recovery cases examined led to the non-recovery of the SGC debt either because the employer was insolvent or it was uneconomical to pursue the debt. In a further 30 per cent of cases the employer had paid the SGC debt as a result of ATO debt recovery action. Across the 120 cases, most of the SGC collectable debt is associated with payment arrangements and likely insolvent or bankrupt employers.

7.35 Table 7.9 provides a break-up of the number of default and voluntary assessments where the SGC liability remains outstanding, has been paid or has been written-off.

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13 The assessments issued may not necessarily directly relate to an EN complaint investigation.

**Table 7.9: Debt recovery outcome by assessment type**

Outcome	Assessment type	Number of assessments	Amount (\$m)
SGC debt paid	Default	229	2.03
	Voluntary	239	1.92
	<i>Total</i>	<i>468</i>	<i>3.95</i>
SGC debt partially paid	Default	20	0.13
	Voluntary	17	0.1
	<i>Total</i>	<i>37</i>	<i>0.23</i>
SGC not paid	Default	220	2.5
	Voluntary	120	1.23
	<i>Total</i>	<i>340</i>	<i>3.73</i>
SGC debt write-off	Default	135	2.13
	Voluntary	21	0.34
	<i>Total</i>	<i>156</i>	<i>2.47</i>

7.36 The IGT found that where a default assessment is raised, then it is twice more likely that a SGC debt will be outstanding one year after the issue date than where an employer lodges a SGC Statement during an audit.

7.37 In addition, the IGT found that where a default assessment is raised, then it is six times more likely that a SGC debt will be written-off than where an employer lodges a SGC Statement during an audit.

7.38 The IGT found that the ATO's debt collection processes do not adequately take into account the employers compliance behaviour in terms of how cases are actioned.

7.39 Default assessments by their very nature indicate that the employer has not engaged with the ATO or carried out their obligations under the SGAA. These employers generally reflect a low compliance attitude and as a result would tend to have debts outstanding for a longer period of time. There is a greater likelihood when default assessments are issued that the employer also has other debts outstanding, has not attempted to get their affairs up to date, may not even be operating any further and may already be in the process of insolvency proceedings. This situation contrasts with voluntary lodged statements where the employers are attempting to work with the ATO and engaging in a positive manner to rectify and make good amount s due.

7.40 By comparison, employers that voluntarily lodge assessments understand they have been deficient in keeping up to date with their affairs and are engaging with the ATO in getting their affairs into order and negotiating payment.

7.41 The ATO's end-to-end review also found that employers that voluntarily lodged SGC Statements (either after prompted by auditors during an investigation or unprompted disclosures) are more likely to pay their SGC debt than employers that were issued with a default assessment. This was supported by the observation of debt collection staff that it is more difficult to engage and recover debt from 'default' employers.

7.42 The ATO's review recommended that the SGC Debt area should be provided with details on whether the SGC debt is derived from employers that voluntarily lodged SGC Statements or default assessments.

7.43 The IGT supports this recommendation and believes that this detailed information would allow the ATO to develop better strategies for collecting SGC debt. For instance, the issuing of a default assessment indicates that an employer has not been cooperative during the audit (given the ATO's approach of seeking to encourage voluntary disclosure). When such a case proceeds to debt collection then the ATO should respond with firmer action much sooner than it currently does.

7.44 A more detailed analysis of the 'SGC not paid' category indicates that of the 340 outstanding assessments (with SG liabilities of \$3.73 million) a total of 95 assessments (with SGC liabilities of \$1.24 million) were classified as insolvency, bankruptcy or non-pursuit cases. Nearly all of these assessments were issued as default assessments.

7.45 The ATO is aware of the relatively high risk associated with default assessments and is modifying its collection strategies in relation to those employers who have been issued with a default assessment.

## **PROTECTION OF SG ENTITLEMENTS**

7.46 ASFA observed that although the compulsory superannuation system is a vital pillar to Australia's retirement income policy, employee's superannuation entitlements are not guaranteed. It suggested that the General Employee Entitlements and Redundancy Scheme (GEERS) should be expanded to also cover unpaid employer superannuation contributions, which are currently specifically excluded.

7.47 The IGT supports the expansion of GEERS to cover unpaid employer superannuation contributions. The review findings confirm that the employees missing out when employers become bankrupt or insolvent are those that are the most reliant on compulsory superannuation for retirement support.

7.48 An expansion of GEERS to cover unpaid SGC will also allow government to quantify higher future age pension outlays and act as a driver for improvements in the SG system to minimise employers defaulting on their SG obligations.

7.49 While the current legislation affords SGC debt a priority status in insolvency it does not provide the ATO with additional collection powers. The IGT supports the expansion of the director penalty notice provisions to cover unpaid SGC. If a company fails owing superannuation to employees, then the directors of the company should be made strictly liable for the unpaid superannuation liabilities of the company. This will act as a strong deterrent against employers not paying superannuation and also discourage phoenix practices. It will also enhance the ATO's ability to recover SGC debt on behalf of employees by allowing it to recover SGC even after a company has been wound up.

7.50 The IGT believes that expansion of the director penalty notice provisions and GEERS to cover SGC are complimentary. Where a company has not met their SG obligations then the ATO should have the ability to recover unpaid SGC amounts against the directors of the company personally. Only when the ATO has not been able to recover unpaid SGC from the company and directors should GEERS cover unpaid employer superannuation contributions.

## **RECOMMENDATION 11**

To better protect employees' SG entitlements and improve both deterrence against SG non-compliance and provide greater transparency of the cost of SG non-compliance on future age pension outlays, the Government consider:

- Expanding the director penalty regime to apply to unpaid SGC liabilities of the company; and
- Expanding GEERS to cover unpaid SGC liabilities where a company has been placed into liquidation and the ATO has not been able to recover against the directors personally.

### **ATO response**

This is a policy matter for Government's consideration.

## **ATO SGC collection actions**

7.51 The ATO advises that all SGC debt is characterised as high risk and accordingly receives priority debt collection action in that firmer debt collection action and legal action is taken on cases of comparatively small value.

7.52 Employees and the joint ACTU, ISN, IFCC and AIST submission raised a number of concerns with the ATO's debt collection actions and possible suggestions. Some believed that the ATO does not have the resources to undertake thorough SGC debt collection activities and to take additional action to recover SGC debts.

7.53 It has been suggested that letters to employers with significant and accruing tax debts demanding payment should also require employers to provide proof that SG contributions in respect of employees have been made and request lodgement of SGC Statements. For example, before the ATO enters into a payment arrangement with employers, it should ask for proof that SG contributions are being made and ask for SGC Statements to be lodged.

7.54 Employees that have lost their superannuation entitlements have asserted that the ATO is not following up with liquidators by lodging proofs of debt in relation to unpaid SGC – rather it is asking that employees do so and is asking employees to contact liquidator even though employees have no standing. The IFCC also submitted that in insolvency cases it was rare for the ATO to lodge a formal proof of debt and appears to leave the pursuit of unpaid superannuation to the superannuation funds, the employees themselves or insolvency practitioners.

7.55 The view was also expressed that the ATO is not taking any legal action for insolvent trading or for breaches of director duties where companies go into liquidation with significant tax and SGC debts.

7.56 The ATO advises that once an employer becomes insolvent, (liquidator/administrator/trustee appointed), responsibility for collection of unpaid SGC transfers to the insolvency practitioner. However, ATO procedures require the lodgement of a Proof of Debt in all cases involving an SGC debt.

7.57 The ATO then directs enquiries from employees and super funds to the insolvency practitioner for the most up to date information as to whether funds are, or may become, available for payment of the unpaid SGC debt.

### ATO SGC collection results

7.58 Payment arrangements are the most common debt collection method utilised by the ATO in seeking to recover outstanding SGC, with an active payment arrangement in place for 26 per cent of all SGC collectable debt cases as at 30 June 2009.

7.59 Table 7.10 sets out more detailed information on the number of payment arrangements granted and defaulted.

**Table 7.10: Payment arrangements granted and defaulted**

	2007-08	2008-09
<b>Payment arrangements granted</b>		
Number of cases	16,996	11,436
Value (\$m)	368	252.8
<b>Payment arrangements defaulted</b>		
Number of cases	7,037	5,991
Value (\$m)	168.1	127.4

7.60 In 2008-09 the ATO granted 11,436 payment arrangements with a value of \$251.83 million.<sup>14</sup> In 2007-08 the ATO granted 16,996 payment arrangements with a value of

7.61 Table 7.11 outlines the firmer and legal actions taken by the ATO in 2007-08 and 2008-09.

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14 The ATO notes that there could be more than one payment arrangement granted for an entity in any period and across periods.

**Table 7.11: Number of firmer and legal ATO actions**

	2007-08	2008-09
Statutory demand (section 459E)	683	819
Garnishees	420	538
Court action	977	1,230

## IGT observations and findings

7.62 In many instances, ATO staff handles the debt collection process well – they listen and take into account the employer’s individual circumstances, they properly emphasise the priority of SGC debt over other tax debts in discussions and negotiations with employers and the ATO successfully recovers SGC.

7.63 However, the IGT observed that certain ATO debt collection approaches and practices, together with those identified by stakeholders in submissions and consultations, may have a detrimental impact on the efficiency and effectiveness of the ATO’s debt collection strategy in relation to SGC debt. These approaches and practices include the following:

- Debt collection cases are not allocated to a specific tax officer, but rather a number of officers may be involved at different stages in the debt collection process. After an employer enters into a payment arrangement then the case will go back into the pool of debt collection cases. If the employer defaults, then the case will be reallocated to another tax officer. In some debt collection cases examined by the IGT as many as seven tax officers were allocated throughout the debt collection process.
- Due to the long timeframes from the time that SG shortfalls arise to when the ATO begins debt collection action (often more than three years apart), the ATO’s task of recovering unpaid SGC is made more difficult. The ATO has limited avenues to take firmer action without initiating bankruptcy or wind-up proceedings and quite often tracing for garnishee purposes produces no results.
- There are definite resource limitations on the ATO in being able to take firmer action and initiate legal action.
- In many defaulted payment arrangements there is often little examination of the employer’s financial and compliance position before entering into further payment arrangements.
- The end result is that high risk SGC debt cases (such as uncooperative employers and defaulted payment arrangements) that are not selected for legal action tend to undergo ‘churning’ – that is, they are allocated and reallocated to multiple tax officers each taking similar debt collection actions such as issuing a notice of intended legal action and having the employer enter into a payment arrangement which is subsequently defaulted. In some cases examined by the IGT, an employer was issued with five notices of intended legal action over a 14 month period while other employers entered into six payment arrangements, all of which were defaulted.

7.64 It is important that the ATO's SGC debt collection approaches promote a level-playing field. As noted in the IGT's small business debt report, these approaches need to appropriately distinguish those employers that want to comply with their payment obligations but need short-term assistance to do so and those that are either incapable of meeting tax payment obligations within a relatively short time frame or are in serial default.

7.65 The distinct nature of SGC debt means that the ATO's approaches must also take into account that it is seeking to recover unpaid superannuation entitlements on behalf of employees. It acts in a 'trustee-like' capacity, given that employees have very limited powers to recover unpaid SGC. This means that employees are reliant on the ATO acting in their best interest and ensuring that the ATO's debt collection approaches and practices maximise the recovery of unpaid SGC.

7.66 New SGC debt cases should be risk-assessed not only on the basis of debt levels but also on the employer's previous compliance behaviours. For instance, the issuing of a default assessment at the audit stage should be a factor in initiating firmer action sooner. Likewise, an employer's current compliance with their SG obligations (that is, whether they have they paid all other superannuation on time or have lodged SGC Statements) and other lodgement and payment requirements are also relevant considerations in building an employer risk profile.

7.67 The ATO advises that it is adopting a number of key early intervention strategies including:

- Closer collaboration between the Debt and Superannuation business lines to improve the ATO's ability to identify and take appropriate action on high risk cases as early as possible.
- Issuing letters 28 days after the debt case has been created – where a letter would not be suitable, the first debt collection action will be an outbound call or referral to an external collection agency. The 28 day period is to allow for delays in the taxpayer receiving their SGC assessment notices.
- Outbound calls to taxpayers who do not respond to our letters, in as little as seven days after the letter has been issued in the case of larger debts.

7.68 The ATO believes that some of the operational improvements being made will address the problem of 'churning' and ensure defaulted arrangement cases are better managed. Trials are also being conducted in differentiating between voluntary lodged and audit raised (default) assessments for specific treatment action.

## **RECOMMENDATION 12**

To minimise SGC debt defaulters, the ATO should improve its risk identification techniques to better target high-risk employers with firmer action sooner. For instance, the ATO's debt collection processes should place greater emphasis on employers' previous compliance behaviour in determining how a debt case is actioned.

Where an employer has defaulted in their payment arrangement, the ATO should require further information regarding the employer's financial and compliance position before entering into further payment arrangements.

### **ATO response**

Agree.

We have already implemented most parts of this recommendation. Recent changes to superannuation debt collection activities include:

- reducing the average handling time of cases;
- ensuring staff place a greater emphasis on the compliance history of the employer;
- referring debt for legal action in a timelier manner; and
- obtaining additional financial information (not previously recorded) in default arrangement cases.

We are currently exploring options to further improve our case risk assessment and differentiated approach to SGC debt collection.



## **APPENDIX 1: ATO RESPONSE TO THE REVIEW**

Pages 3 to 8, attachment A of the ATO's response, contain the ATO's response to the IGT's recommendations.

These responses have been moved into the body of the report to remove duplication.





Mr Ali Noroozi  
Inspector-General of Taxation  
GPO Box 551  
SYDNEY NSW 2001

Dear Ali,

***Review of the ATO's administration of the Superannuation Guarantee Charge***

Thank you for your email of 16 February 2010, submitting the final draft report of your 'Review into the ATO's administration of the Superannuation Guarantee Charge'.

We are pleased that the review acknowledges that the ATO has taken a number of positive steps to improve its responsiveness to employee complaints.

We note that of the twelve recommendations from this review, five (recommendations 2 & 11 and large parts of 3, 9 & 10) are recommendations for the Government to consider.

Of the seven recommendations and three part recommendations directed to the ATO, we have agreed to nine and disagreed with one.

The ATO's detailed response to your specific recommendations is at Attachment A.

We would also like to comment on some of the findings and other aspects of the report.

***Finding 2.6/1***

Finding 2.6/1 states that :

*Over an eleven year period, the difference between SG Charge raised and SG Charge collected has accumulated to \$936.1 million, increasing substantially from 2000-01. Together with the current SG Charge debt relating to insolvent employers, approximately \$600.8 million in SG Charge raised by the ATO has not been recovered, with most of this debt having been written-off and representing known lost employee retirement savings.*

We note that APRA figures, for the same 11 year period, indicate employers have contributed \$482.2 billion on behalf of their employees. Non payment of \$936 million represents less than 0.2% of these contributions. We think that this is important context that should be added to the finding.

**Finding 2.6/7**

This finding refers to the ATO being '*heavily reliant on EN complaints as a source of risk identification in the SG system*'.

We are committed to investigating every employee complaint we receive on SG in a timely fashion, as we believe this is essential to maintain community confidence in the system.

However, 27% of our compliance resources working on SG this year are working on cases other than complaints. These cases are selected using a range of data matching and other techniques to identify risk. SG liabilities raised per case is generally higher from this work than from the complaints based work.

Accordingly, we do not accept that we are heavily reliant on complaints to identify risk. But we are committed to addressing all employee complaints.

I would like to acknowledge the co-operative and professional approach that Mr Andrew McLoughlin and Mr Tasos Mihail have taken throughout the course of this review.

Thank you for the opportunity to respond to this final draft report.

Yours sincerely



Bruce Quigley  
Second Commissioner Compliance

12 March 2010

## APPENDIX 2: ABBREVIATIONS

ABS	Australian Bureau of Statistics
ABN	Australian Business Number
ACTU	Australian Council of Trade Unions
ANAO	Australian National Audit Office
AIST	Australian Institute of Superannuation Trustees
APRA	Australian Prudential Regulation Authority
ASFA	Association of Superannuation Funds of Australia
ATO	Australian Taxation Office
BAS	Business Activity Statement
Commissioner	Commissioner of Taxation
EN	Employee Notification
FWO	Fair Work Ombudsman
GEERS	General Employee Entitlements and Redundancy Scheme
GIC	General Interest Charge
GST	Goods and Services Tax
FTE	Full Time Equivalent
IFCC	Industry Funds Credit Control
IGT	Inspector-General of Taxation
IGT Act	<i>Inspector-General of Taxation Act 2003</i>
ISN	Industry Super Network
LPP	Late Payment Penalty
MCS	Member Contribution Statement
MEI	Micro Enterprises and Individuals
NFA	No Further Action

PAYG	Pay As You Go
PAYG(W)	Pay As You Go (Withholding)
OTE	Ordinary Time Earnings
SG	Superannuation Guarantee
SGC	Superannuation Guarantee Charge
SGAA	<i>Superannuation Guarantee (Administration) Act 1992</i>
SME	Small to Medium Enterprises
SG 2000	2000 SG compliance survey
SG 2006	2006 SG compliance survey
TIA	Taxation Institute of Australia
TFN	Tax File Number