

18 December 2015

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

Email: eoreview@igt.gov.au

Dear Mr Noroozi,

Re: Review into the ATO's employer obligations compliance activities

In brief:

AIST supports the removal of red tape for employers, however we believe that this must not come at the expense of employees' entitlements. AIST does not support the existing model where a breach must be reactively reported by employees to the ATO, and supports the use of Single Touch Payroll, SuperStream and other technological improvements to more proactively monitor employers for non-payment. AIST believes that enforcement of other types of superannuation contribution by employers must urgently be addressed.

AIST welcomes the opportunity to make a submission on the matter of employer obligations and their compliance activities, noting that there are a number of different areas that this review seeks to cover.

Our comments in this submission are limited to the subject of employers' superannuation contributions. In a report compiled by Tria Investment Partners for Cbus¹, it is noted that there are losses from unpaid super which totalled \$2.6 billion in 2013, which costs affected Australians an average of \$3,800 annually. This amount translates to an annual loss for retired Australians of \$280 million (in real terms).

We note that considerable effort has been made by Government agencies and departments, including the ATO in order to ensure that employer obligations with respect to employees' superannuation entitlements are kept front of mind. However, we also note that occasionally, the balance that must be maintained between the rights of employees and the compliance obligations of employers can occasionally be tilted in the incorrect direction.

¹ Tria Investment Partners (2015). *Superannuation Guarantee non-compliance, Cbus, September 2015*. [report] Melbourne: Tria Investment Partners.

In particular, we note legislation, presently in front of the House of Representatives, which would seek to reduce penalties for late payment of obligations required as part of the superannuation guarantee (SG) to what would amount to a figurative slap on the wrist. In our submission to Treasury on the exposure draft of this Bill, we noted that²:

We are concerned that this ED fails to represent any serious attempt at reform. The measure reduces the costs of non-compliance to a trifling amount, with the administrative cost of \$20 being the only remaining serious disincentive. From the perspective of an employee, the expectation that a late payment is accompanied by more serious compensation for time out of the market is also not met.

AIST does not support this Bill. We believe that, as the report from Tria indicates, the problem of SG non-compliance is a growing one, and this indicates that with now 7% of the workforce affected (690,000 people), the problem can and will only be made worse by inconsequential punishments.

Notwithstanding the proposed changes to the SG charge, AIST understands that the obligations faced by employers can be complex, and that arrangements in paying contributions on behalf of employees to a number of different superannuation funds has, until quite recently, been problematic from an administrative perspective.

However, we also note that in recent times, the introduction of measures such as SuperStream mean that this situation can and will generally improve as employers, their payroll providers and entities which administer gateway and clearing arrangements implement newer technology to reduce costs and ease these difficulties.

We note that initiatives which are presently under development such as Single Touch Payroll (STP) have the potential to ease this further, raising the real question of whether there is a real “burden” on employers with regards to superannuation which would sit outside the axis of responsibilities which presently contains similar requirements, such as the distribution of payroll. We are already aware that STP has been considered a priority project for the ATO. We also note comments made in the report of the recent audit undertaken by the Australian National Audit Office which considered that the non-payment of superannuation obligations might also reflect a broader pattern of non-compliance, where there may be, for example, non-payment of income tax amounts withheld, or even non-payment of employees’ pay.

² Garcia, T. (2015). *Re: Simplifying and reducing the harshness of the superannuation guarantee charge.* [pdf] Melbourne: Australian Institute of Superannuation Trustees. Available at: <http://tinyurl.com/o3v29aq> [Accessed 15 Dec. 2015].

We believe that the implementation of STP has a larger role to play, not only in the reduction of employer red tape, but in future enhancements designed to better assist employers' own tax compliance. This would also better assist the ATO in risk assessment and verification, as well as have a role to play in ATO data matching.

AIST disagrees with the notion that the present arrangements are “punitive” or “inequitable”. In any given payroll cycle, the amounts of superannuation contributions that is payable for an employee are known. In typical circumstances, employees are paid weekly or fortnightly. Some may even be paid monthly. This jars with the requirements under the *Superannuation Guarantee (Administration) Act 1992*, where the only deadline that is provided is 28 days after the end of the quarter to pay the amounts due on behalf of employees who had amounts due for work undertaken throughout that quarter. 28 days is a full four weeks, and it is arguable that even the most disorganised employer would have difficulty understanding the extent of their superannuation obligations in that timeframe, let alone failing to submit contributions.

In addition, we point to the focus on cash flow, which we believe is misplaced. Employers must, by their very nature, pay their employees at regular intervals in order to ensure that, at the very least, they retain their work force. Superannuation contributions are presently less than a tenth of this amount. Therefore if cashflow is a legitimate concern, this is an argument for more timely payment of contributions, as well as more frequent payment of contributions. After all, employers paying quarterly are far more likely to notice larger portions of cash at these points, rather than smaller amounts departing the company with payroll.

Our comments so far have only considered the issue of Superannuation Guarantee payments, whose basis for calculation rests on and is paid in addition to amounts paid to employees as their regular pay. Employers also commit to making additional payments for or on behalf of their employees in addition to SG amounts. These can fall under the following headings:

- Salary sacrifice contributions;
- Regular contributions in excess of SG amounts, including award mandated amounts, over-award amounts and otherwise agreed amounts;
- One-off employer voluntary contributions; and
- Non-concessional contributions made from post-tax amounts.

We are unaware of any method or legal avenue available to employees to enforce payment of these amounts, despite these having been agreed on, and in two or more cases, withheld from total remuneration with the mutual understanding that the amounts would be on-forwarded to the employee's super fund.

On the subject of legal avenues and methods of enforcement for employees, we note that there appears to be no proactive way of determining when contributions – mandated or otherwise – are not made by employers. The current process which appears to be favoured by the ATO

requires employees to become aware of non-payments or shortfalls, and for this to be raised with employers prior to a complaint being registered with the ATO. This is problematic for several reasons:

- Although the non-payment/short-payment by the employer would be considered a breach by the employer, the expectation appears to be that the breach does not exist unless a complaint is lodged.
- The relationship between an employer and an employee is necessarily a relationship with a power imbalance. Therefore, the raising of a complaint with an employer may need to be treated somewhat sensitively.
- The sensitivity with which a complaint directly made to an employer must be treated pales against the possible implications for an employee in the circumstances where an employee escalates a complaint to the ATO. In either case, the potential exists for certain actions which could be taken in retaliation.

A better strategy would be for the ATO to become aware of the mismatch between employee pay and contributions through data collection methods. The potential already exists for the ATO to cross-match employees' pay with tax collected through existing data matching processes – we believe that this can be improved, and will be through initiatives such as Single Touch Payroll (STP). We also note the Member information eXchange (MiX) project which seeks to overhaul reporting by super funds to the ATO. Ideally, these initiatives should provide a red light to the ATO where contributions are not made, rather than relying on employees to make a complaint.

Further to this, we are aware that a loophole still exists where salary sacrifice contributions are used to satisfy SG requirements, or where salary sacrifice amounts may be used by employers to reduce the base upon which SG amounts are calculated. We would describe instances where employers engage in this kind of conduct as avoidance of their obligations.

We wish to make the following comments with respect to more specific issues raised in the review, together with the draft terms of reference.

Employees vs contractors and alienation of personal services income

AIST is concerned that a number of employers are shirking their responsibilities to their employees, by having them operating as contractors instead. In recent weeks, we have seen celebrated examples of this practice, where people provide regular employee-like services to employers under a contractual relationship, with the news media noting recent allegations involving Myer and Pizza Hut.

We note the findings of Tria Investment Partners, which noted that sham contracting cost \$0.3 billion in 2013. AIST believes that this can be reduced by aligning definitions of employees and contractors across different jurisdictions and different regulatory regimes.

We also believe that if a look through provision can be used to determine one's liability to income tax under provisions designed to combat alienation of personal services income, we believe that these provisions could be re-tweaked to determine an "employer's" superannuation obligations to a contractor. This could be in arrears, but would be better at the establishment of a relationship which is likely to satisfy the criteria of contractual relationships which might be caught under alienation of personal services income provisions.

ATO use of third party data

AIST has no real objections to the use of third party data to verify compliance. However, we naturally emphasise that this should be verifiable and from credible sources. In addition, we take the opportunity to remind that privacy considerations must be upheld at all times.

ATO guidance and tools

AIST believes that the ATO's website has been improved immeasurably in recent years, however we note that navigation around the site could be improved. Whilst we have no comment to offer regarding guidance for employers, we would expect that this would be consistent feedback.

Information and support for employees

We have concerns that, should an employee need to lodge a complaint, resources can be difficult to locate on the ATO's website. Anecdotally, we are aware of criticisms that the Google search engine routinely comes up with better matches on the ATO's website than what the website's own inbuilt search engine is capable of.

More generally, we are concerned that support for employees does not include the employees' own superannuation fund. We believe that lack of a whistleblowing feature for a fund which becomes aware of the non-payment of contributions for a member cuts across a trustee's fiduciary obligations. Whilst there are resources available to trustees to follow up non-payment such as services offered by Industry Funds Credit Control (IFCC), there presently exist no ability for trustees to notify the ATO themselves.

Finally, the requirement that employees lodge complaints based on their own detection of non-payment/shortfall has additional delays due to the statement cycle. This could be circumvented to a large extent if trustees themselves were able to lodge complaints.

Effectiveness of ATO actions with respect to phoenixing

We note increased concern of the practice of phoenixing and employees losing entitlements through this process. We note that one avenue of restitution for affected employees exist in that directors of companies can be personally liable for SG amounts in the event of the wind-up of a

company. However, the process is slow and requires legal action to be undertaken by employees of affected companies.

We note in addition that no such avenue for restitution exists in the event that other contribution types are not paid. Given that these are often in lieu of wages (which directors are also liable for if these are unpaid) we believe that this represents an opportunity for regulatory arbitrage by employers. Given that all superannuation represents deferred taxation, we would recommend that directors be liable for all forms of unpaid superannuation.

AIST would also support harsher penalties for persons who repeatedly deny entitlements to employees through phoenixing.

As we have also previously discussed in this submission, we also note that more proactive monitoring of contributions by the ATO would ensure that problems involving phoenix entities are able to be headed off before they become more serious.

AIST notes that the Fair Entitlements Guarantee (FEG) does not cover the SG. We note that the old General Employee Entitlements and Redundancy Scheme (GEERS) provided some coverage for superannuation entitlements.

AIST is concerned that the very name “Superannuation Guarantee” sends a mixed message if the guarantee is not completely guaranteed. We would support a national guarantee scheme to ensure that the SG is guaranteed.

If you have any further questions regarding this submission, please contact David Haynes, Executive Manager Policy & Research on 03 8677 3800 or at dhaynes@aist.asn.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Tom Garcia', is written over a light blue horizontal line.

Tom Garcia
Chief Executive Officer

The Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds.

As the principal advocate and peak representative body for the \$650 billion not-for-profit superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

AIST provides professional training and support for trustees and fund staff to help them meet the challenges of managing superannuation funds and advancing the interests of their fund members. Each year, AIST hosts the Conference of Major Superannuation Funds (CMSF), in addition to numerous other industry conferences and events.