



**THE TAX INSTITUTE**  
THE MARK OF EXPERTISE

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1 March 2017

Mr Mark Fitt  
Committee Secretary  
Senate Economics Legislation Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600  
**By email:** [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

Dear Mr Fitt

**Inquiry into the impact of non-payment of the Superannuation Guarantee**

The Tax Institute welcomes the opportunity to make a submission to the Senate Economics Legislation Committee in relation to the inquiry into the impact of non-payment of the superannuation guarantee (**Inquiry**).

**Summary**

Our submission below addresses our main concerns in relation to the Inquiry. In particular:

1. The Tax Institute recommends that further education and guidance is required to assist employers to identify employees versus contractors. We also recommend that consideration be given to aligning the definition of the terms employee and contractor for SG purposes with the same definitions used for pay as you go withholding.
2. The Tax Institute has concerns regarding the responses expected, or that may become required by tax agents and advisers who become aware of non-payment of the SG.
3. The Tax Institute considers that the timing issues regarding non-payment of the SG need to be addressed. In particular, we recommend investigating options to identify the non-payment of the SG in a more timely manner and for follow up action to be taken on a more timely basis.
4. The Tax Institute also recommends reducing the administrative burden associated with payment of the SG.

## **Discussion**

### **1. Legislative change – definition of Contractor and Employee**

The Tax Institute recommends that further education and guidance to provide clarity is required to assist employers (especially small and medium enterprises) to identify employees versus contractors. To most businesses, especially SMEs, the definitions are not entirely clear. There are still many grey areas in relation to these definitions. Further, the multi-factor test hinders a clear cut line between employees on the one hand and contractors and independent contractors on the other

In principle, The Tax Institute considers that the current education tools available on the ATO website to identify employees/contractors and the SG decision tools are useful resources. However, the result is highly dependent on the specific answers inputted by the user. Therefore, we consider further education and guidance is required.

To assist with this objective, The Tax Institute recommends that the ATO conducts a review of all its private rulings in relation to the definition of the term 'contractor' to ensure consistency.

The Tax Institute also recommends that consideration be given to aligning the definition of the terms employee and contractor for SG purposes with the same definitions used for pay as you go withholding. In time, all Commonwealth and State statutes should have harmonised definitions. This recommendation would reduce complexity, reduce compliance costs and increase clarity regarding these terms.

### **2. Responses expected from advisers and agents**

The Tax Institute considers that any measures that would require advisers and tax agents to report on non-payment of the SG may actually have a negative effect. In this regard, The Tax Institute considers that any such measures are likely to discourage employers from seeking assistance with difficulties regarding the SG from advisers and tax agents.

### **3. Timely identification of non-payment of the SG**

The Tax Institute considers that the time lag in identifying non-payment of the SG exacerbates the issue. If non-payment of the SG is not detected for 12-18 months, employers may find the cost of paying the Superannuation Guarantee Charge (**SGC**) and associated penalties prohibitive. If the problem is identified earlier when the SGC and penalties are minimal, employers are more likely to be able to rectify the issue rather than potentially face going out of business.

The Tax Institute recommends investigating options to identify non-payment of the SG in a timely manner so that those employers who are affected by this issue have the opportunity to rectify the issue prior to the SGC and penalties building to a point where a business may not be able to absorb the costs.

In this regard, The Tax Institute also suggests considering introducing more flexibility in relation to the application of the SGC and penalties. We are not suggesting a reduction in penalties for those employers who deliberately fail to pay the SG. However, flexibility in the application of the penalties where a reasonable mistake has been made by an employer should be considered.

The Tax Institute considers that the time lag in identifying non-payment of the SG partly stems from the ATO's inability to obtain data from superannuation funds in a timely manner. The existing reporting requirements for third party data to be provided to the ATO should be reassessed in order to address this issue without increasing the administrative burden on employers and superannuation funds.

#### **4. Reducing the administrative burden relating to payment of the SG**

The Tax Institute considers that reducing the administrative burden associated with the SG system is likely to improve compliance from those who are willing to comply.

The Tax Institute considers wilful non-payment of the SG is unacceptable. However, the SG system is legally and administratively very complex, particularly because of the availability of choice of funds. To simplify this for employers and reduce the administrative burden, The Tax Institute recommends considering:

1. Allowing employers to subcontract their SG compliance to clearing houses. Payments of the SG could be made by employers to the clearing house (i.e. equivalent to payment to the fund). The clearing houses would need to be heavily regulated to ensure they are doing their job in a timely and accurate manner.
2. Alternatively, employers may be given the option to use the ATO as a clearing house for all the SG payments by employers. Superannuation could be required to be paid as part of the BAS/IAS process each quarter. Employees could nominate their funds under the choice provisions directly to the ATO through digital means (e.g. MyGov).

Reducing this administrative burden is likely to improve compliance from those who are willing to comply.

Similarly, the SG should be a clear system which is difficult to avoid. Consideration should be given to the system and technology that could be used, such as single touch payroll and increasing electronic data transfers. Such technology would increase the transparency of the system and reduce non-payment of the SG.

If you would like to discuss any of the above, please contact either myself or Senior Tax Counsel, Professor Robert Deutsch, on 02 8223 0011.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M. Pawson', with a stylized, flowing script.

**Matthew Pawson**  
President