



**Submission to the Senate Standing Committee on Economics**

**Inquiry into superannuation guarantee**

**non-payment**

**Prepared by:**

The JobWatch Legal Practice: Gabrielle Marchetti, Ian Scott, John O'Hagan  
with the assistance of Rui Lee

Job Watch Inc  
Level 10, 21 Victoria Street, Melbourne 3000  
Ph (03) 9662 9458  
Fax (03) 9663 2024  
[www.jobwatch.org.au](http://www.jobwatch.org.au)  
Email: [admin@jobwatch.org.au](mailto:admin@jobwatch.org.au)

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## Contents

1. Introduction .....	3
2. About JobWatch.....	3
3. The economic impact of SG non-payment on workers .....	4
4. The role and effectiveness of the ATO: investigations and recovery of unpaid SG.....	6
5. Inadequacy of the self-assessment regime self-assessment .....	8
6. Enforcement rights of individual employees .....	9
7. The role of superannuation funds in detecting and recovering unpaid SG.....	10
8. Recouping SG in the event of insolvency.....	10

## 1. Introduction

Job Watch Inc. (JobWatch) is pleased to contribute to this inquiry into non-payment of the superannuation guarantee (SG).

This submission focuses on the following:

- The high likelihood of SG non-payment amongst vulnerable, low paid workers;
- the long response times to complaints by the ATO;
- the need for more detailed progress reports by the ATO;
- the inadequacy of the self-assessment regime;
- the lack of standing for individual employees to sue for SG non-payment,
- the lack of mandatory reporting obligations on super funds; and
- the particular difficulties faced by employees who are owed SG entitlements in insolvency situations.

## 2. About JobWatch

JobWatch is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most vulnerable and disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria, Queensland and Tasmania. The centre is funded by State and Federal funding bodies to do the following:

- a) provide information and referrals to workers from Victoria, Queensland and Tasmania via a free and confidential telephone information service (**TIS**);
- b) engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other appropriate organisations;
- c) represent and advise vulnerable and disadvantaged workers; and

d) conduct law reform work with a view to promoting workplace justice and equity for all workers from Victoria, Queensland and Tasmania.

Since 1999, JobWatch has maintained a comprehensive database of the callers who contact our telephone information service. To date we have collected approximately 182,000 caller records with each record usually canvassing multiple workplace problems including, for example, contract negotiation, discrimination, bullying and unfair dismissal. Our database allows us to follow trends and report on our callers' experiences, including the workplace problems they face and what remedies, if any, they may have available at any given time. JobWatch currently responds to approximately 10,000 calls per year.

This submission is based on the experiences of callers to and clients of JobWatch and the knowledge and experience of JobWatch's legal practice. Case studies have been utilised to highlight particular issues where we have deemed it appropriate to do so. The case studies which we have used are those of actual but de-identified callers to JobWatch's TIS and/or legal practice clients. Case studies appear in text boxes.

### **3. The economic impact of SG non-payment on workers**

JobWatch agrees with Industry Super's submission that there appears to be an epidemic of SG non-payment that particularly affects vulnerable, low paid workers. On the basis of our database, we also agree with the ATO's assessment<sup>1</sup> that small business employers are particularly prone to non-compliance with SG laws.

Most of the complaints we receive about SG non-payment come from small business employees and low wage workers with largely insecure working arrangements. Many of these callers are also paid on a cash-in-hand basis and are generally underpaid. Many of our callers are not financially literate and find it difficult to understand, let alone pursue unpaid superannuation entitlements. These callers often discover that they are owed superannuation a long time after their SG contributions were initially not paid. Sometimes it is too late for these employees to recover their SG entitlements because of a variety of

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<sup>1</sup>Australian Tax Office, Submission No 6 to Senate Standing Committee on Economics, *Superannuation Guarantee Non-Payment*, 10 February 2017, 33.

obstacles to enforcement action, including insolvency, difficulties in identifying the correct legal entity or the disappearance of the employer.

**Case Study: Jack - Non-payment of superannuation by employer**

Jack worked in a café as a chef for 6 1/2 years. The business was closed down on 29th May 2016 and all employees were told they were to finish up. Jack was paid \$9k for accrued but untaken annual leave. He was not paid any redundancy pay.

Upon closure of the business, Jack became aware that his superannuation fund had not received any SG contributions since June 2011 totalling approximately \$22k in outstanding payments.

He approached his boss about this and was advised she was dealing with some legal matters but the payment would be made by the end of 2016. Payment has not been made and his employer has since become uncontactable.

Jack informed the ATO, who have written to him advising that the employer's ABN has not been registered since April 2012. His employer was set up as a trust but the trust no longer exists and as such the ATO does not have a legal entity to sue.

**Case Study: Fatima – Inability to recoup unpaid superannuation due to employer insolvency**

Fatima and her colleagues had their super payments withheld for several months. The employer said the funds were being held in a separate account and would be distributed at a later undisclosed date. At the same time, the employee was forced to

**Case Study: Hiro – Difficulty to recoup unpaid superannuation due to employer insolvency.**

Hiro was told his company was going into liquidation. He was given two forms by his supervisor to navigate the insolvency process. He is owed four years' worth of superannuation. He was told he had until 4pm the next day to hand in his completed forms, otherwise he would not receive anything.

## 4. The role and effectiveness of the ATO: investigations and recovery of unpaid SG

### ATO's slow response times

JobWatch's callers are frustrated about the ATO's lack of activity in both of these respects: in detecting the SG non-payment and in investigating complaints. Many employees feel that if they manage to recover any unpaid SG it is often through their own efforts and not through the ATO's. One caller has asked us; 'Is someone meant to chase up employers?'

JobWatch recognises the steps that the ATO has taken to significantly improve on its complaint response outcomes. JobWatch recognises the improvements made by the ATO noted by the 2010 Inspector-General of Taxation's report into the ATO's administration of the superannuation guarantee<sup>2</sup> and the 2015 Australian National Audit Office's report on promoting compliance with Superannuation Guarantee Obligations<sup>3</sup>.

Despite these improvements, our callers still largely perceive the ATO's follow-up on their complaints as inadequate.

### **Case Study: Joe - Employer's failure to pay superannuation**

Joe's employer never contributed to his superannuation. When this issue was raised with his employer, he was abused and the non-payment of super was completely denied. Joe advised JobWatch that he already called the ATO to no avail in anonymously requesting an audit of the employer's company, as the investigation had taken a prolonged period of time without any success.

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<sup>2</sup> <http://igt.gov.au/publications/reports-of-reviews/administration-of-the-superannuation-guarantee-charge/>

<sup>3</sup> <https://www.anao.gov.au/work/performance-audit/promoting-compliance-superannuation-guarantee-obligations>

### **Case Study: Joan- Employer's failure to pay superannuation**

Joan has worked for her employer for 2.5 years. She has not been paid super since an initial \$200 payment when she began her employment. The employer has been audited (by the ATO) and several complaints have been made by other staff members but 'no one has been paid'.

More rigorous measures need to be employed to enforce compliance with the Superannuation Guarantee. The ATO should consider an increase in its resources dedicated to enforcing the superannuation regime, a regime which was intended to be fundamental to the welfare of Australians in their retirement.

**Recommendation 1:** JobWatch recommends that increased resources should be given to the ATO to improve investigation and enforcement outcomes of the SG regime.

### **Detailed updates required**

Many callers who have spoken to the ATO often complain that the responses provided by the ATO are inadequate. JobWatch recognizes the inherent difficulty and time involved when attempting to recover debts owed by non-complying companies. JobWatch also understands the time consuming nature of providing detailed updates. However, more can be done to ensure complainant satisfaction through proper disclosure and detailed progress reports.

JobWatch believes that the problem of complainant dissatisfaction can be largely addressed by ensuring that complainants are properly informed about the nature and details of the investigation conducted by the ATO. JobWatch understands that the enforcement of debts is a time consuming, resource intensive process. We firmly recommend that, as far as possible, the ATO should take steps to personally explain the complexities and intricacies of debt enforcement to complainants. Anecdotally, many of our callers have complained about feeling as if they had not been listened to thoroughly by the relevant authorities, perceiving responses by the ATO as largely scripted and robotic. The time taken to properly explain the

complexities and difficulties based on a personalized assessment of a complainant's situation will go some way to ensure that, at the very least, the complainant feels listened to.

**Recommendation 2:** JobWatch recommends that a more personal reporting approach should be taken with complainants when providing progress updates. The ATO should work towards providing more detailed explanations of the difficulties and complexities of recovering unpaid superannuation based on a personalized assessment of the complainant's situation.

## 5. **Inadequacy of the self-assessment regime self-assessment**

Employers are required to self-assess their liability to the superannuation guarantee charge. If they discover a shortfall, employers are then required to lodge a statement with the ATO. This enforcement mechanism is essentially reliant on the goodwill of employers. Without the ATO initiating a random audit, or an employee alerting the ATO to a situation where SG obligations are being avoided, an employer can get away with non-payment.

### **Case Study: Sally - Non-payment of SG by employer**

Sally suspected that her employer was not paying SG contributions into her fund. She made enquiries of her employer. The employer was adamant that contributions had been made. Later, Sally learnt from her super fund that no SG contributions had been paid.

Reliance on the goodwill of employers to self-assess their liability to the SG is clearly insufficient, as situations where employers are dishonest about non-payment of super go largely undetected by the ATO under the current system.

This deficiency is not new. Indeed, former Deputy Commissioner of the ATO, Leo Bartor, noted in 2000:

*‘Because this is a self-assessment regime, it’s been very difficult for us up to this point to put an accurate figure around what the actual levels of non-compliance might be.’<sup>4</sup>*

In this same interview, superannuation lawyer John Berrill described the capacity for non-compliance within the self-assessment scheme as *‘the superannuation black hole’*. A system that relies on employer self-assessments results in the burden of investigation being placed on employees.

## **6. Enforcement rights of individual employees**

Many JobWatch callers are frustrated to learn that they lack standing to sue their employer or their former employer for unpaid SG, if their entitlements simply come from the SG legislation and not from a common law contract, modern award or registered agreement. This means that employees cannot take private legal action but must rely on the ATO to enforce the SG legislation on their behalf.<sup>5</sup>

There should be a legislative option for employees to take action against their employers for unpaid superannuation. Perhaps this measure would alleviate the demand on the ATO’s services and allow affected employees a self-determinative route to ensuring payment of SG entitlements.

Giving individuals standing to sue for unpaid SG would also be particularly advantageous for vulnerable, low paid workers. Often the ATO will decide not to pursue matters regarding unpaid superannuation if the costs of enforcing the amount are higher than the amount to be recovered. The complexities surrounding recovering superannuation from informal business structures (which often have no ABN and pay in cash) places a large burden of recovery on the ATO which can limit recovery.

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<sup>4</sup> 7:30 Report Transcript, *Concerns employers aren’t paying compulsory superannuation*, (7 December 2000) [online] <<http://www.abc.net.au/7.30/stories/s221295.htm>> [Accessed 2 August 2007]

<sup>5</sup> *Kronen v FCT* [2012] FCA 1463, *Kronen v Commissioner of Taxation* [2013] FCA 416 .

**Recommendation 3:** JobWatch recommends that there be a legislated option for employees to take private legal action against their employers for unpaid SG. For example, the National Employment Standards within the *Fair Work Act* could include an entitlement to SG. This would enable employees to issue proceedings to recover unpaid SG, including by way of the small claims procedure outlined in the *Fair Work Act*.

## 7. **The role of superannuation funds in detecting and recovering unpaid SG**

Currently, employees must notify the ATO about their employers' non-compliance with SG obligations. There is no obligation on super funds to report detected non-compliance to the ATO or to the employee who is their member. If there were mandatory reporting for super funds, it is expected that enforcement action could be taken faster.

**Recommendation 4:** JobWatch recommends that it should be mandatory for super funds to report non-payment of SG to its members and the ATO.

## 8. **Recouping SG in the event of insolvency**

JobWatch's callers are dissatisfied with their inability to recover unpaid SG when their employer has gone into liquidation, or has been declared bankrupt.

Some of our callers have reported non-payment of SG to the ATO before the employer's bankruptcy or liquidation has started but by the time the ATO conducts an investigation the insolvency process has begun.

The ATO needs to investigate complaints quickly as there is only a small window between discovery of SG non-payment (which is a sign of the employer's financial trouble) and insolvency proceedings. The lengthy and secretive investigation process for recovery through the ATO is inadequate in these situations as rapid resolution is essential to prevent employee entitlements from being subjugated by other creditors.

## **The Fair Entitlements Guarantee**

The Fair Entitlements Guarantee (FEG) is a legislative scheme to assist ex-employees who have outstanding entitlements as a result of the liquidation or bankruptcy of their employer.<sup>6</sup> Currently the scheme does not pay out for outstanding SG.

Superannuation and wage entitlements sit side by side in the prioritising of payments within insolvency legislation,<sup>7</sup> yet if an employee cannot access their superannuation due to employer insolvency there are no other options available for remuneration.

The inclusion of superannuation in the FEG scheme would provide necessary additional assistance for employees in accessing the superannuation entitlements they are owed.

Unfortunately there are certain categories of employees, including international students, who are not eligible for FEG payments. If super is to be included in the entitlements that can be paid out under the FEG scheme, consideration should also be given to extending the scheme to international students.

### **Case Study: Rosa - Non-eligibility to FEG due to status as international student**

Rosa is an international student is owed a significant amount of SG. Her employer has gone into insolvency. She has made a complaint to the ATO but has been told that because of the insolvency the administrator must advise creditors of any funds available. Rosa knows her employer owes large amounts of money to many creditors, making recovery virtually impossible through the administrator. She makes an application to FEG for other entitlements, including outstanding wages and leave, but she is rejected on the basis that she is an international student.

**Recommendation 5:** JobWatch recommends that superannuation should be included within the FEG scheme.

<sup>6</sup> <[www.employment.gov.au/fair-entitlements-guarantee-feg](http://www.employment.gov.au/fair-entitlements-guarantee-feg)> [Accessed 10 February 2017]

<sup>7</sup> *Corporations Act 2001* (Cth) s 556.