



Senate Standing Committee on Economics

Superannuation Guarantee non-payment

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Executive Summary

The issue of unpaid superannuation is not new. Cbus and other organisations have been highlighting the issue for many years based on direct experience and research from Tria Investment Partners.¹ The issue has also been highlighted through inquiries by the Inspector-General of Taxation, the Australian National Audit Office and the Senate Economics Committee.

The level of non-compliance with payment of the superannuation guarantee, as estimated recently by the joint ISA & Cbus report is \$3.6 billion.²

This is a staggering amount of unpaid superannuation that creates;

1. A delayed and detrimental impact on individuals' retirement savings, robbing them of the benefits of investment earnings and compound interest;
2. An immediate and negative effect on the collection of government revenue through lost taxation – eg 15% of \$3.6 billion is \$540 million;
3. A greater strain on the age pension and other Government services which leads to greater strain on the Federal Budget.

The quarterly payment cycle for SG can create a significant risk of non-compliance and significantly delay detection where this occurs. Superannuation should be treated the same as wages and paid congruently. A national education campaign should inform employees of their rights and employers of their responsibilities regarding SG compliance.

SG non-compliance typically has 4 main sources:³

- Employer non-compliance (SG contributions are not made at all, or only in part);
- Cash economy (avoidance of SG, PAYG and other employment obligations);
- Sham contracting;
- Employer insolvency;

Unfortunately, the construction industry features all of these activities and is one of the worst industries for unpaid superannuation. Consequently, Cbus devotes considerable resources to ensure our members are paid their entitlements. This includes monitoring when companies fall into arrears, encouraging compliance when this happens and pursuing debts when they occur; however, greater legal standing and certainty for super funds would assist in this process.

The ATO have questioned the veracity of \$3.6 billion; however, they have not put forward an alternative figure. Cbus and ISA welcome a debate about the methodology used in the report and would encourage the ATO to publish their estimate as soon as possible.

The ATO can, and should, do more in relation to unpaid superannuation. We do not suggest it is entirely the ATO's responsibility to 'fix' this issue; however, they have an important role and should be given the necessary tools and resources to undertake it properly.

Penalties for SG non-compliance should be retained and strengthened.

¹ Tria Investment Partners, *Superannuation Guarantee non-compliance*, 2014 & 2015.

² *Overdue: Time for Action on Unpaid Super* – Industry Super Australia & Cbus 2016.

³ Tria Investment Partners, *Superannuation Guarantee non-compliance*, 2014 & 2015.

The current loophole that allows salary sacrifice to be counted towards SG compliance should be closed.

The human impact of this issue is negative and disturbing, especially in the long term where a lower retirement balance equals a lower standard of living.

Unfortunately, the nature of unpaid super can make it difficult to collect case studies because people often don't realise they have unpaid super or may be reluctant to talk publicly for fear of employment repercussions.

Two case studies are attached; however, these are expressed anonymously for the reasons explained above.

Recommendations:

1. Requiring real time payment and reporting of SG payments and requiring SG contributions to be paid congruently with the payment of wages.

Cbus also recommends:

A coordinated national education campaign to inform employees of their rights and employers of their responsibilities regarding SG compliance.

2. Amending the *Super Guarantee Administration Act 1992* so that employers cannot count salary sacrifice amounts towards compliance with their obligation to pay SG.

3. Facilitating collection of unpaid SG by superannuation funds directly.

Cbus also recommends that:

Funds seeking default status in industry awards be required to have a rigorous arrears collection process in place.

4. Measuring and reporting on the extent of the problem.

5. Increase ability of regulators to recover unpaid SG.

6. Retaining and using strong penalties.

7. Extending the safety net for unpaid entitlements in the event of employer insolvency.

About Cbus

Cbus was established in 1984 as one of the first truly national industry based superannuation funds, predominantly representing employees and employers in the construction and building industry.

Cbus, originally known as BUS (Building Union Superannuation Scheme), was established as a not-for-profit trust to receive the deferred wages of construction and building workers delivered as a result of industrial campaigns by building trade union members.

The Fund's Trustee, United Super Pty Ltd, was formed on the basis of equal representation between construction and building employer associations and employee trade unions. That equal representation governance model remains current and reflects both the industrial origins of superannuation and the continued affinity with the construction and building industry.

Over the past 32 years, Cbus has grown in membership and funds under management, becoming a full public offer fund in 1996. Today, Cbus has over 740,000 Fund members, over 120,000 participating employers (the majority of which are still drawn from the construction and building industry), with around \$37 billion of funds under management.

Cbus is regulated by the Australian Prudential Regulatory Authority (APRA) under the provisions of the *Superannuation Industry (Supervision) Act 1993* (SIS).

The 'Unpaid super' problem is not new

Cbus welcomes the Senate Committee Inquiry into this area; however, we note that several reviews and audits relevant to superannuation entitlements have already recommended various measures to improve SG compliance. Sadly, the issue does not appear to have improved or received the attention it requires.

It is also disappointing to note that the new multi-agency working group set up by the Minister in December 2016 was only publicly announced⁴ days before its interim report was due (which also hasn't been released) and has not sought industry consultation.

We also note that the Minister's statement happened to coincide with the first hearing of this committee's inquiry. Cbus hopes that the multi-agency working group is being provided with the scope to genuinely address the issue. We look forward to the release of the interim report by the working group and trust it will be provided to this Committee for examination.

- *Inspector-General of Taxation*

We also note that the IGT *Review into the ATO's employer obligations compliance activities* report was transmitted to the Minister on 2 December 2016 and has still not been released. This was a wide ranging review that included collection of unpaid SG by the ATO. Again, it is Cbus' hope that this Committee is provided with the IGT report to assist its deliberations.

The IGT 2010 report into the ATO's administration of the SG charge cited figures of known SG non-compliance in the vicinity of \$1.5 billion; however, this was only based on what has been raised through employers voluntarily lodging a SGC statement or the ATO issuing default assessment. Accordingly, "The actual SG non-compliance could actually be much greater than the figures suggest."⁵

⁴ Kelly O'Dwyer MP, Minister for Revenue and Financial Services, Media Release, 25 January 2017, *GOVERNMENT ACTING ON SUPER GUARANTEE NON-COMPLIANCE*

⁵ *Review into the ATO's administration of the Superannuation Guarantee Charge*, Inspector-General of Taxation, March 2010, Page 4.

Cbus obviously believes that the size and scope of the problem is significantly larger than \$1.5 billion and increasing. The evidence points to an issue that requires action from policy makers, regulators including wider community awareness regarding superannuation entitlements.

We note the IGT 2010 findings and recommendations in respect of the ATO's administration of the Superannuation Guarantee (SG) Charge⁶, in particular:

“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.”

We endorse this recommendation and believe it is still relevant and important today. However, it should be noted that Cbus advocates a stronger position; namely amending the SG Act and/or any other relevant Act to require SG to be paid congruently with the payment of wages.

In relation to the ATO's proactive work in the area of SG non-compliance we also agree with the 2010 IGT recommendation that:

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.

We note that the ATO rejected this recommendation and commented that:

“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.”

Regardless of whether there is \$1.5 billion, \$2.6 billion or \$3.6 billion in unpaid SG contributions then, by definition, the level of ATO resources allocated to addressing SG risks simply cannot be adequate.

We accept that it is not entirely the ATO's responsibility to 'fix' this issue; however, they have an important role to play and should be resourced accordingly.

Cbus' experience of the ATO SG compliance area has sometimes been frustrated by poor communication, extensive time taken in recovery and a lack of confidence in the willingness of the ATO to pursue arrears given their policy and resourcing restrictions. Feedback from Cbus members also suggests that employees often feel the ATO is not a key player in resolving issues regarding SG arrears.

⁶ Review into the ATO's administration of the Superannuation Guarantee Charge, Inspector-General of Taxation, March 2010.

It would appear that resourcing limitations continue to curtail the proactive work that the ATO can undertake in the SG non-compliance area and notes that any further efficiency dividends and reductions in the public sector will result in a further erosion of this capacity. We note the Community and Public Sector Union (CPSU) submission to this inquiry highlights the reduced staffing levels at the ATO and its impact in this area.⁷

Cbus welcomes the efforts of the ATO in more recent times to build relationships with the industry, the Fund and its service providers, work jointly and share information and encourages further like activities and on-going consultation.

We are also encouraged by the development of the Single Touch Payroll platform and the confluence likely between it and SuperStream data. Put together, these platforms will provide the ATO with a rich source of data to assist it and other agencies with monitoring SG compliance. However, we note that Single Touch Payroll is only applicable for employers of twenty plus employees at this stage. As will be discussed further, it is Cbus' experience that the bulk of non-compliance with SG occurs in smaller businesses.

Nevertheless, Single Touch Payroll offers the opportunity for Government to launch a major education campaign for the community about rights and obligations surrounding the payment of superannuation.

- *Australian National Audit Office*

The 2015 ANAO Report, *Promoting Compliance with Superannuation Guarantee Obligations*, emphasized the importance of compulsory superannuation to help employees, particularly lower paid workers, enhance their living standards in retirement and to supplement reliance on the age pension in the future.

They observe that:

“The age pension is the Commonwealth’s largest spending programme, with annual expenditure of \$39.5 billion in 2014, growing at 3.7 per cent per year in real terms to 2023-24. For the SG Scheme to operate effectively, the ATO has an important role to play, supporting employers to comply with their SG obligations and dealing with those that do not.”

The ANAO made four recommendations as to how the ATO could improve its SG compliance activities – broadly these related to better data analysis and engagement with external stakeholders, increased emphasis regarding compliance in communications and better alignment of its Superannuation Guarantee compliance strategy with the compliance activities conducted by other relevant business lines.

It is encouraging to note that the ATO accepted all recommendations.

⁷ CPSU - Submission No.20 - Superannuation Guarantee non-payment inquiry, 2017.

- *Senate Economics Committee*

The 2015 Senate Economics Committee Report⁸ into Insolvency in the Australian construction industry also voiced concerns regarding the issue of SG non-compliance and recommended that:

“Recommendation 5

The committee recommends that the ATO and ASIC increase their formal cooperation with superannuation funds to coordinate measures around early detection of non-payment of superannuation guarantee.”

Cbus endorses this sentiment and note that the ATO had been positively engaging with funds like Cbus through the Superannuation Industry Reference Network (SIRN) until the program of work ceased in 2015.

The ‘Unpaid super’ issue

Unpaid superannuation guarantee contributions are a significant problem for a number of reasons.

1. There is a delayed and detrimental impact on individuals’ retirement savings, robbing them of the benefits of capital accumulation and investment earnings;
2. They have an immediate and negative effect on the collection of government revenue through lost taxation;
3. Lower superannuation balances lead to a greater strain on the age pension and other public services which leads to a greater impost on the Federal Budget.

Non-payment of the superannuation guarantee is essentially non-payment of wages and should be treated with the same degree of seriousness by all stakeholders. Ensuring that superannuation is paid in a timelier and transparent manner would help to address the issue of unpaid super.

Payslips generally show superannuation amounts which (understandably) gives workers the impression that ‘the money is in the fund’; however, this is not always the case and employees are often not aware of the non-payment of SG.⁹ We also strongly concur with the IGT submission to this inquiry which notes that:

“even if employees are alerted to the non-payment at an earlier point in time, they may not always take any action. The reason is that they are usually amongst the most vulnerable in our society and may be too afraid of potential repercussions such as loss of employment.”¹⁰

We note that that Anglicare have also highlighted the disproportionate impact that unpaid super has on the lower paid and those affected by insecure work patterns.¹¹

Superannuation Guarantee payments under the SG Act are only required on a quarterly basis which can create a significant risk of non-compliance. The quarterly cycle means that detection of non-payment can be significantly delayed which can reduce the likelihood of recovery. To help address this issue and facilitate early detection of arrears, the Cbus Trust Deed provides that participating employers make superannuation payments on behalf of their employees monthly by the 1st day of the following month. Employers, upon joining the Fund, enter a contract accepting these payment terms.

⁸ *Insolvency in the Australian construction industry*, Economics References Committee, December 2015.

⁹ Helen Anderson and Tess Hardy, ‘Who Should be the Super Police? Detection and Recovery of Unremitted Superannuation’ (2014) 37 UNSW Law Journal 162 – page 168.

¹⁰ *Inspector-General of Taxation – Sub 21 (page 8) - Superannuation Guarantee non-payment inquiry*, 2017.

¹¹ *Anglicare – Sub No.22 - Superannuation Guarantee non-payment inquiry*, 2017.

Mandated real time payment and reporting of SG payments across all companies will encourage people to engage with their super and allow them to take timely recovery action where payments are not being made.

Recommendation - 1. Requiring real time payment and reporting of SG payments and requiring SG contributions to be paid congruently with the payment of wages.

Cbus also recommends:

A coordinated national education campaign to inform employees of their rights and employers of their responsibilities regarding SG compliance.

Superannuation can be complex for employers and for employees. The better that rights and responsibilities regarding superannuation are understood the more likely that non-compliance will be lower (inadvertent or otherwise). The advent and availability of Single Touch Payroll in the near future may provide an opportunity to promote superannuation compliance and highlight the various tools available to help employers meet their obligations.

Cbus has developed two market leading apps to make super easier and facilitate better compliance and monitoring. For example, the Cbus Employer Mobile App was launched in November 2016¹² and allows businesses to make super contributions, add new employees, generate receipts and manage account administration, all from the convenience of their mobile phone. The app is designed primarily for small businesses (employing less than 20 staff) who make up 97% of Cbus' total employer base of around 120,000 employers.

The app lets businesses add new employees by scanning their ID to automatically pre-fill and match their member details. Super contributions can then be made with the tap of a screen, PDF receipts can be easily created and business details can be updated anytime. The app login is secure and requires the use of a 4-digit pin or fingerprint technology once the account is verified.

The advancement in digital technologies and administrative platforms including clearing houses, Single Touch Payroll and secure, easy use apps and website portals render redundant the quarterly payment regime from an administrative burden point of view. Counter arguments that such a move would create cashflow pressures should be put to the test given that employee's superannuation is not business cashflow and paying more regularly would, in fact, smooth cashflow.

Cbus' employer app complements the highly successful member smartphone app that went live in 2014 and allows members to check (in real time) whether contributions have been made, update personal details, change insurance options and check investment returns. It is our intention to further develop the functionality of the member app to allow for messages to be sent to members to inform them when superannuation payments have been received, prompting greater engagement with and monitoring of their superannuation.

¹² <https://www.cbussuper.com.au/about-us/news/media-release/cbus-builds-industry-first-employer-smartphone-app>

Unpaid Super, Construction and Cbus

SG non-compliance typically has 4 main sources:¹³

- Employer non-compliance (SG contributions are not made at all, or only in part);
- Cash economy (avoidance of SG, PAYG and other employment obligations);
- Sham contracting;
- Employer insolvency;

Unfortunately, the construction industry features all of these activities and is one of the worst industries for unpaid superannuation. The cash economy is widespread, there is a large number of small businesses, insolvency is common, it has one-third of the nation's independent contractors and a high level of illegal 'phoenixing' activity as highlighted by the Committee's 2015 inquiry,¹⁴ and the recent report by Melbourne Law School and Monash Business School.¹⁵

Exacerbating this challenge is the incidence of sham contracting in the industry which sees some employers transferring obligations such as superannuation to individual workers despite those workers only providing their labour to one business.

Consequently, Cbus devotes considerable resources to ensure our members are paid their entitlements. This includes monitoring when companies fall into arrears, encouraging compliance when this happens and pursuing debts when they occur.

Cbus member profiling¹⁶ confirmed that 14.7% of members had experienced a problem with unpaid superannuation; however, a further 24.6% said 'I don't know' in response to the question of whether they had ever not been paid their super. In other words, only 60% of members were confident their super had been paid. Unfortunately, over a third of those people who had experienced unpaid super reported that their issue had not been resolved.

Being an industry fund, Cbus has maintained a strong affinity with the building and construction industry throughout its 32-year existence which has resulted in an intimate understanding of the issues confronted by businesses and employees in the sector.

It is Cbus' experience that the failure in payment of employee entitlements, such as superannuation, is often a sign of a deeper cash-flow problem that may be a precursor to insolvency. We are continually improving our processes around superannuation arrears processes to improve predictive modelling that may assist in averting the loss of entitlements through early intervention.

Business and employment in the industry is largely precarious because of the project nature of the work. In the 2012/13 financial year, some 57,000 businesses exited the industry with some 36,000 entering. The ABS notes that nearly all of the businesses working in the construction industry are small businesses and collectively are responsible for 82% of all employment in the industry.

The industry employs over 1 million people. Many of those are self-employed, with the industry having the second highest amount of self-employed behind farming. The IGT review into the ATO's administration of SG in 2010, noted ABS figures that showed at that time there was almost 1 million independent contractors in Australia, with nearly a third of those in construction. Cbus suspects that a proportion of these may be 'sham contracting' and should actually be classified as employees. The transient nature of the workforce is known and understood by Cbus and was one of the key drivers to the establishment of a national, portable, industry based superannuation fund.

¹³ Tria Investment Partners, *Superannuation Guarantee non-compliance*, 2014 & 2015.

¹⁴ *Insolvency in the Australian construction industry*, Economics References Committee, December 2015

¹⁵ Anderson, H, Ramsay, I, Welsh, M, and Hedges, J, *Phoenix Activity: Recommendations on Detection, Disruption and Enforcement* (February 2017)

¹⁶ *'Cbus Member Profiling 2016'* (based on 1912 responses)

However, the transient nature of the industry also presents significant challenges in ensuring employee entitlements are being properly paid and that gaming the system or non-payment is not occurring by a minority of businesses for the purposes of establishing an unfair and unlawful cost arbitrage between business competitors. Such gaming, as experienced by Cbus, includes 'short' or non-payment of superannuation entitlements.

What Cbus does to stop Unpaid Super

Cbus' Trustee, United Super Pty Ltd and its Board of Trustee Directors, has always taken very seriously its role in ensuring the fund is administered effectively, including its responsibility to ensure that superannuation monies owed are paid to members.

The Cbus Trust Deed provides that participating employers make superannuation payments on behalf of their employees monthly by the 1st day of the following month. Employers, upon joining the Fund, enter a contract accepting these payment terms. Of Cbus' 124,000 participating employers, 70% (86,000) accept the terms and conditions of the Cbus Trust Deed and their legal obligations to pay SG entitlements to their employees.

Cbus categorises employers into 4 Tiers as defined below:

- Tier 1 – Over \$40M in FUM or over 1000 members with Cbus
- Tier 2 - Between \$10M and \$40M in FUM, or between 150 & 999 members with Cbus
- Tier 3 – Between \$3M and \$10M in FUM, or between 20 & 149 members with Cbus
- Tier 4 – any employers who don't meet the criteria of Tiers 1-3

The breakdown of employers and Cbus members for each Tier is below:

- Tier 1 – 0.1% of Cbus employers and 8.2% of Cbus members
- Tier 2 – 0.3% of Cbus employers and 11.0% of Cbus members
- Tier 3 – 2.3% of Cbus employers and 25.5% of Cbus members
- Tier 4 – 97.3% of Cbus employers and 55.4% of Cbus members

Cbus has in place a rigorous arrears process designed to establish a level playing field of payment timing across the industry with a built in early detection process of payment failure. It is the Fund's experience that time counts in ensuring compliance with SG payments. Early detection of non-payment and intervention means a much greater likelihood of recovery of monies.

Failure to make payment within 28 days of the due date triggers an arrears letter to be sent to the employer reminding them of their obligations under the Trust Deed of the Fund, requesting payment and offering assistance.

Should payment still not be received after the elapse of another 10 days from the 1st letter, a further arrears communication is triggered reminding employers of their obligations and the possibility of being subject to legal action. Employers with greater than 10 employees are contacted by phone if they have not responded to the first arrears letter.

If payments are outstanding for at least 48 days, then an employer is classified as being in default or 'D status'. For example, December contributions are due 1 January. If they were not received, then an arrears letter would be sent on 28 January and a second arrears letter would be sent on 8 February if payment had still not been received. If money was still outstanding on 18 February then the employer would be placed into 'D status'.¹⁷

¹⁷ A flow chart of Cbus' arrears process is contained at Appendix A.

Cbus employers with 2 members or less comprise approximately 65% of all employers in arrears, whereas this employer subset represents approximately 90% of all 'D status' employers. Tier 4 employers (less than 20 employees) have 72% of the total members affected by arrears.

These figures show that although each Tier 4 employer has the smallest number of members attached to them, the sheer volume of these employers with arrears mean they also represent the employer segment with the greatest number of members impacted by Arrears. Tier 4 employers affect almost double the number of members than all the other employer Tiers combined.

Coupled with our own efforts, our sponsoring organisations, trade unions and employer associations, also play a role in educating members about Cbus requirements and in being parties to industrial agreements that often stipulate amounts of superannuation to be paid on behalf of employees, the fund to which they are paid and the timings of those payments.

The parties to those agreements have an interest and responsibility in ensuring that those agreements are complied with on behalf of their members and the industry at large. Our trade union sponsors effectively work with employers, employees and the Fund in ensuring SG payments are made.

Superannuation funds such as Cbus are well placed to detect and potentially recover unpaid SG on behalf of their members. We note that a recent major report on phoenixing observed that:

“Despite not being creditors themselves, superannuation funds, trade unions, and credit reporting agencies are arguably the ‘canaries in the coal mine’ when it comes to harmful phoenix activity. Superannuation funds may notice that a particular employer ceases to remit contributions, well before any individual employees become aware of the non-payment of their own superannuation entitlements.”¹⁸

We concur with the Report’s recommendation that there should be better liaison between the ATO, ASIC and superannuation funds to assist early detection and that privacy provisions should be reviewed to facilitate improved information sharing.¹⁹

Our knowledge of the industry and constant interaction with employers give us a much better chance of collecting unpaid super than many of the individuals who experience it. However, we do not have a direct, clear, enforceable mechanism for doing so, both in cases where the employer is not subject to the terms of the trust deed and where an employer becomes insolvent. When an insolvency practitioner is involved they are often reluctant to liaise with funds due to perceived privacy issues; and where the ATO issues a proof of debt this takes precedence over the Fund’s actions. Super funds can, and should, be allowed to play a greater role in collecting unpaid super directly, particularly where employees do not have the time or understanding to pursue it themselves.

Recommendation – 3. Facilitating collection of unpaid SG by superannuation funds directly

Cbus also recommends that:

Funds seeking default status in industry awards be required to have a rigorous arrears collection process in place.

Cbus believes that unpaid super may only get worse unless funds seeking default status are required to have in place a rigorous arrears collection process.

¹⁸ Anderson, H, Ramsay, I, Welsh, M, and Hedges, J, Phoenix Activity: Recommendations on Detection, Disruption and Enforcement (February 2017) – page 40.

¹⁹ Recommendation 10 – page 42.

The current default fund criteria contained in the *Fair Work Act*²⁰ does not include the issue of Superannuation Guarantee compliance. Unpaid super represents a significant threat to the balances of many Australians. Only superannuation funds that have stringent process in place for retrieving unpaid Superannuation Guarantee contributions on behalf of members should be considered when assessing funds for default fund status.

Industry Funds Credit Control

Should the Funds approach to employers via arrears letters not succeed in eliciting payment 48 days from the due date, we ask our credit control agency, Industry Funds Credit Control (IFCC) to take over the process.

With the non-payment issue being moved to IFCC, a 7-day demand call is placed to the employer. This is often a customer service type interaction in which a discussion is had to determine the reasons why payments have not been made and what action is required including establishing a repayment agreement if required.

Should a further 10 days elapse and payment not be received, a solicitor's letter will be sent to the employer.

Should payment still not be received 48 days from the matter being transferred from the Fund to IFCC a demand call will be placed. Should this not result in a repayment agreement, legal action will be commenced that may lead to insolvency.

IFCC recovered more than \$60 million in unpaid Cbus members' superannuation in 2016. Over the past 20 years of its operation IFCC has recovered approximately \$1 billion in unpaid superannuation, the vast bulk of which would be SG.

Effective as this process is, the increasing amounts of recovered unpaid monies highlights the continued and growing problem of SG non-compliance.

The size of the 'Unpaid Super' problem

The recent ISA/Cbus report estimated the level of non-compliance with payment of the superannuation guarantee to be \$3.6 billion in 2013/14.

The ATO has sought to question the amount of \$3.6 billion; however, they have not put forward an alternative figure.

This is surprising given that:

- this issue has been highlighted by ANAO, IGT, Cbus and others over many years;
- the ATO has access to a rich amount of data and analytical tools; and
- unpaid super also equates to unpaid tax which deprives the Government of revenue.

Cbus and ISA welcome a debate about the methodology used in the report; however, we note that the ATO do not seem to be disputing the fact there is a big problem with unpaid super - they simply dispute how big it is.

The ATO intends to measure and report on the level of unpaid SG annually. ISA and Cbus welcome this development and encourage the ATO to further develop its measurement tool to enable more sophisticated, granular analysis of the types of industries and employers that do not pay SG. This will enable the ATO to target its compliance and enforcement activity. As noted, the introduction of Single Touch Payroll and its confluence with SuperStream should further enrich the ATO's data

²⁰ Section 156F of the *Fair Work Act 2009*

sources. Cbus, and other Funds, are happy to explore the extent to which we can assist the ATO better monitor SG compliance with a clear view that action will be taken to eradicate the practice of non-payment.

Recommendation - 4. Measuring and reporting on the extent of the problem

Cbus Experience of ATO

Cbus referrals to the ATO of unpaid SG contributions are minimal. Our collection agency, IFCC, will only recommend that the Fund refer employer cases to the ATO when:

1. All arrears processes of the Fund and IFCC have been exhausted.
2. Recovery through legal action is not fruitful; and
3. The employer is currently registered with the Fund and continuing to incur superannuation arrears.

There are varied reasons for the minimal levels of referral from the Fund, but principally it is because of both the success in recovery of members' funds through Cbus' internal processes, the Trustee's obligation to maintain management of members and employers accounts, the extensive time taken in the ATO recovery process and/or because it is known that the ATO will be unlikely to pursue, let alone be successful in the pursuit, of the arrears given policy and resourcing restrictions.

A large part of the frustration of the Funds with the ATO process arises because of poor communication resulting from privacy constraints. Owing to these privacy constraints, the ATO does not confirm payment details to Funds. Therefore, the only acknowledgement the Fund has that superannuation arrears have or will be paid to the ATO is if a payment is received from the ATO into members' accounts or alternatively through the legal action process if the defendant signs a statutory declaration and provides evidence of the payment being made to the ATO.

Furthermore, during the ATO payment process it is inconclusive as to what period/s the payment covers given that the ATO does not provide any information other than the payment amount to the member's default fund. This problem with information flows has been raised in various previous submissions and directly with the ATO who in the past have shown a strong resistance to assist in disclosing information regarding employers either as a consequence of legislative restrictions or other reasons. In effect, once the matter is referred to the ATO, little or no communication is afforded to the Fund regarding the ATO's recovery activities.

Where the Fund is aware that the ATO has been involved there are often extensive delays in remittance of superannuation entitlements into members' accounts which can take the ATO up to 2 years to remit superannuation payments to members' accounts.

In insolvency matters, the ATO Proof of Debt for employee superannuation entitlements has precedent over the Fund. This requires the Insolvency Practitioner to pay the dividend to the ATO rather than directly into workers accounts. This creates further time delay in funds finding their way to their rightful accounts compounding problems associated with member exits or deaths.

Positively, in more recent times the ATO has demonstrated a more flexible approach in being prepared to discuss some matters with IFCC and to build relationships. This is to be commended and Cbus would like to see greater efforts from all parties in increasing communications between Funds and the ATO.

Cbus also welcomed the opportunity to participate in 2011 in a Joint SG Pilot with the ATO and Industry Funds Forum (IFF). This pilot helped all parties to gain a shared understanding of each other's processes and acted as a catalyst to better communication between the parties.

However, the key finding drawn from the pilot was that the ATO determined that significant investment would be required to build a predictive model and that:

“although it has responsibility to ensure employers meet their superannuation obligations, this must be balanced against resources available, in particular our existing commitment to Government to investigate every complaint we receive from employees.”²¹

This further entrenches a view amongst stakeholders that the ATO is not adequately resourced to be able to seriously tackle the problem of SG non-compliance.

In 2014-15, the ATO raised liabilities of three times as much in unpaid SG as a result of employee complaints than it raised as a result of its own proactive risk-based work. In a compulsory system, significant resources should be allocated to recovering unpaid SG regardless of whether an employee lodges a complaint with the ATO. It is also concerning, that only 51% of debts raised, result in payment of SG. The Fair Work Ombudsman, which is responsible for recovering unpaid wages, should also be empowered to recover unpaid SG.

Recommendation – 5. Increase ability of regulators to recover unpaid SG

Penalties for SG non-compliance

Given the size and ongoing nature of the problem Cbus was disappointed when the Government introduced a section of an omnibus Bill in late 2015 that would actually reduce the penalties for SG non-compliance under the auspices of ‘red tape reduction’.²²

Payment of superannuation entitlements is not a regulatory burden – it is a basic legal entitlement and should never be viewed as flexible or bothersome. If a company can’t pay basic employee entitlements, then it shouldn’t be an employer.

As highlighted by the ISA/Cbus Report there is a serious need to address the growing problem of non-compliance with superannuation guarantee payments for employees. Cbus does not support reduced penalties for employers who fail to pay superannuation guarantee contributions. It is pleasing to note that the relevant sections of the Bill were withdrawn following an outcry about the proposed measure.

Cbus is cognisant of the legislation passed in 2012 following the 2010 IGT review of the ATO SG compliance, specifically the expansion of the Director Penalty Notice (DPN) regime for unpaid SG contributions.

Under the legislation, the ATO can issue a notice requiring a director to pay unpaid SG. If the director does not comply with the notice by the due date, the director becomes personally liable for the penalty amount until it is paid in full.

²¹ Australian Taxation Office “ATO & IFF Joint SG Pilot Outcomes – Report on the superannuation guarantee joint pilot between the ATO, Industry Funds Forum and Cbus super fund” 2 August 2011.

²² Treasury Legislation Amendment (Repeal Day 2015) Bill 2015, introduced to the House of Representatives, 12 November 2015.

In relation to the DPN the Explanatory Memorandum states that:

“The objective of these reforms is to reduce the incentives for company directors to allow their companies to engage in fraudulent phoenix activity, reducing its impact on the community. The reforms also aim to better protect workers’ entitlements to superannuation. There should be sufficient deterrents in the tax law to discourage directors from undertaking fraudulent phoenix activity with the intention of the company avoiding its tax and superannuation obligations or avoiding the company’s obligations to creditors more generally.”²³

We strongly agree with these objectives and note that in 2015/16 the ATO issued 877 Director Penalty Notices for SG debt of \$130 million.²⁴ We welcome the ATO using these powers; however, high levels of phoenixing still appear to exist, especially in the construction industry.²⁵

A 2014 Report discussing the DPN regime in relation to unpaid superannuation observed:

“Companies wishing to avoid these (and possibly other) liabilities can simply liquidate or enter voluntary administration before three months has elapsed without reporting or paying their SGC liabilities. In such circumstances, the directors will face no personal consequences, even if the ATO later identifies the lack of superannuation payment. The business may then be reborn through a ‘phoenix’ company and the behaviour continues. This is a fundamental concern and shows the deficiency of the legislative response.”²⁶

This loophole should be closed. The Fair Work Ombudsman should also be given equivalent powers to require directors to pay unpaid SG.

Recommendation 6 - Retaining and using strong penalties

Insolvency

As noted previously, the construction industry has high levels of insolvency which unfortunately will often involve unpaid super.

IFCC statistics show that across a 10-year period, the number of Cbus insolvency cases (and therefore likely construction and building businesses) dealt with as a percentage of the total for all industry superannuation funds was 23.5%.

The IFCC statistics show:

10 Year financial Insolvency: 1 July 2007 to 30 June 2016

1. Insolvency Cases over the past 10 years (industry Funds):	30,882
2. No. of Cbus Cases:	7,113
3. Amount of Money Recovered on Cbus Cases delivered to the Fund:	\$18,111,432
4. Amount of Money Recovered on Cbus Cases delivered to the ATO:	\$13,152,444
5. *The Amount of Estimated SG debt lodged for in insolvency cases for Cbus employers across the period²⁷:	\$59,896,208

²³ Revised Explanatory Memorandum, *Tax Laws Amendment (2012 Measures No. 2) Bill 2012*, p49.

²⁴ Australian Taxation Office – Sub No.6 - Superannuation Guarantee non-payment inquiry, 2017.

²⁵ *Insolvency in the Australian construction industry*, Economics References Committee, December 2015.

²⁶ Helen Anderson and Tess Hardy, ‘Who Should be the Super Police? Detection and Recovery of Unremitted Superannuation’ (2014) 37 UNSW Law Journal 162 – page 178.

²⁷ **NOTE:** *The amount estimated superannuation amount is not always the actual debt from the books and records of the company; it may be based on the records of the Superannuation Employer Account. The estimated debt is calculated when the Insolvent Practitioner does not have reliable books and records to quantify the Insolvent Companies superannuation

Unfortunately, this highlights the need for a better safety net for people who lose superannuation due to insolvency. Employees of companies with insufficient assets to pay their wages, leave and redundancy entitlements are protected by a Government safety net, the Fair Entitlements Guarantee (FEG). However, the FEG does not cover any form of superannuation contributions. The predecessor to FEG, the General Employee Entitlements and Redundancy Scheme, also did not cover unpaid SG, but did fund 3 months of superannuation contributions.

Many other jurisdictions, including New Zealand, Canada, the UK, the US and Germany provide an additional layer of protection for employees in the event of employer insolvency, in the form of either bankruptcy priority, a statutory safety net or both.

We note and concur with the IGT view²⁸ that the expansion of both DPNs and GEERS to cover unpaid SGC is complementary. If a company has not paid their SG obligations, then ATO should have tools to recover unpaid superannuation personally from the directors of the company. If that is unsuccessful then there should be a safety net provided through the FEG.

7. Extending the safety net for unpaid entitlements in the event of employer insolvency

The 'adequacy' problem

Providing an adequate or comfortable retirement for all Australians should be the objective of Australia's retirement policy of which superannuation is a growing pillar, and (understandably) this aspiration is a high priority for most people. However, current forecasts suggest it will not occur for many people around the world and in Australia.

Internationally, the Aegon Retirement Readiness Index (ARRI) assesses data, across 15 different countries and ranks retirement readiness on a scale from 1 to 10. A high index score is considered to be between 8 and 10, a medium score between 6 and 7.9 out of 10, and, a low score being less than 6.

The 2016 ARRI scores are chronically low, suggesting that many workers are falling far short of what is required to be retirement ready. In 2016, more than half (53 %) of workers globally achieved a low ARRI score (below six out of 10). Australia's score was 5.8.²⁹

The Mercer Retirement Readiness Index³⁰ for Australians projected that just 41% of women and 53% of men in Australia are currently on track to achieving a comfortable retirement income.

The figures for Cbus are better with around two thirds (68%)³¹ on track to be retirement ready however, this is obviously still too low.

The methodology for these Index's vary; yet, it is clear that more needs to be done to ensure more people retire with more superannuation savings.

There is obviously a complex set of levers involved to 'fix' the adequacy issue that will require effort from governments, regulators, funds, employers, and individuals. In this sense ensuring compliance with the law is one of the simpler issues given everyone agrees it should be done.

Unfortunately, there is also the loophole that allows employers to count salary sacrifice towards SG obligations. Many employees make voluntary additional super contributions under a salary sacrifice

debt. We note that IFCC will not lodge a Proof of Debt if the Insolvency Practitioner advises that there will not be a dividend payment from the Insolvent action. Hence, the value of this debt in reality is far greater.

²⁸ Inspector-General of taxation – Sub No.21 - Superannuation Guarantee non-payment inquiry, 2017.

²⁹ <https://www.aegon.com/en/Home/Research/Aegon-Retirement-Readiness-Survey/Aegon-Retirement-Readiness-Index/>

³⁰ <https://www.mercer.com.au/about-mercerc/lines-of-business/retirement/mercerc-retirement-readiness-index.html> & <https://www.mercer.com.au/newsroom/2016-retirement-readiness-index.html>

³¹ Cbus Retirement Readiness index, 30 June 2016.

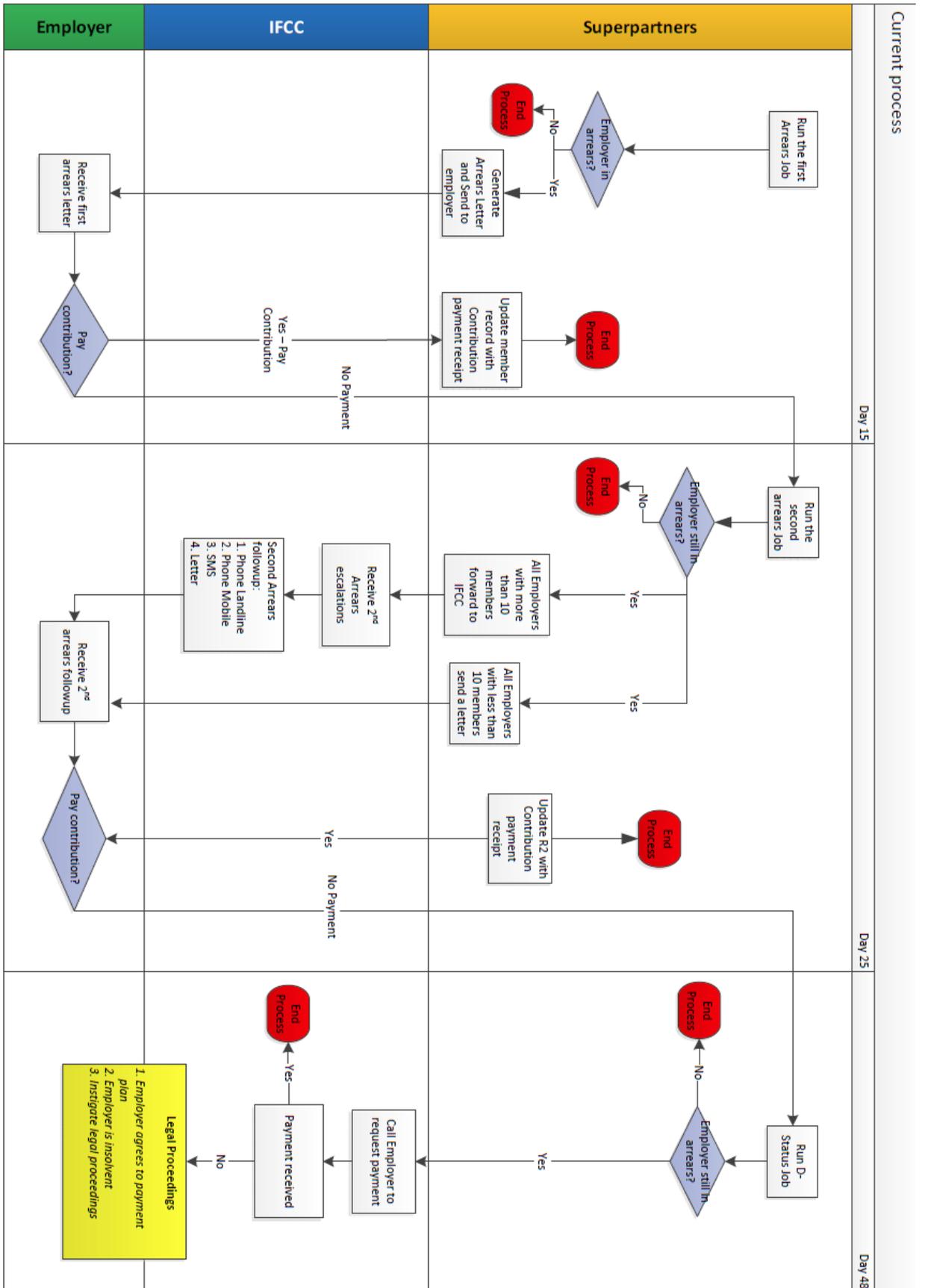
arrangement in the belief that they are increasing their superannuation over and above the SG. Indeed, financial advisers and many others encourage people to do so where it is in their best interest.

The majority of employers understand and support the efforts of their employees to build their retirement nest eggs by providing genuine salary sacrifice arrangements over and above their SG obligations; however, some employers use the current loophole to legally reduce their SG obligations.

Employees do not understand that if they salary sacrifice into super, their employer can use this to meet their SG obligation. The key motivation for an employee to make additional salary sacrifice contributions is to boost their retirement savings. This loophole should be closed immediately.

Recommendation - 2. Amending the Super Guarantee Administration Act 1992 so that employers cannot count salary sacrifice amounts towards compliance with their obligation to pay SG

Appendix A: Cbus arrears process – Flow chart



Appendix B – Unpaid Super case studies

Case study 1

Reggie Bell (actual name withheld)

Reggie worked for a company called Trihard Pty Ltd (actual company name withheld) as a plumber. The company had picked up some good contracts on some large construction sites, work seemed plentiful and Reg and his colleagues had no cause to believe that there was anything amiss regarding their jobs or entitlements.

Reg and his colleagues had done a bit of thinking about their super. Some of them were approaching retirement age and they'd decided to start putting a little extra into their super via salary sacrifice. Reg decided to put in an extra \$25 a week on top of his SG agreed amount of \$175 per week. Some of his mates decided to put in \$100 extra a week.

Each week all the workers got their payslips from Trihard Pty Ltd which explained their wages, tax withheld, allowances, deductions and superannuation payments. It all seemed in order and certainly wages were going into bank accounts.

In February 2016, Trihard Pty Ltd was the subject of a Winding-Up Order issued by the State Revenue Department. Trihard Pty Ltd directors determined to split the company operations with its commercial activities transferred to Cornonthecob Pty Ltd (actual company name withheld) and other activities transferred to Trihard Australia Pty Ltd.

It was a genuine shock when the workers were informed that Trihard Pty Ltd faced liquidation and the work at Trihard Australia Pty Ltd ran down quickly resulting in lay-offs, including for Reg.

It was at this time that Reg and his colleagues learnt that their superannuation had in fact not been paid for a substantial period of time by Trihard, including their salary sacrifice amounts. Trihard owed something in the vicinity of \$300,000 in SG payments for its employees and \$13,000 in salary sacrifice contributions for the period between March 2015 and February 2016.

Cbus had been aware of the non-payment of superannuation and had, through its debt recovery agency, Industry Funds Credit Control (IFCC), made contact with the company on numerous occasions. Solicitors for the parties had discussed an upfront payment to be followed by an agreed repayment plan. All of which never came to fruition with the company's solicitors stalling and gaming.

IFCC was looking to file court proceedings to recover the debt when the Winding-Up Order became known in February 2016 and the court proceedings were halted in the belief that liquidation would follow. However, in November 2016 the Winding-Up Order was withdrawn by the State Revenue Department and Trihard Pty Ltd remains a registered company.

IFCC have recommenced proceedings against the director of Trihard Pty Ltd with court hearings set for the first quarter of 2017.

Reg was advised by Cbus at the time that the Winding-Up Order was in place that legal action wouldn't proceed and that, given it was likely that Trihard Pty Ltd would be liquidated, he should raise a complaint with the ATO.

Reg did this and was advised it would take a minimum of 12 months before any investigation was commenced.

In Reg's words: "The system is a dog's breakfast. The regulator has no teeth and the company and directors just set up other companies and wash their hands of any responsibility. What really makes it sting is that the company was taking our money – not just our super, but that money we were salary sacrificing to try and have a little more for retirement – and used it for their business. And what appears on your payslip is just a misleading lie."

Reg decided to retire knowing that at his age he's not likely to pick up much more work. While his actual individual loss is yet to be detailed, based on the super he should have been receiving and his salary sacrifice and taking into account the full period of non-payment as being pursued by IFCC, Reg may have lost up to \$19,500 gross in contributions, before earnings.

Case study 2

Peter (actual name withheld) is a Cbus member who experienced unpaid super.

For approximately 3 months in 2016 he was employed as an electrician by Tryinghard Pty Ltd (actual company name withheld).

Peter finished up with Tryinghard and received a final payslip showing an amount of \$1,305.27 in superannuation; however, this had not been paid.

Peter is also aware of another worker (an apprentice) who had not been paid his superannuation entitlements of approximately \$1,500. The apprentice is young and a bit reluctant to follow it up. Over a period of 30 years this unpaid amount may lower his retirement balance by tens of thousands of dollars.

Peter waited until the end of the relevant quarter plus a further 28 days before contacting Tryinghard in relation to his own super. The owner said he had paid the money through a portal which may have not worked. Peter was sceptical and had heard stories of the company not paying benefits previously.

Two weeks later Peter contacted the ATO to lodge a complaint and was told it would take at least 4-5 months to follow up. Peter is concerned he may be waiting nearly 12mth for his entitlement to be paid.