

SUBMISSION

Submission to
Department of
Employment and
Workplace Relations:
Addressing corporate
misuse of the Fair
Entitlements Guarantee

31 March 2025

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Fair Entitlements Guarantee Policy Team

Department of Employment and Workplace Relations

Via email: FEGPolicy@dewr.gov.au

31 March 2025

Dear Sir/Madam

Addressing corporate misuse of the Fair Entitlements Guarantee

The Association of Superannuation Funds of Australia (ASFA) is pleased to provide this submission in response to the consultation on addressing corporate misuse of the Fair Entitlements Guarantee.

About ASFA

ASFA has been operating since 1962 and is the peak policy, research and advocacy body for Australia's superannuation industry. ASFA represents the APRA regulated superannuation industry with over 100 organisations as members from corporate, industry, retail and public sector funds, and service providers.

We develop policy positions through collaboration with our diverse membership base and use our deep technical expertise and research capabilities to assist in advancing outcomes for Australians.

ASFA has a keen focus on matters that impact the outcomes achieved by individuals through the superannuation system, their experiences with the system, and issues that impede the industry's operational effectiveness. We welcome this latest package of miscellaneous amendments, which reduce uncertainty by correcting technical and drafting defects, removing anomalies and addressing unintended outcomes.

ASFA's general position on the proposals

ASFA supports the introduction of measures which would lead to greater employer accountability for unpaid employee entitlements. The adoption of corporate structures and related arrangements which reduce or eliminate any responsibility to reimburse the Commonwealth for payments made under the Fair Entitlements Guarantee (FEG) also lead to the avoidance of compulsory superannuation contributions requirements of the companies concerned. More fundamentally, ASFA proposes that unpaid superannuation contributions be covered by the FEG.

Background

The FEG provides for the Commonwealth to pay an 'advance' on certain unpaid 'employment entitlements' in cases where an individual's employment ended in circumstances connected with the insolvency or bankruptcy of their employer, and the individual cannot obtain payment of their entitlements from other sources. However, the types of 'employee entitlements' currently covered by the FEG are limited and do not include unpaid superannuation contributions. There have been a range of high-profile cases where businesses have become insolvent with unpaid superannuation contributions.

Compulsory superannuation contributions are part of an employee's remuneration and are vital for achieving dignity in retirement. Without government assistance in regard to unpaid superannuation contributions due to employer insolvency many Australian employees will have a substantial shortfall in their superannuation savings and lifestyle in retirement.

The paper notes that in 2023-24, a potential employee entitlement defeating transaction/agreement was identified in 39 per cent of large FEG cases. The total advances paid in these cases was \$52.7 million, just under a quarter of total advances paid in 2023-24. The average estimated unpaid Super Guarantee Charge in these cases was \$258,982 (relative to average FEG advances of \$431,980 per case).

Unpaid superannuation can be large relative to unpaid wages given that unpaid superannuation generally covers periods of three months or more while unpaid wages in the case of an insolvency will be in regard to a much shorter period as most wages are paid on a fortnightly or less basis. ASFA also notes that there is evidence that insolvencies involving unpaid superannuation occur not infrequently in retail and hospitality sectors where rates of female employment are quite high.

Addressing the problem of unpaid superannuation

While recent and proposed changes to reporting and payment requirements for employers give greater visibility to the ATO for unpaid employer contributions it is likely that even after the implementation of Payday Superannuation there will be continuing cases where there are unpaid contributions when businesses become insolvent. ASFA also notes that the FEG Recovery Program has been expanded, from 1 July 2024, to actively pursue recovery of unpaid Superannuation Guarantee Charge amounts from insolvent employers. However, there is no evidence at this stage that any substantial recoveries of such amounts have been actually made.

ASFA considers that unpaid Superannuation Guarantee amounts should be treated the same way for the purposes of the FEG as unpaid wages as both make up the remuneration of employees. If the ATO is subsequently able to raise an SG charge against an employer this would in effect offset any SG related payments made through the FEG arrangements. However, any amounts recovered by the ATO in regard to interest or penalties related to payment of the superannuation guarantee charge should be made available to employees to meet any shortfall in Superannuation Guarantee contributions in regard to such employees.

ASFA also considers that payment of Superannuation Guarantee Charge liabilities of insolvent employers should take priority over amounts payable under the FEG Recovery Program in regard to payments that have been made by the Commonwealth relating to unpaid wages. This would both be more equitable and consistent with the 2024 decision to actively pursue recovery of unpaid Superannuation Guarantee Charge amounts from insolvent employer.

Specific proposals in the paper to better protect employee entitlements in insolvency

The paper queries whether 'superannuation guarantee charge' should be added to the list of employee entitlements in section 596AA of the Corporations Act 2001. Section 596AA is part of the provisions aiming to deter and prevent arrangements or transactions designed to evade or hinder the recovery of employee entitlements during a company's winding up.

ASFA supports this proposal as a necessary but not sufficient step in protecting employee entitlements in regard to superannuation. The core problem is that superannuation contributions are not covered by the Fair Entitlement Guarantee. Modifications to the Corporations Act in regard to insolvency are likely to only lead to very modest additional amounts of superannuation contributions being paid on behalf of affected employees.

If you have any queries or comments in relation to our submission, please contact Ross Clare on (02) 8079 0809 or by email rclare@superannuation.asn.au.

Yours sincerely

James Koval

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