ATO tightening the net on unpaid superannuation

Australian employees are missing more than $17b in superannuation entitlements since 2009, according to the ATO's first superannuation guarantee audit.

By comparing the difference between super owed and super paid to workers, the ATO calculated that employees were short changed more than $3.27b in 2014-15 alone. With claw backs of some $414m, the net underpayment for 2014-15 still came in at $2.85b, about 5.2% of the total super required to be paid.

In all, the ATO's efforts have returned more than $3b to employees since 2010, but with estimates that unpaid super could reach $5.6b a year, the ATO is keen to boost compliance.

In July 2017, Financial Services Minister Kelly O'Dwyer sought to close a loophole allowing reduced super payments where an employee chose to salary sacrifice into their super.

Super Guarantee Gap

($b)	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15
Estimate of super owed	40.2	43.5	47.0	49.1	52.4	54.8
Payments to super funds + ATO compliance activities	38.7	41.5	44.2	46.7	50.0	51.9
Net gap	1.5	2.0	2.8	2.4	2.5	2.9

The largest contributors to the gap were small businesses with poor payroll systems and stretched teams. From an industry perspective, the worst offenders included construction companies, retailers, food servers and accommodation providers.

Over half of the companies investigated for underpayment were considered to be insolvent by the time the ATO opened the case.

The ATO now has 150 full time staff monitoring superannuation obligations, targeting employers via the 20,000 employee queries each year and through internal modelling to identify inconsistencies.

Proposed reforms include a move to 'single touch payroll' electronic payment systems, providing near-real time visibility of wages and super payments, and allowing missed payments to be followed up promptly. The new system will be implemented for small employers from 1 July 2019.

It is worth remembering that in a formal insolvency appointment, outstanding super entitlements are treated as a priority claim against assets of the company, but are not covered by the Fair Entitlements Guarantee, the Federal Government's safety net scheme for entitlements.

The current focus by the ATO on outstanding super provides a timely reminder to directors that they can become personally liable for unremitted superannuation contributions via the Director Penalty Notice (DPN) regime. There are two types of DPN:

- **Traditional Director Penalty Notices**

  These can be issued to directors whose company has lodged its BAS or IAS, but is yet to remit PAYG Withholding or SGC debts. The notice gives 21 days to pay the outstanding amounts or appoint an administrator or liquidator to the company to avoid personal liability.

- **Lockdown Director Penalty Notices**

  The laws were changed in 2012 to allow for a 'lockdown' DPN, where a company hasn't lodged its BAS or IAS within 3 months of their due date. The Lockdown DPN makes the director automatically liable for the unpaid PAYG Withholding and SGC debts.

The DPN is a powerful weapon regularly used by the ATO to recover outstanding debts and force directors to take action. Given the serious implications, directors receiving such a notice should seek prompt and appropriate advice to understand their risks and options.

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