



AUSTRALIAN INSTITUTE of
SUPERANNUATION TRUSTEES

Superannuation Guarantee Integrity Package

16 February 2018

AIST Submission to Treasury

AIST

The Australian Institute of Superannuation Trustees is a national not-for-profit organisation whose membership consists of the trustee directors and staff of industry, corporate and public-sector funds.

As the principal advocate and peak representative body for the \$700 billion profit-to-members superannuation sector, AIST plays a key role in policy development and is a leading provider of research.

AIST provides professional training and support for trustees and fund staff to help them meet the challenges of managing superannuation funds and advancing the interests of their fund members. Each year, AIST hosts the Conference of Major Superannuation Funds (CMSF), in addition to numerous other industry conferences and events.

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Executive summary

We welcome the opportunity to comment on the exposure draft *Treasury Laws Amendment (Taxation and Superannuation Guarantee Integrity Measures) Bill 2018* and accompanying material.

We support each of the measures contained in the exposure draft. However, we recommend further measures to effectively address the systemic problem of unpaid superannuation. These recommendations include measures to:

- Enable members to identify unpaid superannuation.
- Require superannuation funds to have effective employer arrears collection processes in place and give funds the tools required to develop these processes.
- Provide the ATO with adequate resourcing to perform its role in recovering unpaid superannuation.
- Address unpaid superannuation issues affecting independent contractors.

The level of unpaid superannuation should also be accurately measured and publicly reported by the ATO.

We believe that the proposed amendments should also be reviewed two years after the day on which they come into effect. This will provide an opportunity to assess the effectiveness of the measures.

Key issues

Unpaid superannuation is a systemic problem

There is a systemic problem with unpaid Superannuation Guarantee (SG) in Australia. The non-payment of SG negatively impacts those that use the superannuation system, including fund members, businesses and government.

The *'Superbad – Wage theft and non-compliance of the Superannuation Guarantee'* report details the impacts of non-payment of SG:¹

- Economic impacts on the member, including a loss of retirement income and the benefits of compounding interest.
- Competitive advantages to businesses that choose not to pay superannuation and therefore increase the amount of money available to spend on other business operations or to increase profits.
- A greater burden on government services such as the Age Pension, which results in higher government expenditure.

Due to the widespread impact of non-payment of SG the proposed reforms are essential and, if implemented, would improve Australia's retirement savings system.

Recommendations

We support the proposals contained in the exposure draft bill. However, we believe that the overall integrity of the system could be further improved by:

- Investigating the introduction of real-time payment and reporting of SG to promote compliance. Consider utilising existing Single Touch Payroll (STP) systems to achieve this. This measure may also be extended to include a requirement for employers to provide notice to employees when superannuation has been paid.
- Enabling superannuation fund trustees to identify and collect unpaid SG from employers on behalf of fund members.

¹ Economics References Committee (2017). *Superbad - Wage Theft and Non-compliance of the Superannuation Guarantee*. [online] pp.25-28. Available at: <https://tinyurl.com/y9bw4zlo> [Accessed 12 Feb. 2018].

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- Ensuring that any fund seeking default status in Enterprise Bargaining Agreements or modern awards has an effective employer arrears collection process in place.
- Requiring the ATO to measure and report on the extent of unpaid superannuation.
- Adequately resourcing the ATO to recover unpaid SG, investigate non-compliance and commence enforcement actions.
- Enabling employees, either directly or through federal entities such as the Fair Work Ombudsman, to recover unpaid SG.
- Exploring the introduction of mechanisms to reduce sham contracting because the practice effectively prevents workers from receiving entitlements such as SG.
- Exploring extending the payment of SG to ensure that 'dependent contractors' receive superannuation. Dependent contracts are those workers that are engaged to provide services under a contract, however have limited autonomy and as a result are very similar to a traditional 'employee'.²
- Removing the \$450 monthly income threshold for employer SG payments. The threshold limits the ability for some workers to save for their retirement, particularly those with multiple jobs and low-income earners.

We believe that the operation of the amendments in the package should be reviewed two years after the day on which they come into effect. This review mechanism will provide an opportunity to assess the adequacy of the measures, including those that we recommend.

² Association of Superannuation Funds Australia (2018). *ASFA Pre-Budget Submission for the 2018-19 Budget*. [online] p.4; p.13 Available at: <https://tinyurl.com/y9g63tox> [Accessed 14 Feb. 2018].

Response to each measure

Disclosure of information about non-compliance

We support the ATO being given the power to disclose information about an employer's non-compliance with the law to other employees that may not have been paid some or all of the SG.

Under the current regime, if an employee makes a complaint to the ATO regarding non-payment of SG, the ATO can investigate and inform the employee that the employer has breached their responsibilities under the law (if relevant). However, employees that did not complain will not be told that their employer was in breach of their obligations. Employees need to know that their employer has not paid SG on their behalf so that they can act and protect their retirement futures.

Identifying non-compliance is an important first step, however employees themselves should not be expected to recover unpaid SG. Instead, the ATO should be required to take pro-active action to recover unpaid SG on behalf of employees where it identifies non-compliance.

It would be unsatisfactory if members were simply advised by the ATO of their employer's non-compliance, and were then required to make a complaint to the ATO to recover the superannuation.

Single Touch Payroll reporting

We agree with the observation in the explanatory memorandum that '*a significant proportion of superannuation guarantee non-compliance is attributable to small business*'³ and strongly support the proposal to extend STP to all employers. The extension of the reporting framework will enable the ATO to detect non-compliance earlier and better protect employees.

Compulsory reporting of salary sacrificed amounts will also give the ATO greater visibility of employers that are counting salary sacrificed amounts towards SG. While increased visibility is welcomed, it is important that the loophole that allows employers to use salary sacrificed amounts to reduce their mandated SG obligations is closed. The *Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017* contains mechanisms to close this loophole, however it is still before the Senate.

³ Exposure Draft Explanatory Material of the *Treasury Laws Amendment (Taxation and Superannuation Guarantee Integrity Measures) Bill 2018*, p30.

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If the salary sacrifice loophole is not closed then some of the measures outlined in this package, such as the enhanced STP reporting measure, may not have its desired impact. The greater visibility, in conjunction with the closure of the loophole, will place the ATO in a better position to act against employers that do not comply with their obligations under the law.

Further, the strengthening of reporting obligations must be supported by the ATO prioritising investigation and enforcement activities. To perform these functions, the ATO requires adequate resourcing because acting against individual employers through avenues such as directions, fines, or imprisonment is resource intensive.

We have consistently advocated for loopholes, that are used by some employers use to reduce their SG liability, to be closed. The most recent example of this is our submission to Treasury on the exposure draft *Treasury Laws Amendment (Improving Accountability and Member Outcomes) Bill 2017: Superannuation Guarantee (Salary Sacrifice Integrity Measures)*.

Fund reporting and compliance measures

Permitting the ATO to provide superannuation funds with a grace period for correcting false and misleading member information statements is beneficial. The move towards more regular reporting is beneficial because it increases payment visibility and improves compliance. However, it increases the risk of reporting errors due to the increased regularity of reporting. We believe that the introduction of a grace period is beneficial because it allows for information to be corrected, while also providing the benefits associated with faster reporting.

The removal of the requirement for employers to report to the ATO the SG contributions paid to superannuation providers is welcomed. Superannuation funds already provide this information to the ATO therefore the removal of the requirement for employers to do the same increases efficiency and reduces red tape.

Removing the requirement for funds to lodge lost member statements twice a year with the ATO is also welcomed because it harmonises reporting obligations under the law. However, we believe that it is critical for the ATO to undertake a reunification workstream whereby they attempt to reunite members with ATO-held super monies.

We also strongly support the enhanced director penalty regime outlined in the exposure draft bill and welcome the proposed lock down rule for director penalties because this prevents directors from liquidating a company to avoid various superannuation obligations.

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Employee commencement

The proposed amendments allow the ATO to disclose the following to an employer if the employee consents:

- Information relevant to an individual's withholding rates; and
- Information about an individual's existing superannuation accounts.

We support this proposal because it will make the onboarding process more straightforward for employees. However, it is important that employee consent is event based, free and informed and for the administrative process around the giving of consent to be clearly outlined.

To ensure integrity in the process and to ensure that the employee provides informed consent at the time of commencing employment, at a minimum the explanatory memorandum must clearly outline how the consent mechanisms and controls will work. It is appropriate to consider whether the ATO can develop a companion guide that details how the consent framework operates in practice.

Directions and penalties in relation to superannuation guarantee charge

Education directions

AIST supports giving the Australian Taxation Office (ATO) the power to issue education directions to employers that have failed to comply with their SG obligations.

Addressing employer knowledge gaps can contribute to a reduction of future cases of SG non-compliance, which is attributable to employers having a poor understanding of their legal obligations.

The Superannuation Guarantee Cross-Agency Working Group found that:⁴

Education and assistance is particularly important for small business employers to help them understand their obligations... Educating employers can assist in preventing non-compliance and supporting positive behavioural changes...

⁴ Superannuation Guarantee Cross Agency Working Group (2017). Superannuation Guarantee Non-compliance: A Report to the Minister for Revenue and Financial Services. [online] pp.49 - 50. Available at: <https://tinyurl.com/y9gx37mu> [Accessed 12 Feb. 2018].

Many beneficial outcomes may result by allowing the ATO to issue a direction to employers such as:

- A better retirement outcome for superannuation fund members that are employed by an employer that may not fully understand their legal obligations until they have had formal training.
- A reduction of regulatory costs associated with continued investigation of non-compliance by recalcitrant employers.

For these reasons we support this measure.

Directions to pay superannuation guarantee charge

AIST supports the ATO being able to direct an employer to pay unpaid overdue superannuation because it effectively targets recalcitrant employers that fail to pay their superannuation liabilities. This will help combat the impact that non-payment of SG can have on superannuation fund members, such as a loss of retirement income and the benefits of compounding interest.

In addition to the impacts outlined above, non-payment of SG reduces the likelihood for individuals to achieve an adequate retirement outcome. The concept of adequacy in retirement is essential, because it enables the policy reforms to be assessed in relation to the overall objectives of the superannuation system.

Failure to comply with an ATO direction

A range of penalties apply to individuals and employers that fail to comply with a direction from the ATO. These penalties are appropriate and send a clear message that compliance with SG obligations is essential and that there is little reasonable excuse for a failure to comply. Employees are entitled to expect that their employer complies with basic elements of the law, including the payment of deferred wages and that the ATO investigates and enforces the law.

A failure to comply with an education direction can result in administrative and criminal penalties that increase in severity depending on the employers past non-compliance. The lowest penalty is an administrative penalty of 5 penalty units, and the most severe is for individuals that have been convicted of at least two contraventions of the *Taxation Administration Act 1953* (Cth) in the past. For these individuals, the penalty is a fine not exceeding 50 penalty units or 12 months imprisonment or both.

The direction to undertake education training is a suitable complement to the existing penalty regime and helps ensure that individuals comply with their legal obligations.

The penalty for employers that fail to comply with a direction to pay SG are more severe than those that apply to employers that do not comply with an education direction. The penalty

applicable is a fine not exceeding 50 penalty units, or 12 months imprisonment or both. This penalty applies irrespective of an employer's history of non-compliance.

It is appropriate that higher penalties apply to the non-payment of SG due to the negative impact that non-payment can have on an individuals' retirement future.

Other measures

We repeat the suggestions outlined above and believe that the superannuation system could be improved by:

- Investigating the introduction of real-time payment and reporting of SG to promote compliance.
- Enabling superannuation fund trustees to identify and collect unpaid SG from employers on behalf of fund members.
- Ensuring that any fund seeking default status in Enterprise Bargaining Agreements or modern awards has an effective employer arrears collection process in place.
- Requiring the ATO to measure and report on the extent of unpaid superannuation.
- Adequately resourcing the ATO to recover unpaid SG.
- Enabling employees, either directly or through federal entities to recover unpaid SG.
- Exploring the introduction of mechanisms to reduce sham contracting.
- Exploring extending the payment of SG to ensure that 'dependent contractors' receive superannuation.
- Removing the \$450 monthly income threshold for employer SG payments.
