

ISA SUBMISSION

Treasury Laws Amendment (Taxation and Superannuation Guarantee Integrity Measures) Bill 2018

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Industry
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Australia 

ISA Submission on SG Integrity Measures Bill 2018

ABOUT INDUSTRY SUPER AUSTRALIA

Industry Super Australia is a research and advocacy body for Industry SuperFunds. ISA manages collective projects on behalf of a number of industry super funds with the objective of maximising the retirement savings of over five million industry super members. Please direct questions and comments to:

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ISA SUBMISSION ON SG INTEGRITY MEASURES BILL 2018

Contents

KEY POINTS	iii
INTRODUCTION	1
1. Visibility of the SG Base and SG Contributions in Real Time	5
Box 1 Amended version of the main part of Section 389-5 TAA 1953	7
2. Improving superannuation non-compliance before and after insolvency	8
3. Improving incentives to comply for under-paying employers when insolvency is not in prospect	8
4. Stop the use of superannuation salary sacrifice contributions to reduce actual SG contributions	9
5. Removing legislative gaps in SG coverage, particularly the wage threshold of \$450 per month for SG contributions	9
6. Allowing an employee to more readily detect SG underpayment and to facilitate third parties (such as funds and unions) to assist employees with the recovery of unpaid superannuation	10

Tables

Table 1: Reconciliation of Published ATO SG GAP for 2013-14 with ISA Estimate	1
Table 2 : The Growing Number of Casual Employees	2
Table 3: Proportion of Employees and Owners of Incorporated Businesses Working Part-time	3

KEY POINTS

There are welcome initiatives in the Exposure Draft for this Bill. However, when you look at the detail of this proposed legislation, the broad claims made about the package look thin, particularly in the area of making underpayment more identifiable.

The Bill and the existing law (TAA 1953 Section 389 and 390) do not deal with the changing nature of work. It leaves short term workers, casuals, labour hire workers and sham contractors exposed. Workers in the gig economy or workers who are easily replaced are not protected.

The most important compliance policy for the SG would be to make the SG payments and the SG wage base visible in a pay cycle or within a month. This real time information would expose non-payment and underpayment. But the SG Integrity Bill:

- Leaves contributions due only quarterly so that short term workers and continuing workers cannot see that they have been underpaid in line with their pays;
- Does not deal with gaps in SG coverage such as the \$450 per month wage threshold;
- Actually removes the need for employers to report SG payments to the ATO, they would only be required to report salary sacrifice payments under STP.

A brand new system of fund event reporting is supposed to give quarterly information, but it does not currently exist and it will take the ATO sometime to use the information when it becomes operational. Period of payment information is optional in this system. SMSFs are not in this system, so anyone having contributions to their family fund will not be able to see from MyGov that they have been made.

The Bill leaves the reporting of Ordinary Time Earnings entirely optional. Ordinary Time Earnings are the base on which SG obligations are calculated. This policy decision would mean that the base is not visible monthly, quarterly or annually to employees, their representatives or the ATO.

- The consequence is that such ATO enforcement efforts that exist will concentrate on complaints and zero payments, not partial payments
- The Explanatory Memorandum's claims that legislation requires employers to report ordinary time earnings (e.g., paragraph 3.24) are simply false.
- The Bill leaves labour hire workers and contractors outside of STP reporting, even though they should be paid SG.

The Bill does create penalties for employer non-payment, but the extent to which the ATO will act on partial payment remains an issue because the SG base is not collected.

The Bill does address the operation of Director Penalty notices which effectively gave directors 21 days to wind up a company before they were liable for underpayments of super and wages.

Recommendation 1: The Bill should be amended so that Section 389-5 of the TAA 1953:

- **does not exclude labour hire and contract workers from single touch payroll;**
- **makes the reporting of ordinary time earnings compulsory; and**
- **makes pay cycle reporting of SG payments by employers compulsory.**

Recommendation 2: that the SG Administration Act should be amended to have SG paid at the same time as wages and to remove the \$450 per month of wages threshold for SG entitlement.

INTRODUCTION

ISA's submission to the Senate Economics Committee inquiry into non-payment of the Superannuation Guarantee (SG) uses ATO tax file data for 2013-14 to estimate the extent of SG non-compliance. The research found that 2.76 million people were affected in that financial year by an average amount of \$2,025 per person, or an aggregate amount of \$5.6 billion.¹ Industry Superannuation funds have the research evidence based on ATO data and the client contact to confirm that unpaid SG is a major problem.

The ATO has released an estimate showing of an aggregate concept of the 'SG Gap' of \$3.0 billion in 2013-14 and \$17.1 billion from 2009-10 to 2014-15. These are big numbers, but the ATO's aggregate numbers hide SG underpayment, because employer contributions above the SG rate hide an equivalent amount of contributions below the SG rate.

The ATO estimate of the SG Gap is an aggregate estimate based on total cash flows, ISA's is a distributional estimate based on ATO unit records for individual people.

In the ATO SG Gap estimate, the sizeable contributions made by employers who pay above the SG rate are aggregated with the contributions of people underpaid SG. These contributions that are above the SG rate hide or mask the total amount for the people who are underpaid.

We have looked at this using the ATO 2% sample file for 2013-14. We estimate that the total value of SG contributions paid in 2013-14, which were above a rate of 11% of ordinary time wages, was \$2.5 billion. This masks a corresponding amount of underpayment. If the mask is removed, the true face of SG underpayment emerges. The estimate has negligible differences from ISA's – as demonstrated in the Table 1.

Table 1: Reconciliation of Published ATO SG GAP for 2013-14 with ISA Estimate

Reconciliation of Published ATO SG GAP for 2013-14 with ISA Estimate		
Estimate	\$m	Source
ATO Gross SG Gap	3,023	ATO
Value of Employer SG contributions above 11% of Ordinary Time Wage	2,529	ISA Analysis of ATO Sample file
Total	5,552	
ISA Estimate March 2017	5,591	ISA Analysis of ATO Sample file
Difference	39	

¹ See [ISA submission to the Senate Economics Committee inquiry into non-payment of the superannuation guarantee](#)

The ATO and Treasury methodologies are not robust because they do not control for the many employees who receive significant superannuation contributions above the SG rate. To address this, the agencies need to complement the aggregate timeseries with distributional measures of SG underpayment. The ATO has currently decided not to release a 2014-15 version of the unit record sample file which was set for release in April 2017. The non-release of the file means that there is no new data for updated distributional estimates by those researchers with the skills to do the analysis. Treasury has made it clear that they will not release their distributional estimates.

The Superannuation Guarantee was designed at the start of the 1990s. Almost 30 years later there have been significant changes in casual work, part-time work, short-term work and multiple job holding.

Table 2 shows that the number of employees without paid leave has grown from 1.93 million in 2005 to 2.46 million in 2016. The 2016 ABS estimate was 25.1% of all employees

Table 2 : The Growing Number of Casual Employees

Number of employees without paid leave ('000)			
YEAR	Males	Females	Persons
2005	805.4	1,120.6	1,926.0
2006	862.2	1,118.8	1,981.0
2007	912.3	1,149.6	2,061.9
2008	898.9	1,165.1	2,064.0
2009	934.2	1,183.2	2,117.4
2010	993.1	1,208.2	2,201.3
2011	1,006.2	1,239.1	2,245.3
2012	1,016.6	1,199.4	2,216.0
2013	1,031.2	1,227.8	2,259.0
2014	1,046.4	1,261.1	2,305.6
2015	1,059.2	1,267.5	2,326.3
2016	1,166.8	1,294.5	2,460.9

Source: ABS Publication 6333.0 Characteristics of Employment, Australia, August 2016

Table 3 shows that the proportion of male employees and owners of incorporated enterprises who are part time increased from 13.8% in 2005 to 18.0% in 2016. The proportion of part-time workers for females started and ended on a very high 45.6%.

In 2015 the ABS published estimates based on administrative data which placed the number of concurrent multiple job holders at 1.9 million in the 2011-12 financial year, which was 18.4% of the 10.3 million employees covered by the study.² In 2007, using survey data, the ABS estimated that 657,000 workers had more than one job in a month (6% of employed people).³ Although these estimates have different methodologies, the large number and apparent rise in multiple job holders should be of concern for policy makers and system designers.

² 6311.0 - Information Paper: Construction of Experimental Statistics on Employee Earnings and Jobs from Administrative Data, Australia, 2011-12

³ ABS 4102.0 - Australian Social Trends, Sep 2009

Table 3: Proportion of Employees and Owners of Incorporated Businesses Working Part-time

Proportion of Employees and Incorporated Enterprise Owners PT			
Year	Males	Females	Persons
2005	13.8%	45.6%	28.6%
2006	14.2%	44.9%	28.5%
2007	14.2%	44.2%	28.2%
2006	14.2%	44.9%	28.5%
2007	14.2%	44.2%	28.2%
2008	13.8%	44.3%	28.0%
2009	15.5%	45.4%	29.6%
2010	15.5%	44.6%	29.1%
2011	15.2%	45.2%	29.3%
2012	15.1%	45.1%	29.2%
2013	15.7%	45.1%	29.6%
2014	16.7%	45.5%	30.4%
2015	16.3%	45.8%	30.3%
2016	18.0%	45.6%	31.1%

Source: 6333.0 Characteristics of Employment, Australia, August 2016

Just as the nature of work has changed since the early 1990s, so too has the nature of the information technology available to businesses and the ATO for payroll and tax administration. Most businesses including small businesses have payroll systems which electronically handle payroll and tax administration each pay period. The ATO is building single touch payroll systems which will accept business reporting every pay period. The ATO is building MyGov notification and information systems which pass on to taxpayers real time information about wages, superannuation contributions and superannuation balances.

The new challenges of the changed nature of work can be (and should be) handled by the new standardised business and superannuation reporting technologies. It is exactly these technological changes that make more effective SG compliance activity possible.

The Superannuation Guarantee system was established to deal with the market failure of retirement savings myopia. The new technology can make the progress, or lack of progress, on retirement savings visible in real time.

The primary policy goals to improve SG compliance should be:

1. To improve the real time visibility of the amount of employer superannuation payments (from each employer) and the corresponding SG base, to each individual employee and to the ATO. Timely compliance requires timely information on payment which enables employees and the ATO to work out if the payment level is correct.
 - a. The minimum requirement for quarterly payment of SG removes contribution visibility in real time and leads to compliance activity which is too late;
 - b. The current annual nature of member contribution statements and the fact that they are not for each employer significantly delays and confuses visibility; and
 - c. The absence of any visible measure of the SG base, ordinary time earnings (OTE), means that spotting partial payment is very difficult, and the ATO systems are biased towards non-payment and against partial payment enforcement by this invisibility.
2. To substantially improve superannuation non-compliance before and after insolvency.

3. To provide incentives to comply to under-paying employers when insolvency is not in prospect;
4. To stop the use of superannuation salary sacrifice contributions to reduce actual SG contributions;
5. To remove legislative gaps in SG coverage, particularly the wage threshold of \$450 per month for SG contributions.
 - a. The \$450 threshold per month is an impediment to employers not paying SG with wages as a part of payment cycles;
6. To allow an employee to more readily detect SG underpayment and to facilitate third parties (such as funds and unions) to assist employees with the recovery of unpaid superannuation.

The current draft Superannuation Guarantee Integrity Measures Bill:

1. Makes a start, but ends up significantly short of what is required for the real time visibility of the SG base and SG contributions;
2. Makes welcome changes to insolvency problems, particularly the problems with the Director Penalty Notice System, but does not address the omission of super from the Fair Entitlements Guarantee program;
3. Provides important new incentives for employers to comply with SG compliance findings from the ATO;
4. Does significantly address the use of salary sacrifice contributions as a substitute for employer SG contributions;
5. Does not address legislative gaps in SG coverage and is completely silent on the issue of the \$450 per month wage threshold for SG contributions; and
6. Does not facilitate third party assistance for employees with unpaid super but may help an employee detect their underpayment.

1. Visibility of the SG Base and SG Contributions in Real Time

The current system is quarterly SG payment and annual reporting to the ATO of individual employee wages and superannuation.

Single Touch Payroll was initially meant to give a pay cycle view of wages, ordinary time earnings and employer superannuation liabilities to the ATO. This should have allowed the ATO detection of mismatches between wages, the SG base and contributions in real time. This system should have applied to traditional employees, labour hire employees and consultants providing mostly labour – these are the groups covered by the SG. Potentially, online systems available through MyGov could provide ATO notification of potential underpayment to employees, or could present a table of ordinary time earnings and employer superannuation paid for a given month.

But the current drafting of Section 389-5 of Schedule 1 of the Tax Administration Act 1953, and the ATO system design do not do this. Neither do the draft Bill's amendments. The new ATO system design will not achieve pay cycle or even monthly visibility of SG contributions. The SG base of ordinary time earnings is only to be collected on an exception basis – so the ATO and the employee cannot readily see if partial payments are correct.

ISA welcomes the draft Bills extension of single touch payroll to employers with less than 20 employees. ATO research places emphasis on small business as a major source of underpayment.

Box 1 is the proposed amended text of Section 389-5 of Schedule 1 of the Tax Administration Act 1953.

The proposed amendments have the following problems:

- Item 1 refers to the amounts paid by employers from which tax must be withheld – particularly salary and wages and parental leave and partner payments but **not** amounts under a labour hire agreement (references are to TAA 12-B).
- Item 2a refers to salary and wages as defined in the SG Administration Act but excludes payments made under contract (sub-section 12(3) of SGAA), and
- Item 2(b) is linked to 2a by an OR – so if you report salary and wages you do not need to report ordinary time earnings – so you do not need to report the SG base so that the ATO can check if payments are correct.
- The Bill removes the need for employers to report SG contributions and passes that obligation on to superannuation funds if they are APRA regulated, and omits it if the funds are SMSFs.

The policy importance of this interpretation is that:

- The legislation fails to cover any labour hire or other contractors – leaving out one of the most frequently SG underpayment groups and the subject of many ACTU and union campaigns;
- The statements in paragraph 3.24 of the EM about the legislation requiring the notification of ordinary time earnings are false;
- Responsibility for reporting their liability for super contributions to the ATO has shifted to funds which have no information on the wages or ordinary time earnings base for those contributions;⁴ and

⁴ In addition, as indicated below, the relevant ATO systems document does not require super funds to report the period to which a superannuation contribution relates. This will undermine the ability to match contributions to the wages earned in a given period.

- The ATO enforcement capacity will remain hamstrung, because apparent partial SG payments could be due to overtime; as a result the current barriers to identification of and action on partial payment will persist.

The Bill and the existing law (TAA 1953 Section 389 and 390) do not deal with the changing nature of work. It leaves short term workers, casuals, labour hire workers and sham contractors exposed. Workers in the gig economy or workers who are easily replaced are not protected. Short term workers will not know that SG has not been paid for three months or more. The quarterly payments system continues to encourage the use of earmarked SG contributions for cash flow, particularly in small businesses.

ATO systems will not collect ordinary time earnings (the SG base) or separately identify overtime so that OTE can be approximated. Page 17 of the relevant ATO systems document⁵ shows that fund reporting of the period to which a contribution relates is optional. This suggests that in most cases contributions will not be able to be matched to the wages from the pay periods to which they relate. If the payments are quarterly, a reconciliation for the three months might be possible. If the employer contribution is not quarterly, we are back to the current potential for an annual reconciliation.

ISA research has shown that current policy leaves 2.8 billions of dollars of SG underpayment (as opposed to just non-payment) undetected.⁶

As discussed in the Introduction, the ATO has demonstrated its difficulty in measuring unpaid partial SG in its estimate of the SG Gap. Although they appear different, in fact the ATO aggregate estimate shows that the ISA distributional estimate is essentially correct – if we just correct for people paid at above SG rates. ISA estimates that 2.76 million SG eligible workers are under paid their SG entitlements. This is 32% of the SG eligible population. Of the 7% have no payment recorded and the remaining 25% have a partial payment.

On another issue, Schedule 6 of the Bill contains amendments to allow the pre-filling of employee tax file number declarations and the superannuation standard choice form. The latter includes releasing the employee’s existing superannuation account names to employers. The intention is that employers can pre-fill new starter choice of fund forms. However, we understand that these disclosures by the ATO, and the resulting list of funds presented to the employee, will not identify which are MySuper-compliant and which are not. The precise design of how fund choice may operate within STP is still being developed by the ATO. ISA is closely monitoring how the ATO proceeds.

Recommendation 1: The Bill should be amended so that Section 389-5 of the TAA 1953:

- **does not exclude labour hire and contract workers from single touch payroll;**
- **makes the reporting of ordinary time earnings compulsory; and**
- **makes pay cycle reporting of SG payments by employers compulsory.**

Recommendation 2: that the SG Administration Act should be amended to have SG paid at the same time as wages and to remove the \$450 per month of wages threshold for SG entitlement.

⁵ Australian Taxation Office – Member Account Transaction Service (MATS) (SPRMBRACCTX.0001) web service

⁶ See Table 3 of [ISA submission to the Senate Economics Committee inquiry into non-payment of the superannuation guarantee](#)

Box 1 Amended version of the main part of Section 389-5 TAA 1953

An entity must notify the Commissioner of an amount of a kind referred to in column 1 of an item in the following table on or before the day referred to in column 2 of that item, if the amount arises as a result of conduct of the entity (such as payment of an amount or provision of a benefit)".

Amounts to be notified to the Commissioner		
Item	Column 1	Column 2
	The following must be notified on or before this day
1	<p>The following amounts:</p> <p>(a) an amount the entity must withhold under Subdivision 12-B (other than section 12-55 or 12-60), paragraph 12-85(b), section 12-90, paragraph 12-110(1)(ca) or (cb) or section 12-319A;</p> <p>(b) the * withholding payment from which the amount referred to in paragraph (a) is required to be withheld</p>	<p>the day by which the amount is required to be withheld (regardless of whether it is withheld) (see section 16-5).</p>
2	<p>An amount (other than an amount covered by item 1) paid by the entity that constitutes:</p> <p>(a) the salary or wages (within the meaning of the Superannuation Guarantee (Administration) Act 1992) of a person who is the entity's employee (within the meaning of that Act but disregarding subsection 12(3) of that Act); or</p> <p>(b) the ordinary time earnings (within the meaning of that Act) of such an employee</p>	<p>the day on which the amount is paid.</p>
2A	<p>The following amounts:</p> <p>(a) a sacrificed ordinary time earnings amount (within the meaning of the Superannuation Guarantee (Administration) Act 1992) of an employee of the entity, in respect of the entity;</p> <p>(b) a sacrificed salary or wages amount (within the meaning of that Act) of an employee of the entity, in respect of the entity</p>	<p>The day on which the entity would have been required, under this section, to notify the Commissioner of the payment of the amount, if it had been paid to the employee as ordinary time earnings (within the meaning of the Superannuation Guarantee (Administration) Act 1992) or salary or wages (within the meaning of that Act).</p>
3	<p>[Removes employer direct reporting of SG contributions to the ATO]</p>	

2. Improving superannuation non-compliance before and after insolvency

Schedule 5 of the Exposure draft of the Superannuation Guarantee Integrity Measures Bill:

- strengthens director penalty provisions for directors whose companies do not pay SG or meet their PAYG withholding obligations; and
- enhances compliance with the requirement to provide security deposits for SG charge payments through the use of court orders.

The director penalty provisions remove a loophole which allowed directors to escape penalties if they wound up their company within 21 days of receiving a Director Penalty Notice. This is a welcome change.

The policy which is not addressed in the proposed amendments is the inclusion of SG payments inside the Government's Fair Entitlements Guarantee program. This would give employees with unpaid SG some compensation and give the government more skin in the game of SG non-compliance. Unpaid superannuation is a leading indicator of unpaid wages and company failure.⁷ More real time ATO initiated action on evidence of unpaid superannuation would assist the Government in limiting its FEG liabilities.

3. Improving incentives to comply for under-paying employers when insolvency is not in prospect

Schedule 1 of the Exposure draft of the Superannuation Guarantee Integrity Measures Bill:

- Allows the Commissioner to direct an employer to take an approved course on meeting their SG obligations; and
- Gives the Commissioner the power to direct payment of unpaid or overdue SG with an ultimate sanction of criminal penalties.

These changes are welcome.

⁷ See <http://www.industrysuperaustralia.com/publications/submissions/warning-signstightening-the-belt-on-sharp-corporate-practices/>

4. Stop the use of superannuation salary sacrifice contributions to reduce actual SG contributions

Schedule 3 of the Bill contains requirements for all employers to report salary sacrifice contributions in the Single Touch Payroll process. The reporting date is to align with that of the corresponding wages or ordinary time earnings.

These changes bolster the changes made to the SG Administration Act 1992 in Schedule 2 of the *Treasury Legislation Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017*.

The complementary sets of changes are welcome but ISA estimates that they only deal with 16% of the problem.

5. Removing legislative gaps in SG coverage, particularly the wage threshold of \$450 per month for SG contributions

The Bill does not address any of the legislative gaps in SG coverage. The \$450 wage threshold can be used by employers to prevent casual employees from gaining access to superannuation contributions. The same may be true of exemptions for part-time workers aged under 18.

As discussed in the Introduction, ABS data indicates a substantial increase in casual workers and multiple job holders. Both groups are at risk of not obtaining SG because of the \$450 threshold.

In 2015 the ABS published estimates based on administrative data which placed the number of concurrent multiple job holders at 1.9 million in the 2011-12 financial year, which was 18.4% of the 10.3 million employees covered by the study.⁸

In 2007, using survey data, the ABS estimated that 657,000 workers had more than one job in a month (6% of employed people).⁹ Although these estimates have different methodologies, the large number and apparent rise in multiple job holders should be of concern for policy makers.

⁸ 6311.0 - Information Paper: Construction of Experimental Statistics on Employee Earnings and Jobs from Administrative Data, Australia, 2011-12

⁹ ABS 4102.0 - Australian Social Trends, Sep 2009

6. Allowing an employee to more readily detect SG underpayment and to facilitate third parties (such as funds and unions) to assist employees with the recovery of unpaid superannuation

Schedule 2 of the Bill contains amendments which more readily allow the ATO or an ATO officer to disclose to an individual that they have been or may have been a victim of SG underpayment.

The current law only allows such disclosures if the affected individual has lodged a complaint.

The proposed amendments should allow more visibility of underpayment to employees and SG eligible contractors when implemented in ATO systems. Potentially, it could be included in the MyGov notification system.

But the onus is on the individual to seek help from third parties such as their fund or trade union. The legislative amendments do not allow disclosure to third parties.

Allowing third parties such as unions or superannuation funds to commence legal proceedings on behalf of aggrieved employees for unpaid SG could help obtain better outcomes, and reduce the burden on the government's Fair Entitlements Guarantee to pursue employers in certain circumstances.

This could be achieved through permitting the ATO to delegate an agent (such as a fund or service provider to them) to recover unpaid SG on application.



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