

24 October 2019

Industrial Relations Consultation  
Attorney-General's Department  
3-5 National Circuit  
Barton ACT 2600

Dear Sir/Madam,

Industry Super Australia (ISA) undertakes policy research and advocacy on behalf of over five million members of industry superannuation funds, to ensure that the policy settings for superannuation are consistent with the objective of maximising their retirement incomes.

Given the role of superannuation as an important workplace entitlement, ISA welcomes the opportunity to comment on the Attorney-General's Department's consultation paper, *Improving protections of employees' wages and entitlements: strengthening penalties for non-compliance*.

#### Summary of ISA's position

ISA broadly welcomes the Government's acknowledgement that the incidence of unpaid and underpaid wages is unacceptably high and warrants significant enhancements to the penalty framework in the *Fair Work Act 2009* (FWA) – including the criminalisation of serious, persistent and deliberate cases of wage theft. It is important to note, however, that non-compliance in relation to wages is closely related to non-compliance in relation to other employment entitlements – including the non-payment of Superannuation Guarantee (SG) contributions.

This consultation process is focused on considering how the law should be strengthened to protect workers. Given the FWA includes clauses relating to superannuation as a workplace entitlement, we recommend the Attorney-General consider what further action could be taken to address the significance of unpaid superannuation entitlements. While ISA notes separate policy initiatives are being worked through elsewhere, we recommend additional measures which, if introduced, will significantly reduce SG non-compliance.

ISA's position is that:

- The principle behind stronger penalties for wage theft is welcomed, but it should be acknowledged that the causes of wage and superannuation non-compliance are closely linked.
- They should be dealt with simultaneously, which means escalating and initiating further solutions to address unpaid super at the same time.
- Key to this is ensuring a more rigorous application of existing penalty frameworks for SG non-compliance – which have, to this point, been insufficiently utilised, allowing unscrupulous employers to avoid their obligations.

- It also means amending the *Superannuation Guarantee (Administration) Act 1992* (SGAA) to require employers to pay SG contributions at the same time as salary and wages. This is a simple and effective step that would ensure rogue employers do not avoid their SG obligations.

### **Wage theft and SG non-compliance are connected, and equally serious**

We welcome the Government's willingness to tackle wage theft. It is equally important to understand that unpaid super contributions are another aspect of this problem. Unpaid super also has an escalating impact on employees over the long term, due to foregone compounding of investment returns.

There is a clear and direct connection between underpaid (including unpaid) wages and underpaid SG contributions. The current requirement to pay SG quarterly allows it to be used by some employers to bolster their cash flows. Accountants also argue that the inability to meet SG obligations is a first sign that a business is having cash flow problems or heading towards insolvency.<sup>1</sup> SG underpayment is an early warning of the likelihood of significant underpayment of salary.

The two are mutually reinforcing. Given the level of SG contributions an employee is eligible for is contingent on their base salary, any underpayment of salary directly impacts on their SG entitlements. Of course, if wages are withheld entirely, then so too are the corresponding SG contributions.

ASIC insolvency statistics for 2015-2016, for example, revealed that while 18.7 per cent of insolvencies involved unpaid wages, a much higher proportion – 39.2 per cent – included unpaid superannuation.<sup>2</sup> The total amounts of unpaid superannuation were also higher than unpaid wages, and over time will have a more significant impact on impacted employees due to foregone compound interest. While 6.9 per cent of insolvencies featured SG debts of greater than \$100,000, just 2.7 per cent of reported insolvencies featured a similar amount of unpaid wage debt.

ISA research shows that the overall level of unpaid super increased by 25 per cent in the three years since 2013-2014, with 2.85 million Australians being short-changed \$5.9 billion in super entitlements in 2016-2017.<sup>3</sup>

Consultations have recently closed on the *Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019*, which features as its centerpiece a proposed amnesty for historical SG non-compliance.<sup>4</sup> While such an amnesty would result in some shortfalls being recouped for some employees, ISA has expressed our concern that the relevant Bill does not go far enough in ensuring a reduction in future non-compliance.

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<sup>1</sup> Industry Super Australia supplementary submission to the Senate Economics Reference Committee inquiry into superannuation guarantee non-payment, March 2017, p.21: submissions 3,8 and 25 to Senate Economics References Committee inquiry into superannuation guarantee non-payment.

<sup>2</sup> ASIC, 'Australian insolvency statistics: External administrators' reports for Australia, 1 July 2015—30 June 2016' (December 2016).

<sup>3</sup> Industry Super Australia, *Super Scandal.: Unpaid Super Guarantee in 2016-17*, October 2018.

<sup>4</sup> Outlined in the *Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019*.

To more effectively address the ongoing problem of unpaid super, ISA has consistently made several recommendations. They are as follows.

### **Stricter enforcement of existing penalties**

There should be a much more rigorous application of the existing enforcement regime. On paper, the current penalty framework should act as a strong deterrent to SG non-compliance. Under Part 7 of the SGAA, maximum additional penalties for SG non-payment can reach 200 per cent of the Superannuation Guarantee Charge (SGC).<sup>5</sup> The problem, however, is that such a maximum penalty has not been applied on a single occasion,<sup>6</sup> with the ATO instead consistently using its discretion under the SGAA to remit Part 7 penalties.

The *Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019* has sought to address this issue relating to penalty remission; however, rather than encouraging greater use of the 200 per cent maximum penalty, the Bill simply requires that penalties would not be able to be remitted below 100 per cent of the SGC. While this is a welcome step, ensuring that non-compliant employers will be liable to pay the bare minimum level of the SGC they incur is arguably unlikely to act as an effective deterrent. Given the Government's willingness to consider enhanced penalties for wage non-payment, ISA encourages it to give greater thought to how a more robust application of the Part 7 penalty regime could be achieved.

ISA provided a submission to the ATO on its draft Practice Statement, *PS LA 2019/D1 – Remission of additional superannuation guarantee charge*. We are concerned that the Practice Statement in its current form:

- takes a permissive approach to what is a mandatory obligation;
- adopts inconsistent and contradictory positions;
- effectively guides employers on how to delay paying SG and receive a lower penalty; and
- gives no explanation for how the ATO arrives at the remission percentages.

ISA notes that since the commencement of the *Treasury Laws Amendment (2018 Measures No. 4) Act 2018*, the ATO Commissioner now has the ability to impose criminal penalties on employers culpable for serious SG non-compliance. Such penalties, though, only come into play in the event that an employer fails to pay an unpaid SGC *after* receiving directions to do so by the Commissioner. We continue to support the intent behind the *2018 Measures No. 4 Act*. However, the threshold for criminal liability for non-payment of SG obligations is too high. The ATO's poor track record in imposing maximum Part 7 penalties means the future use of these penalties and sanctions by the ATO should be subject to greater monitoring and oversight by the relevant Parliamentary Committee.

The ATO Annual Report 2017-18 reveals some progress has been made to recover unpaid super through compliance activities – however, unfortunately, the amounts raised are insignificant compared to the \$5.9 billion of super entitlements that are not paid.

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<sup>5</sup> The SGC comprises the SG shortfall amount, tax of 10% on that amount, and an administration fee of \$20 per employee, per quarter.

<sup>6</sup> Senate Economics Legislation Committee, 10 April 2019, p 71

In the 2019/20 Federal Budget, the ATO was given additional funding to recover unpaid super. It is critical that the ATO can demonstrate that the additional funding is being used effectively for enforcement.

### **Aligning the timing of SG payment with the payment of wages**

A simple and effective strategy for addressing unpaid super involves amending the *Superannuation Guarantee (Administration) Act 1992* to require employers to pay SG contributions into employees' superannuation accounts at the same time they pay salary and wages.

Aligning such payments would strengthen the ability of the ATO, and employers themselves, to monitor the payment of SG, and identify and enquire about missing payments. ISA polling has revealed that most workers (around 70 per cent) believe that when super entitlements are recorded on their payslip this means they have been paid into their account. In fact, by allowing employer SG payments to be made as infrequently as once a quarter, the current settings make it difficult for employees to track whether the contributions they receive actually match their entitlements. An additional negative impact of quarterly payments is that workers are denied significant benefits arising from compound interest on their returns.

The quarterly payment regime in the SGAA was initially established in the early-1990s. Today, the ubiquity of modern payroll software – including the Single Touch Payroll system, which from 1 July 2019 all businesses are now required to have adopted – means there should be little administrative difficulty in aligning the payment of wages and SG contributions.

### **Stricter penalties for sham contracting**

ISA would welcome stronger penalties for entities found to have engaged in sham contracting, as signaled in the consultation paper.

As the Senate Economics References Committee noted in its 2017 report of wage theft and non-compliance of the SG, “it is not unknown for unscrupulous employers to deliberately misclassify employees as contractors in order to avoid paying entitlements such as SG.”<sup>7</sup> Indeed, in conjunction with the deliberate underpayment of SG to salaried employees, the practice of sham contracting continues to rob Australian workers of their rightful superannuation entitlements (as well as other rights such as minimum wage protections and leave).

A report prepared for industry fund Cbus predicted that in the ten years to June 2024, SG contributions totalling an estimated \$18 billion will be incorrectly withheld from workers misclassified as contractors or engaged in the cash economy. The study estimated that in 2014 alone, around 50,000 workers in sham contracting arrangements missed out on a total of \$278 million in SG entitlements.<sup>8</sup>

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<sup>7</sup> Senate Economics References Committee, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee* (May 2017), p.41

<sup>8</sup> Tria Investment Partners, *Superannuation Guarantee non-compliance: Cash economy & sham contracting* (Report prepared for Cbus, October 2016)

### Other measures to address the problem of unpaid super

ISA has identified above two measures to address the problem of unpaid super. They are:

- Mandating payment of super with payment of wages; and
- Better utilisation of penalties by the ATO.

Other measures are:

- Better monitoring and stronger enforcement

While, as discussed above, greater government oversight over the ATO's approach to monitoring SG compliance is needed, other relevant agencies such as the Fair Work Ombudsman and third parties such as unions or superannuation funds should be given greater scope to work with the ATO to recover unpaid super. 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.

- Extending the Fair Entitlements Guarantee (FEG) to cover SG contributions

The FEG is a legislative safety net for the recovery of unpaid entitlements such as wages and annual leave, if an employer becomes insolvent. The FEG should be extended to cover superannuation contributions. This is consistent with the treatment of other employee entitlements.

If you wish to discuss this submission, please contact Daniel Hannington-Pinto at [REDACTED] or [REDACTED].



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