

Additional Comments from Labor Senators

1.1 Labor Senators broadly support the measures set out in this bill and note the majority support from stakeholders, but continue to reiterate that the Government is slow to action on unpaid super and has a lacklustre approach to enforcement.

Schedules 1–6—Superannuation Guarantee Integrity

1.2 Labor Senators note the general support for these schedules but note that they will not close the entire superannuation guarantee (SG) gap. Labor Senators are of the view that any level of underpayment should be considered unacceptable.

1.3 The Financial Services Council (FSC) support strong action on unpaid superannuation guarantee payments:

It is unacceptable that some employers deliberately and systematically withhold their staff's contributions. This can significantly impact on an individual's savings by the time they retire. This mustn't be tolerated. The level of SG noncompliance is shockingly high. It allows some unscrupulous businesses to compete unfairly with other businesses that comply with the law.¹

1.4 The Australian Council of Trade Unions (ACTU) characterised the Government's approach this way:

Workers lose \$5.6 billion per year in unpaid superannuation, and the Government's piecemeal and post hoc approach unpaid super shows it is not serious, nor does it intend to take real action on unpaid super. The Government has willfully ignored the Senate Economic References Committee report *Superbad – Wage theft and non-compliance of the Superannuation Guarantee* which recommends real action on unpaid super, and would represent a significant first step in addressing the systemic shortfall of superannuation payments.²

1.5 Industry Super Australia (ISA) support the intent of this legislation but highlighted that the Government's current action is insufficient:

This legislation is a strong step in the right direction. However, on balance, it is not adequate to deal with the scale of the problem, particularly the changing nature of work and fully harnessing technological improvements that have occurred since the introduction of the SG a quarter of a century ago.³

1.6 ISA also indicated that the SG gap is widening, not closing:

1 Ms Jane Macnamara, Policy Manager, Superannuation and Investment Financial Services Council, *Committee Hansard*, 1 June 2018, p. 15.

2 Australian Council of Trade Unions, *Submission 9*, p. 2.

3 Mr Matthew Linden, Director, Public Affairs, Industry Super Australia, *Committee Hansard*, 1 June 2018, p. 7.

We have estimated the number of eligible SG employees underpaid in 2013-14 at 2.76 million. Our estimate for 2015-16, which is largely about labour force growth, is 2.98 million. Back in 2013-14 the estimate was that 32 per cent of employees were affected. We are now saying 33.4 per cent. Senator Ketter referred to the figure of \$5.6 billion earlier. The estimate for 2015-16 is \$5.9 billion.⁴

1.7 The Association of Superannuation Funds of Australia (ASFA) said that:

Will the SG gap go from \$2.85 billion to zero? No.⁵

1.8 Labor Senators also note comments of Treasury officials confirming that any level of underpayment is unacceptable:

Mr Jeremenko: Thank you, Chair. The position that the government takes, and Treasury, is that any level of underpayment of SG is unacceptable.⁶

1.9 Both ISA and the ACTU stated that the scope of single touch payroll was not sufficient—that there are contractors who are eligible for superannuation guarantee payments under the *Superannuation Guarantee (Administration) Act 1992* but will not be covered by the Government's primary superannuation guarantee integrity scheme—Single Touch Payroll (STP):

The legislation fails to cover any labour hire or other contractors—even though they are eligible for SG under the SGAA—leaving out one of the most frequently underpaid groups and potentially incentivising employers who wish to avoid paying SG to engage more workers in this way to avoid detection.⁷

1.10 The ACTU provided the following evidence to the committee:

Senator KETTER: What about the issue of the carve out of labour hire staff and contractors? Do you see an issue with that?

Mr Mitchell: I do. I think that for no real reason it carves it out, other than for the idea it might incentivise labour hiring contractors to be used more, which further increases the level of insecure work in the country.⁸

1.11 The Australian Restructuring Insolvency and Turnaround Association also supported the idea of labour hire staff and contract workers being covered by an SG integrity scheme:

4 Mr Phil Gallagher PSM, Special Retirement Policy Adviser, Industry Super Australia, *Committee Hansard*, 1 June 2018, p. 7.

5 Mr Glen James McCrea, Deputy Chief Executive Officer and Chief Policy Officer, Association of Superannuation Funds of Australia, *Committee Hansard*, 1 June 2018, p. 5.

6 Mr Robert Jeremenko, Division Head, Retirement Income Policy Division, Department of the Treasury, *Committee Hansard*, 1 June 2018, p. 42.

7 Industry Super Australia, *Submission 17*, p. 6

8 Mr Joseph Mitchell, Workers' Capital Organising Officer, Australian Council of Trade Unions, *Committee Hansard*, 1 June 2018, p. 21.

Senator KETTER: On Single Touch Payroll, do you have concerns about the fact that some groups of workers aren't covered—people who aren't employees?

Mr Winter: To keep it to our own backyard, Senator, wherever we see capacity for better financial information to be provided at that point of financial distress, we believe that's valuable. Insofar as you can keep proper account of who you owe money to, and that includes all types of workers, that's of significant concern to insolvency practitioners. From our point of view, in terms of the recoveries and paying what's due to people, we would see extending it as far as possible as a positive.

Senator KETTER: So you'd support the inclusion of labour hire staff or contract workers?

Mr Winter: Again, and for that same reason. And part of that is obviously the financial responsibility piece that comes for all sorts of organisations to keep track of where their obligations are at any point in time. Of course, the definition of solvency is the requirement to be able to meet your debts as and when they fall due. That language is really important here. That includes payments to contractors. It includes payments to the ATO [Australian Taxation Office] et cetera.⁹

1.12 The Australian Chamber of Commerce and Industry also supported this proposal:

Senator KETTER: Logically, they should be included in the reporting mechanism, shouldn't they, so as to avoid the underpayment issue?

Mr Grozier: I think employees should be included, and that includes deemed employees.

Senator KETTER: Contractors who are, essentially, entitled to superannuation by virtue of the nature of their engagement. You believe they should be included in the Single Touch Payroll regime?

Mr Grozier: I accept that that may not be how every employer's payroll system operates. But my understanding of the legislation is that, for those employers who have a Single Touch Payroll reporting obligation, it would extend to deemed employees.¹⁰

1.13 When questions were put to Treasury about expanding STP coverage to everyone eligible for SG purposes, Treasury officials made it clear that contractors on payroll would be reported through STP, but contractors paid via accounts payable will not be covered by this regime, in response to industry consultation:

Mr Crowe: Senator, all I can rely on in forming the ultimate advice that brought about the current arrangements in the bill, as I said, had its genesis in 2014 and that started a very, very extensive industry consultation process. Almost immediately, the notion of changing the timing of payments under the withholding system was removed from the table

9 *Committee Hansard*, 1 June 2018, p. 32.

10 *Committee Hansard*, 1 June 2018, p. 4.

because of the feedback that you've heard today from COSBOA [Council of Small Business Organisations Australia], et cetera, saying, 'Don't go there.' As we grew the consultative arrangements, there was a very, very strong shot across our bow not to include contract payments in a payroll environment. Now, we are predominantly working with the software industry, who understand payroll very, very well. It was a strong shot across our bow informing the legislation that went through in the budget omnibus bill to not include contract payments. They advised us that they do not appear in payroll. They are generally outside of payroll. So we heard, we listened and we've delivered in that fashion in order to make Single Touch Payroll the success we hope it to become.

Senator KETTER: In doing so, Mr Crowe, you have carved out a group of quite vulnerable people, in my personal opinion, because they might be considered to be contractors, yet we come across this sham contracting arrangement quite frequently and these people are paid through the payroll system. So I'm not quite understanding. We are trying to improve visibility, particularly, and if we are going to create a perverse incentive for more people to be put into this category—

Mr Crowe: If they are paid through a payroll system—and the narrative for STP is what is in your payroll system—you simply transmit that data to the tax office and it is likely to be picked up, without going to the definitional issues. We were very clearly advised in the construct of our law that to include any form of contract arrangements in what is a narrative around dumping a payroll system was the wrong thing to do. So, if they are in payroll, it is most likely we will get the data. The reason for that is they have to acquit that withholding component. So, if the employer is taking tax off people and treating them otherwise like an employee and paying them through payroll—that's what it does; it takes tax off people—the employer is likely to include that in the STP dataset, and Mr O'Halloran will be able to make full use of it.¹¹

1.14 On penalties, the ACTU made it clear that the strong penalties used in media releases¹² are not as strong as claimed by the Government:

The penalties proposed by the government may sound exciting, and tougher penalties for rogue employers are warranted—but that is if the employers are caught and only if they fail to pay after they're caught, and then only at the discretion of the commissioner. It's ridiculous to think that many employers will face harsher penalties as a result of this law, especially given the amnesty the government is giving to employers who've ripped off their staff for more than 26 years.¹³

11 *Committee Hansard*, 1 June 2018, p. 4.

12 The Hon. Kelly O'Dwyer MP, Minister for Revenue and Financial Services, *Protecting workers' superannuation*, accessed via <http://kmo.ministers.treasury.gov.au/media-release/031-2018/> (accessed 12 June 2018).

13 Industry Super Australia, *Submission 17*, p. 6.

1.15 In evaluating these measures, Labor Senators hold vision of a superannuation guarantee compliance system that covers everyone eligible for superannuation guarantee payments.

Schedule 7—Information Sharing

1.16 Labor Senators support this measure.

Schedule 8—Miscellaneous

1.17 Labor Senators support this measure, but also believe that this schedule fixes problems of the Government's own making.

1.18 When commenting on amendments in respect of changes to reversionary transition to retirement income streams, Treasury officials confirmed that this schedule fixes a problem that was created with the introduction of the Government's 2016 superannuation changes, a measure which industry has been calling for:

Senator KETTER: I've heard that. In schedule 8 there are two amendments that relate to previous government bills. Can you confirm that the changes to reversionary transition-to-retirement income streams fix up the problem that was created with the introduction of the government's 2016 superannuation changes and that this fix has been called for by industry?

Mr Jeremenko: That's correct, it does. It's a minor amendment to ensure that the original intent is met of those 2016-17 changes.¹⁴

1.19 Another amendment is in respect of transitional arrangements relating to the Australian Financial Complaints Authority (AFCA). The amendment allows the Superannuation Complaints Tribunal to share information about complaints with AFCA to facilitate a coordinated approach to handling complaints during the transition period. It is not clear why this provision was not included in the Government's bill that passed the Parliament in February 2018:

Senator KETTER: Can Treasury confirm that changes to the transitional arrangements relating to the Australian Financial Complaints Authority are to allow the Superannuation Complaints Tribunal to share information about complaints with AFCA to facilitate a coordinated approach to handling complaints during the transition period?

Mr Preston: That's correct.

Senator KETTER: Why was this provision not included in the government's bill that passed in February of this year?

Mr Jeremenko: I'm not sure which bill you're referring to, sorry. Do you mean in terms of AFCA?

Senator KETTER: Yes.

Mr Jeremenko: Unless my colleagues know I would have to take that on notice.

14 *Committee Hansard*, 1 June 2018, p. 49.

Senator KETTER: Could you tell me who made the decision not to have that—

Mr Jeremenko: As you know, all decisions as to what goes into bills, when they're introduced and what they're called is a matter for government.¹⁵

Schedule 9—Deductible Gift Recipients

1.20 Labor Senators support this measure.

Labor's strong stance on unpaid SG is delivering results, and in contrast the Government is trying to play catch-up

1.21 The Association of Superannuation Funds of Australia has noted the stronger action the ATO has taken since the tabling of the *Superbad – Wage theft and non-compliance of the Superannuation Guarantee (Superbad)* report:

Senator KETTER: And do you have a view that the ATO should make SG a higher priority in its actions?

Mr McCrea: Absolutely. We think it's an important issue because of that reason with the SG gap, and that's why we're very supportive of the bill today.

Senator KETTER: And, at the time of the Senate inquiry you were fairly dissatisfied with the fact that ATO was being reactive rather than proactive.

Mr McCrea: We're certainly pleased that they're being more proactive. Certainly in our dealings with the ATO there's a greater sense of urgency, and we're very pleased with that.¹⁶

1.22 Testimony given by the ATO confirmed that Labor Senator's *Superbad* report (Superbad – Wage theft and non-compliance of the Superannuation Guarantee) has had a positive impact in getting the Government, Treasury and the ATO to take action, acknowledging that much more needs to be done:

Mr O'Halloran: We have achieved 40 per cent of all of our case work for super guarantee—ATO-initiated cases, which is a term I think you may be familiar with. We've also improved our data modelling. You might recall, Senator, that last time we discussed a whole range of information around different data models. We have introduced what's called a 'nearest neighbour' model. I won't bore you with the details. I think the main point is that that has provided improved information—some from some funds, some from continued work across our other sources of data. We're now achieving, off a sample—it's a bit more than a sample—of the 300 cases, a 93 per cent strike rate. In other words, there's been an assessment raised in 93 per cent of the cases.

You might be aware that we also had a range of other models, including cases that had come from employee notifications where that contributes. We've increased the strike rate on that by 10 per cent. We've also

15 *Committee Hansard*, 1 June 2018, p. 49.

16 *Committee Hansard*, 1 June 2018, p. 4.

introduced other models. Our overall strike rate has improved by 15 per cent across all our models, and, at the same time, the selection has been taking up 40 per cent of our total case loads. Finally—I'll be brief—

Senator KETTER: That's okay.

Mr O'Halloran: There are associated increases, obviously, in the amount of revenue, the number of employers that have been spoken to and the amount of appropriately issued director penalty notices. Also, from a debt collection point of view, which is perhaps what this is as much about—how much money is going to an employee at the end of the day—for the year to date, we've been able to collect \$352 million up until April. For the same time last year it was \$263 million. So there's been significant increases in relation to our proactive work and also our intervention. Obviously the government has flagged that it will give the ATO funding coming out of MYEFO [Mid-Year Economic and Fiscal Outlook] for the super guarantee taskforce, and that again will draw heavily from our more targeted, nearest-neighbour model, as it's called, and that body of work has about 350 cases ready to go from 1 July, and, obviously, associated data improvements. So what I'm painting—I hope I'm answering your question—is: Single Touch Payroll probably gives us a macro view of much more than we've ever seen out of an annual cycle. We will use that to inform and shape. I'm aware that there's a view that there's a lot of rich information held by superannuation funds around debt collection and those sorts of things. I would just say that we've been in very detailed discussions with a number of funds and associated service providers within that industry. We are drawing from some of that progressively. It's perhaps not as rich as I thought it might be, but, through increased drawing from some of that referral material or information, subject to a bit of data settling, it certainly is adding. Certainly it has some spots where there are heavy caveats around the quality of the data and the format. But we are in active discussions across industry and with others to tap into that much more than we have. Also we have obviously increased our exchange of data with other agencies, particularly the Fair Work Ombudsman and so forth. I'll leave it at that.

Senator KETTER: Mr O'Halloran, I'm going to be so bold as to suggest that perhaps it was the report of this committee that shone a light on this issue and provided an incentive for the ATO to act in this regard. Would you agree with that?

Mr O'Halloran: Certainly the committee raised fair and reasonable questions—similar to, if I may say, the report to government that the SG working group did. As a bureaucrat, there wasn't a lot of material difference to some of the things, but certainly the focus on SG has, I think, reminded us all—and I'm happy to accept that good reminder on behalf of the ATO—that employees are disadvantaged in their retirement through this, and therefore we must improve. We, quite appropriately, have sharpened our efforts, and also we've got more community support about some of this, from employees and a range of other areas and other agencies.¹⁷

1.23 Labor Senators note the new abilities provided by STP and will monitor its usage by the ATO in closing the SG gap.

1.24 In contrast to Labor's thirty-two recommendations in the *Superbad* report, the Government has only taken limited steps to addressing superannuation guarantee compliance. As stated by the ACTU:

This bill, like each of the government's attempts to address the urgent problem of unpaid super, is inadequate, unenthusiastic and weak.¹⁸

1.25 Without going through all thirty-two recommendations, this bill as well other bills introduced by this Government have failed to consider issues such as the \$450 threshold, aligning superannuation payments to regular pay cycles, reviewing the definition of ordinary time earnings, extending liabilities of unpaid SG to corporate entities and ATO resourcing levels.

1.26 One issue in particular that was raised through this inquiry was the lack of empowerment for superannuation trustees and employee representatives, such as unions, being enabled to pursue unpaid SG amounts on behalf of an employee. Both the ISA and the ACTU continue to support Recommendation 14 in the *Superbad* report, which would have the Government consider a legislated option for employees, or third parties acting on their behalf, such as unions or superannuation funds, to take private legal action in the relevant courts against their employers for unpaid SG:

Mr Linden: Just to add to that, one of the key issues here is whether or not there is legal standing for them to take action in any case, and currently that's not the case. The SCG regime, ultimately, means that the only party that has legal standing when it comes to unpaid superannuation is the ATO, unless of course there is specific superannuation guarantee obligations written into an employment contract. But under the SGC regime, it is the ATO, even for individuals.¹⁹

Mr Mitchell: ... to empower workers and their representatives, such as a superannuation fund or union, to take action against employers for the non-payment of the superannuation guarantee or superannuation contributions.²⁰

1.27 In summary, the evidence noted here makes it abundantly clear that Labor has dragged the Government into acting on irrefutable evidence of a large SG gap, and that even when brought to this point, the Government has failed to provide a robust, comprehensive approach to uncovering and then acting on such underpayment. The Government claims that any level of SG underpayment is unacceptable, but has failed to provide a serious response to closing this large, widening SG gap.

18 Mr Joseph Mitchell, Workers' Capital Organising Officer, Australian Council of Trade Unions, *Committee Hansard*, 1 June 2018, p. 18.

19 Mr Matthew Linden, Director, Public Affairs, Industry Super Australia, *Committee Hansard*, 1 June 2018, p. 12.

20 Mr Joseph Mitchell, Workers' Capital Organising Officer, Australian Council of Trade Unions, *Committee Hansard*, 1 June 2018, p. 18.

Senator Chris Ketter
Deputy Chair

Senator Jenny McAllister
Senator for New South Wales

