

ISA Submission to Senate Economics Legislation Committee

# Treasury Laws Amendment (2018 Measures No. 4) Bill 2018

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## ISA Submission on Treasury Laws Amendment (2018 Measures No. 4) Bill 2018

### ABOUT INDUSTRY SUPER AUSTRALIA

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# ISA SUBMISSION TREASURY LAWS AMENDMENT (2018 MEASURES NO. 4) BILL 2018

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## KEY POINTS

There are welcome initiatives in this Bill to begin addressing the problem of unpaid superannuation – they are long overdue. However, the detail reveals some significant gaps in the proposed compliance framework and, inexplicably, the payment of SG won't be made more transparent or timely by ensuring payments are made at the same time as wage and salary income. In the case of single touch payroll, the drafting could mean that the Bill would not achieve the stated policy intent and could in fact worsen the problem.

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 so called 'gig' economy or workers who are easily replaced are not protected – such workers are already at higher risk of being unpaid and underpaid.

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 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 pay cycle;
- 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. The extension of Single Touch Payroll to small employers does not start until July 2019. 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 lacks clarity in the reporting of Ordinary Time Earnings and salary Sacrificed Ordinary Time Earnings – which is essential to determine if the correct amount of SG has been paid. The current drafting suggests employers could report one or the other but not necessarily both.

The Explanatory Memorandum to the Bill argues that more frequent payment of SG would cause SG underpayment. A very odd argument indeed. The basic argument is that businesses should not make provision for a legally required expense as it occurs.

- The consequence of the long quarterly lag in payments being made or being visible is that such ATO enforcement efforts that exist will continue to concentrate on complaints and zero payments, not partial payments.
- The Bill leaves labour hire workers and contractors outside of STP reporting, even though they are legally entitled to SG under the SG Administration Act. This significant gap could incentivise employers to engage more workers under such arrangements knowing they will fall outside the enhanced SG compliance net.

The Bill does create penalties for employer non-payment, but the extent to which the ATO will act on partial payment remains an issue. 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;**
- **clarifies the reporting of ordinary time earnings and sacrificed ordinary time earnings so that all applicable quantities are reported;**
- **clarifies the reporting of salary and wages and sacrificed salary and wages so that all applicable quantities are reported 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 2017 submission to the Senate Economics Committee inquiry into non-payment of the Superannuation Guarantee (SG) used 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.<sup>1</sup> 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	

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

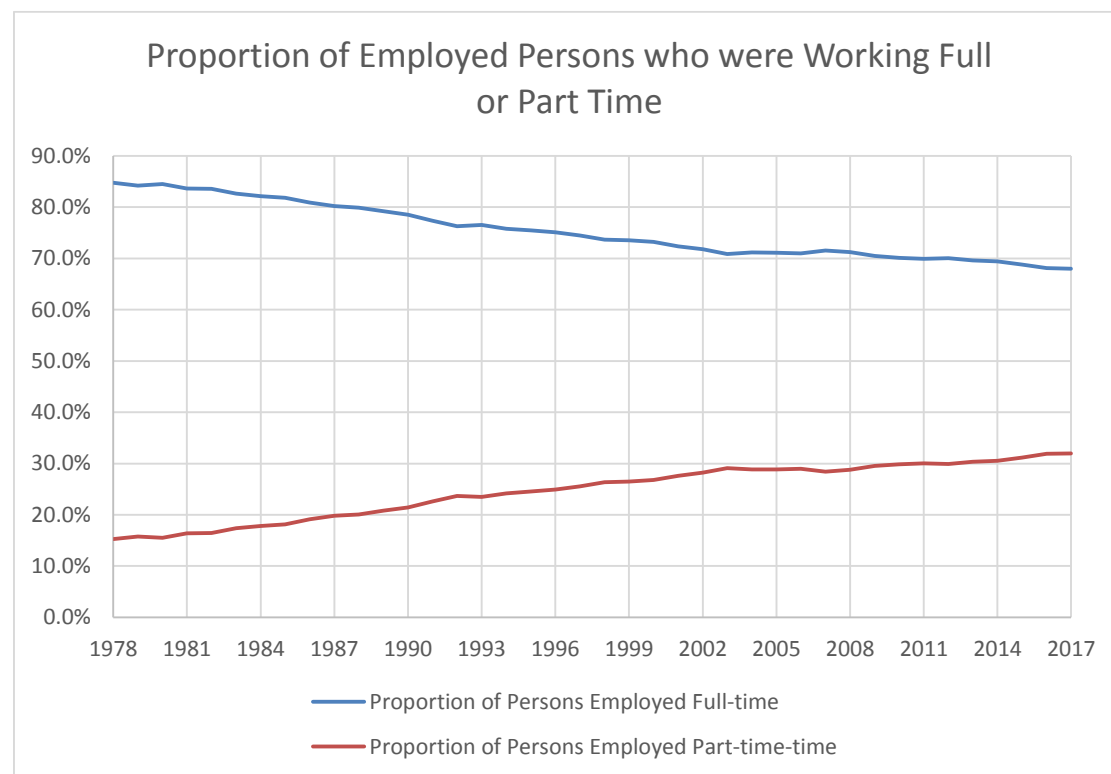
The ATO and Treasury methodologies are not robust because they do not control for the many employees who receive significant superannuation contributions above the SG rate. To address this, the agencies need to complement the aggregate timeseries with distributional measures of SG underpayment. Treasury and the ATO have made it clear that they will not release 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, contract work and multiple job holding.

The trends in part-time work and multiple job-holding present particular challenges for SG coverage because SG payments are not required for workers with wages below \$450 per month.

Figure 1 shows the rise in part-time work as a percentage of all employed persons in May of the relevant year. In 1978, only 15 per cent of workers were part-time. When the SG was introduced in 1992, 24 per cent were working part-time. In 2017, 32 per cent were working part-time. Full-time employment has gone from 85 per cent of the labour force to 68 per cent in 2017.

**Figure 1: Proportions of Employed People working Full-time and Part-time, May 1978 to May 2017, Original series**



Source: ABS Timeseries spreadsheet 6202001, *Labour force status by Sex, Australia - Trend, Seasonally adjusted and Original*

As shown in Table 2, 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.<sup>2</sup> In 2007, using survey data, the ABS estimated that 657,000 workers had more than one job in a month (6% of employed people).<sup>3</sup> Of the group, 372,000 were employees in their first job (4.1%). 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.

The core message is that the changing nature of work has seen a dramatic fall in full time work with well over one in 3 workers now in part-time, casual, and contract employment. The starkest change has been the more than four-fold increase in multiple job holdings among employees not in full time work as they have had to take on multiple jobs to derive sufficient income. Almost one in five employees now fall in this category and are at extreme risk of being underpaid relative to a person in a single job earning the same income.

**Table 2: Proportion of Employees with Multiple Jobs, 2007 and 2011-12**

	<b>Number of Employees with more than one job</b>	<b>Percent of Employees</b>
<b>2007 (a)</b>	<b>372,200</b>	<b>4.1%</b>
<b>2011-12 (b)</b>	<b>1,864,500</b>	<b>18.0</b>

(a) Source: Australian Social Trends 2009 ABS Cat. No 4102.0

(a) Source: 6311.0 Experimental Statistics on Employee Earnings and Jobs from Administrative Data, Australia, 2011-12

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.

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

<sup>3</sup> ABS 4102.0 - Australian Social Trends, Sep 2009

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 current absence of any visible measure of the SG base, ordinary time earnings (OTE), means that spotting partial payment is currently 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 Treasury Laws Amendment (2018 Measures No. 4) Bill 2018:

1. Makes a start, but ends up significantly short of what is required for the real time visibility of 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, but leaves labour hire contractors eligible for SG outside the scope of STP potentially incentivising the use of such employment to avoid SG detection;
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. The intent of the TLAB Bill's amendments is that employers report ordinary time earnings and sacrificed ordinary time earnings when payments are made. But the reporting is "*An amount that consists of either or both*" of these. The Oxford Dictionary defines the word *either* as being "Used before the first of two (or occasionally more) given alternatives". We do not want a situation where an employer reports one or the other of the two amounts in Column 1 of Item 2 or 2A in Sub-section 389-5 of the TAA 1953. We do not want sacrificed ordinary time earnings of zero reported, and not ordinary time earnings. At a minimum this could be redrafted as "*An amount that consists of either one as applicable or to both of the following*".

The new ATO system design will not attempt to achieve pay cycle or even monthly visibility of SG contributions. The Explanatory Memorandum (pp53 and 54) argue against payment of SG with wages in the following way:

“... mandatory real-time payment of employee tax and superannuation obligations at the time the report is lodged which will alter the current reporting and payment cycles currently in effect.

Altering this payment cycle to real-time may disrupt cash flow in small businesses resulting in additional financial pressure and have negative effects on the economy.

More frequent payment of superannuation obligations will not necessarily improve compliance with SG. It has not been identified as a significant driver of non-compliance. Non-compliant small business employers often cite cash flow problems as the major reason for their failure to pay employees' superannuation entitlements. By disrupting cash flow arrangements, this option may actually worsen compliance with the superannuation guarantee for smaller employers. “

This seems an unusual argument. The quarterly payment of SG leads to provisions not being made for the payment. It leads to a failure to manage cash flow. Paying the legal liability for SG payments with wages or within a month would encourage management of cash flows. It would be the best way of provisioning for the legal liability.

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).
- Items 2 and 2A require notification of “*An amount that consists of either or both of the following*”. If both are applicable, there should not be an option to report one.
- Item 2(a) refers to ordinary time earnings as defined in the SG Administration Act but excludes payments made under contract (sub-section 12(3) of SGAA), and
- Item 2(b) also effectively excludes salary sacrifice ordinary time earnings from being notified under STP if paid under a labour hire contract.
- The Bill removes the need for employers to report SG contributions and passes that obligation on to superannuation funds if they are APRA regulated (sub-section 389-5(3) is abolished), 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 –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;
- 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;<sup>4</sup> and
- The ATO enforcement capacity will remain slow, because SG payments corresponding to the ordinary time earnings will only be reported quarterly.

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. More frequent payment of legal liabilities would encourage better management of cash flow.

ISA research has shown that current policy leaves 2.8 billion dollars of SG underpayment (as opposed to just non-payment) undetected.<sup>5</sup>

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.

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<sup>4</sup> 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.

<sup>5</sup> See Table 3 of [ISA submission to the Senate Economics Committee inquiry into non-payment of the superannuation guarantee](#)

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. This could result in an employee unwittingly selecting a substandard non-MySuper compliant fund. 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;**
- **clarifies the reporting of ordinary time earnings and sacrificed ordinary time earnings so that all applicable quantities are reported;**
- **clarifies the reporting of salary and wages and sacrificed salary and wages so that all applicable quantities are reported 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.**

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

### 389-5 Required reporting by employers

- (1) 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 <b>Subdivision 12-B</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>	the day by which the amount is required to be withheld (regardless of whether it is withheld) (see section 16-5).
2	<p><b>An amount that consists of either or both of the following:</b></p> <p>(a) an amount (other than an amount covered by item 1) paid, on a particular day, by the entity that constitutes the ordinary time earnings (within the meaning of the <i>Superannuation Guarantee (Administration) Act 1992</i>) of an individual who is the entity's employee (within the meaning of that Act but <b>disregarding subsection 12(3) of that Act</b>);</p> <p>(b) a sacrificed ordinary time earnings amount (within the meaning of that Act) of such an employee of the entity, in respect of the entity, that would be paid as ordinary time earnings on a particular day if it was not sacrificed</p>	the day on which the amount is paid, or would be paid, as mentioned in column 1.
2A	<p><b>An amount that consists of either or both of the following:</b></p> <p>(a) an amount (other than an amount covered by item 1) paid, on a particular day, by the entity that constitutes the salary or wages (within the meaning of the <i>Superannuation Guarantee (Administration) Act 1992</i>) of an individual who is the entity's employee (within the meaning of that Act but <b>disregarding subsection 12(3) of that Act</b>);</p> <p>(b) a sacrificed salary or wages amount (within the meaning of that Act) of such an employee of the entity, in respect of the entity, that would be paid as salary or wages on a particular day if it was not sacrificed</p>	the day on which the amount is paid, or would be paid, as mentioned in column 1.

## 2. Improving superannuation non-compliance before and after insolvency

Schedule 5 of the TLA No. 4 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.<sup>6</sup> 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 TLA No. 4 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.

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<sup>6</sup> 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.

We believe there is a drafting slip-up

## 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.<sup>7</sup>

In 2007, using survey data, the ABS estimated that 657,000 workers had more than one job in a month (6% of employed people).<sup>8</sup> Although these estimates have different methodologies, the large number and apparent rise in multiple job holders should be of concern for policy makers.

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<sup>7</sup> 6311.0 - Information Paper: Construction of Experimental Statistics on Employee Earnings and Jobs from Administrative Data, Australia, 2011-12

<sup>8</sup> 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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