

Thank you for the opportunity to provide a submission regarding the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023.

*General points*

My principal concern is the Bill's exclusion of superannuation from the definition of wage theft (proposed s 327A(1)(b)(i) *Fair Work Act 2009*). I came across this exclusion independently. However, I am not alone in my concern: <https://www.theguardian.com/australia-news/2023/sep/10/labor-closing-loopholes-bill-wage-theft-superannuation>

The exclusion of superannuation from the definition of wage theft is especially odd, given the government's own position is that underpayment of superannuation is wage theft. The government said so in the explanatory memorandum for the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023*. At [92] '... reinforce the [g]overnment's position that underpayment of superannuation is a form of wage theft and worker exploitation'. Moreover, in the applicable second reading speech, the Minister himself said 'In almost every instance of wage theft, superannuation is also part of how workers have been ripped off' (*Commonwealth, Parliamentary Debates, House of Representatives, 29 March 2023, 2581* (Tony Burke, Minister for Employment and Workplace Relations)).

One is forced to wonder who paid to attend a lunch with the Minister between March and September 2023.

Nonetheless, the justification for the exclusion of superannuation from the definition of wage theft, as per the Bill's explanatory memorandum, is (at [882]):

'Superannuation contributions are excluded from scope as compulsory superannuation contributions are enforceable under the comprehensive superannuation framework. Superannuation entitlements may also be enforceable as workplace entitlements under the FW Act, by way of proceedings for a contravention of a civil remedy provision.'

There are several problems with this justification.

First, 'enforceable under the comprehensive superannuation framework' and 'proceedings for a contravention of a civil remedy provision' are not criminal offences. Even if one were to succeed in such enforcement and/or proceedings, there would be no finding that a crime had been committed. One purpose of making anything a criminal offence is to cast moral judgement on those that commit the offence. Underpayment of superannuation is equally as worthy of moral judgement as underpayment of wages, for the reasons given by the Minister and explanatory memorandum (quoted above).

Second, the 'comprehensive superannuation framework' is so useless as to be non-existent. Since it was introduced in 2019, there has never been an enforcement of a superannuation underpayment. Not a single time (<https://www.theguardian.com/australia-news/2023/sep/10/labor-closing-loopholes-bill-wage-theft-superannuation>). If double jeopardy or equivalent is a real concern for the government, the appropriate solution is to make underpayment of superannuation wage theft, and repeal the enforcement provisions of the comprehensive superannuation framework. That is, if superannuation is not repaid when the ATO asks nicely, the underpayment is referred to law enforcement as wage theft.

Third, the civil remedy provisions are inaccessible on 4 bases (see s 539 *Fair Work Act 2009*).

- One, standing to file a civil remedy application is narrow. It is generally limited to a directly affected employee and their union. People who become aware of superannuation underpayments, but who were not underpaid themselves, have no recourse to right the wrong (for example, HR staff). As against if superannuation underpayments were wage theft, whereby anyone can report the wage theft to the relevant law enforcement entity.
- Two, civil remedy provisions require court proceedings, the costs of which are prohibitive and uncommercial.
- Three, assuming the hurdle of (2) is overcome, it is difficult to prove. Directly affected employees do not have law enforcement powers. Discovery and subpoena do not assist when you don't know what you don't know. As against if superannuation underpayments were wage theft, and the relevant law enforcement entity can conduct a thorough investigation, covertly if necessary.
- Four, even when there is a successful court action of the relevant civil remedy provisions, the likelihood of being paid the superannuation is still low. Employers do what corporations usually do: go into liquidation to avoid their debts (<https://www.abc.net.au/news/2022-02-22/ato-powers-against-employers-not-paying-workers-superannuation/100851026>).

Fourth, if Commonwealth government employers already actively avoid correct payments of superannuation (see below), how can anyone reasonably expect the private sector to start making correct payments of superannuation without threat of criminal sanction?

*Personal example*

I suspect the above points will be made in other submissions. The value add of my submission is the personal example.

I am a Commonwealth employee, of a noteworthy Commonwealth employer (7,000+ employees). In 2019, I learned that my employer had not been paying superannuation in circumstances where it was legally required to pay superannuation (for the avoidance of doubt, this is not the rent-free accommodation issue). My employer eventually conceded the point, admitted it had made a systemic error resulting in underpayment of superannuation in these circumstances for 15 years, and made a five figure back payment to one employee (not myself).

Excluding the one back payment that did occur, I estimate my employer owes millions and possibly tens of millions in underpaid superannuation.

After this, my employer did nothing. It did not conduct a review to discover what other underpayments had occurred, let alone attempt to rectify those underpayments. When asked, my employer has refused to confirm or deny what action it has taken with regard to its systemic underpayment of superannuation from 2005-2020. It is unclear if my employer has commenced correctly paying superannuation in the relevant circumstances since 2020. The SES Band 1 directly responsible has not provided a meaningful response. An SES Band 2 with an indirect concern for affected employees has raised the issue with the CFO. The CFO has not responded.

I had run out of options to pursue this matter any further. I don't have standing, and even if I did, I cannot personally afford the cost of a court process. Nor should I be expected to do so, when I would not be a beneficiary of the multi-million dollar payout. When I saw the Minister's comments regarding the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* on superannuation being wage theft, I was relieved. I just had to sit on the issue for a few months until (what became) the Closing Loopholes Bill passed, and my employer could be the subject of the very first wage theft report.

But, unless the Closing Loopholes Bill is amended to exclude s 327A(1)(b)(i), it won't help either. Millions of dollars in underpaid superannuation will be forever unrecovered, just from this one employer.

I request the Committee consider the unreality of the government's justification for s 327A(1)(b)(i), and in response, recommend s 327A(1)(b)(i) be cut from the Bill. As a result, superannuation underpayments will constitute wage theft.

Regards,