AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

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6 June 2012

Tim Bryant
Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Department of the Senate

Email: corporations.joint@aph.gov.au

Dear Secretary,

Re: Superannuation Legislation Amendment (Stronger Super) Bill 2012 and the Superannuation Supervisory Levy Imposition Amendment Bill 2012

The Australian Chamber of Commerce and Industry (ACCI) welcomes the opportunity to provide a brief submission to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into the above legislation.

ACCI has been unable to consult more extensively with its members within the timeframe allocated for this inquiry and has limited its response to a number of issues which are particularly important to employers under measures contained in the Superannuation Legislation Amendment (Stronger Super) Bill 2012 (the bill).

The relevant contact officer for this matter is Mr Dick Grozier, Director Industrial Relations, Australian Business Industrial and NSW Business Chamber

Yours sincerely,

DANIEL MAMMONE
Director of Workplace Policy
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ATTACHMENT

ACCI Response - Superannuation Legislation Amendment (Stronger Super) Bill 2012

On 24 May, the Government introduced into the House of Representatives, the Superannuation Legislation Amendment (Stronger Super) Bill 2012 (the bill).

Subject to the detail of the standards, its implementation pathways and transitional arrangements, ACCI supports the SuperStream project and recognises the benefits and efficiencies it can bring to transactions in the superannuation system; efficiencies which will also benefit employers and their employees. However, it must be recognised that there will be new costs imposed on employers, who do not have a choice to participate in the compulsory superannuation guarantee system.[1] The precise extent of these costs on employers is unknown at this stage. However, we anticipate that this will particularly affect small sized firms, and will do so where an employer currently utilises payroll software which will need upgrading or where an employer uses non-electronic means to make contributions to a fund.

As ACCI indicated in its response to the Cooper Review final report, *"Super System Review"* on these issues: *"[p]roposals to move away from non-electronic payment by employers are understandable but need to be road tested with small business, as do proposed new offences on the transfer of data".*[2]

ACCI believes that to maximise the potential for SuperStream requires:

1. The principle that the data and payment standards are universal;
2. Data requirements are confined to the minimum required (as opposed to the minimum felt desirable or useful) for system operation;
3. Recognition that information required from employers is mainly second hand.

However ACCI recognises that different classes of employer or superannuation entity (such as APRA regulated and non-APRA regulated funds) may have circumstances which justify departure from or modification of data or payment standards, and supports the proposed subclauses.

Justification for departure from the general standards would need to be assessed in the context of system integrity, parsimony and efficiency. ACCI notes that various subclauses refer to superannuation entities, and this would mean, for example, that different data standards (such as extra mandatory information) could be required for defined benefit or public sector funds. However it is less clear that the proposed subsections provide for the circumstances where there is a negotiated arrangement between a standard employer sponsor and a fund. These latter arrangements would not affect the entity, only a part of its operations. An example of this might be an arrangement for the employer's employees to receive a higher automatic acceptance level of insurance.

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[1] This is acknowledged at pp 3 - 4 of the Explanatory Memorandum:

> **Compliance cost impact:** This measure is expected to temporarily impose additional compliance costs on employers, regulated superannuation entities and RSA providers that engage in the superannuation industry. Compliance costs will vary across these stakeholders depending on role they perform in the system and the manner that engagement with the data and payment regulations and standards occurs. Ongoing compliance costs will reduce over the medium to long term for all stakeholders.

[2] ACCI Media Release, *"Business Response To Cooper Review: Lower Super Industry Fees Better Option Than Higher Employer Levy"* (5 July 2010).

A capacity for a standard sponsor and fund to enter into arrangements which require additional data or perhaps idiosyncratic payments systems without bringing the fund into breach and possibly bringing the employer into breach would seem justifiable and would also seem to lower transitional costs. Allowing for such a capacity should be subject to three conditions:

1. It must follow from an single employer arrangement which is freely entered into between the standard employer sponsor and the fund
2. It must not have the effect that the employer cannot transact with entities using standard data and payment systems, such as when giving effect to and employee's act of choice, or that the fund cannot transact with other funds using standard data and payment systems, such as when giving effect to a roll-over;
3. It must not have the effect of preventing the fund transacting with the regulators in the appropriate manner.

In the case of condition #1 above, ACCI believes that to be freely entered into, such arrangements must be entered into after the schedule commences. Enabling arrangements of this type should not be possible on the basis of any existing arrangement between the fund and standard sponsor, such as by imposition through a current standard sponsorship arrangement. Existing standard sponsorship arrangements cannot be presumed to be freely entered into, and in some cases, may not be properly entered into. Second, the capacity for one party, say a fund, to impose additional data requirements on its standard sponsors, or the capacity of a third party such as a union, to impose data or reporting requirements on a section of employers through general industrial instruments, or in the context of statutory bargaining, would serve to undermine the benefits of SuperStream.

The bill introduces a new system of new strict liability criminal offences, administrative (civil) penalties, and infringement notices. This is in addition to other legislation (currently in exposure draft form) which would extend the director penalty regime to the superannuation guarantee system and impose personal liability on company directors when the company fails to comply with relevant obligations.[3]

The penalties arise in the event of failure to comply with regulations and payment and data standards or failure to comply with directions. Breaches of these proposed provisions are strict liability offences. They are criminal offences with few defences beyond error of fact. Given the level of sophistication, resources and capacities of employers, particularly smaller firms, unintentional mistakes or errors can lead to significant consequences. The compulsory nature of the superannuation system and the move to a purely electronic platform will mean that the employer will be relying heavily on the reliability and stability of intermediaries (ie. internet providers, software provides, clearing houses etc). It must be recalled that there remains no requirement at law for wages and salary to be paid by electronic means, nor is there a requirement for information required to be retained under the *Fair Work Act 2009* to be contained or provided in an electronic format (ie. time and wages records and payslips).

The transition to SuperStream will affect every employer and most, if not all, superannuation entities. It will take place against the background of imperfect understanding and imperfect records and data. The regulators' approach must be directed towards encouraging and assisting funds and employers to become SuperStream complaint with resort to penalty options as a last resort. SuperStream will undoubtedly take time to bed down and early resort to penalties would be unfair, and perceived to be unfair, which will not assist implementation nor to bring confidence to the system.

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[3] Tax Laws Amendment (2012 Measures No. 2) Bill 2012 Exposure Draft. The exposure draft consultation follows an earlier House Economics Standing Committee Inquiry and report into an earlier bill in the form of the Tax Laws Amendment (2011 Measures, No 8) Bill 2011, which in part, contained similar measures.

Provisions which provide for the withdrawal of infringement notices but also requires that the notice of withdrawal state that the person may still be prosecuted despite the withdrawal should be re-examined. Where a notice is withdrawn because of an error of fact the person should not remain under the stated possibility of a future prosecution (which in this instance would be extremely unlikely).

A principle that must be enshrined in the enforcement policy of the ATO is that it is not in the public interest for employers to be threatened with fines or prosecuted before the courts when a valid contribution has been made into a fund but in circumstances where there is a technical failure to provide the requisite information in an electronic format, or where there is a genuine bona fide reason for non-compliance.

ACCI believes that a "safe-harbour" provision for employers needs to be considered. It could, for example, allow an employer to voluntarily approach the regulator and make voluntary rectification where it became aware of a technical breach of the reporting framework. In that case, an employer would not be subject to the new enforcement framework if they approached the regulator after becoming aware of non-compliance within a specified period of time.

It is proposed that measures generally commences on Royal Assent but would apply to trustees on or after 1 July 2013; medium to large employers on or after 1 July 2014 and to small employers on 1 July 2014 in relation to conduct that occurs or after 1 July 2015. This phasing schedule which is based on employer size, and the ability to extend the date by regulations for small employers, is sensible and supported. A small employer is one who on 1 July 2014 employs fewer than 20 employees. The number of employees, and not some other measure such as effective full time employees, determines whether an employer is "small" or not, and the test is point in time. This raises the question of how casuals should be counted.

Conceptually casual employees are engaged for each period of continuous work (an engagement is not broken by rest and meal breaks) and subsequent periods (such as the next day) are new engagements. This is sometimes obscured by a number of statutory rights casuals have accumulated and also by practices such as engaging "regular casuals" or keeping casuals "on the books" for future offers of work when it becomes available.

ACCI understands that the provisions are intended to operate consistently with this common law view of casuals. This would mean that a casual who works for the employer on 1 July 2014 is counted, those who do not – even if "on the books", or scheduled to work other days in the week of 1 July 2014 – are not. To view casuals otherwise would create numerous instances where a case by case examination would be required to determine whether a particular employer was "small" or not. This kind of transitional uncertainty seems unnecessary, unwarranted and counter-productive, particularly because "small" employers would be able to operate within the SuperStream standards in their transactions before the required date. Naturally, non-casual employees would be counted as employees whether full- or part-time, and whether working on 1 July 2014 or not.

Superannuation entities will have to transact using the SuperStream standards and protocols from 1 July 2013 which means that leading up to that time and in the period between 1 July 2013 and 1 July 2014 funds will not only be upgrading their systems but seeking to clean and amend records and make-up data shortfalls. Much of this data cleaning activity will require funds to talk to individual members which is appropriate, but it seems inevitable that there will be spill-over to employers, as funds seek alternatives to chasing members who are difficult to contact or communicate with.

Whilst the objective of SuperStream overall to deliver net benefits, its introduction and transition will impose additional costs and frustrate many employers. Amongst small employers there may even be a sense of fear and despondency – SuperStream is another new thing they don't understand, will probably get wrong and don't know how they will master. It seems to ACCI that there will need to be ground rules so as to try to minimise the occasions for and nature of intrusion on employers. This needs to be coupled with sufficient practical information and assistance to employers.

Other Matters

ACCI strongly supports the continuation of the Superannuation Small Business Clearing House (administered by Medicare Australia). This will be essential for small business, particularly where they are currently using non-electronic means to make contributions and a review should be conducted to ascertain whether it should be extended to medium sized firms in the near future.

ACCI notes the written submission of the Law Council of Australia raising issues about the constitutional power underpinning some of the proposed measures. ACCI would welcome clarity on this point.

ACCI also notes that on Monday 4 June, the Government formally called for nominations to the SuperStream Advisory Council. Whilst the composition of the Council will only be known after nominations are submitted and appointments confirmed, it will be important that employers continue to be represented in the design and implementation of the SuperStream package of reforms.

The ACCI member network of Chambers of Commerce and national Industry Associations will be an important avenue for providing practical advice to employers as and when certain parts of the reform package commence.