

3 October 2019

Senate Standing Committee on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Chair,

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.

ISA welcomes the opportunity to comment on the *Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019*.

Summary of ISA's position

ISA supports the underlying intention of the proposed amnesty, as outlined in the Bill's Explanatory Memorandum (EM): to "encourage employers to self-correct historical SG non-compliance."¹ However we make the following points:

- The academic literature shows that amnesties can have mixed results,
- To be effective, amnesties need to be accompanied by strong penalties and a clear message that there will be no further amnesties,
- This amnesty would arguably be more effective if it was linked to more significant law reform, targeted at changing employer behavior on the timing of SG payments. For example, if the Government were to consider amendments to the *Superannuation Guarantee (Administration) Act 1992* (SGAA) to oblige employers to deposit Superannuation Guarantee (SG) contributions into employee accounts at the same time as they pay their salary.
- There are also other measures that the government should be taking to address the problem of unpaid super.

Amnesties can have mixed results

The nonpayment or underpayment of SG contributions is a systemic problem. ISA research shows that the problem of unpaid super has increased by 25 per cent in 3 years since 2013-2014 with 2.85 million Australians being short-changed \$5.9 billion in super entitlements in 2016-2017. While the proposed amnesty may result in some historical shortfalls being

¹ *Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019 – Explanatory Memorandum (2019)*, p.3

recouped for some employees, several questions are raised about the amnesty's likely impact on addressing the ongoing problem of unpaid superannuation.

The academic literature on the effectiveness of amnesties in altering behavior and generating revenue for governments is mixed.² In a study of income tax amnesties (arguably the closest parallel to superannuation), the International Monetary Fund (IMF) found that programs that combine both 'carrot' and 'stick' approaches – i.e., incentives along with a strengthening of enforcement regimes – are more likely to succeed.³ Having examined a series of tax amnesties in Ireland in the 1980s and 1990s, for instance, the IMF concluded that although they led to enhanced levels of compliance, "key to this success was not the amnesties per se, but the improved enforcement capacity that was developed prior to [their] launch."⁴ Conversely, a series of tax amnesties in Turkey that were not accompanied by greater enforcement activity "helped cultivate a culture of noncompliance."⁵

Need for strong penalties and no further amnesties

In light of such findings, securing compliance will likely be better achieved by placing greater emphasis on the 'stick': in this case, making more effective use of the penalty regime covering employers who engage in non-compliance. The law currently allows for the imposition of significant penalties on employers who do not meet their SG obligations. However, in the period from the introduction of the current maximum penalty to 10 April 2019, the ATO has not imposed a maximum penalty of 200 per cent on any employer for failing to pay the SG.⁶ The Bill, as it stands, does not address this.

Although the Bill limits the ATO Commissioner's ability to remit Part 7 penalties, this limitation will simply ensure that such penalties cannot be remitted below 100 per cent of the payable SG charge.⁷ In any case, the "in certain circumstances" caveat – relating to the Commissioner's ability to apply discretion to their decision – means that some uncertainty over when and how Part 7 penalties are remitted will remain.

In effect, then, there is a risk that rogue employers may be emboldened by the Bill to continue to engage in SG non-compliance. Although maximum Part 7 penalties will continue to apply following the end of the amnesty period, there is nothing in the current Bill that increases the likelihood they will be imposed with greater frequency. Rather, the proposed enhancements to the penalty regime will simply ensure that non-compliant employers are liable to pay, at the bare minimum, the actual level of the SG charge they incur.

² James Alm and William Beck, 'Tax amnesties and compliance in the long run: A time series analysis,' *National Tax Journal* 46 (1) (March 1993): 53-60; Steven Keithley, 'Indonesia's flawed tax amnesty,' *The Diplomat* (14 March 2017), accessed online at <https://thediplomat.com/2017/03/indonesias-flawed-tax-amnesty/>; Dominika Langenmayr, 'Voluntary disclosure of evaded taxes – Increasing revenue, or increasing incentives to evade,' *Journal of Public Economics* 151 (2017): 110-125.

³ Eric LeBorgne, Katherine Baer, *Tax Amnesties: Theory, Trends, and Some Alternatives* (International Monetary Fund, 2008).

⁴ *Ibid*, p.31.

⁵ *Ibid*, p.41.

⁶ Senate Economics Legislation Committee, 10 April 2019, p 71

⁷ *Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019 – Explanatory Memorandum* (2019), p.7

ISA notes that the Explanatory Memorandum to the Bill states that the amnesty will be a one-off.⁸ The IMF study discussed above found that there were “indications that repeated recourse to ... amnesties has undermined voluntary compliance” in some jurisdictions.⁹ Unless it is made clear to employers that the proposed amnesty will not be repeated, there is risk that some employers may opt to take the calculated risk that they will have another opportunity to remedy SG non-compliance without penalty in the future.

Mandate payment of super with payment of salary

A key measure that would make a significant impact on reducing unpaid super would be to amend the SGAA to oblige employers to deposit SG contributions into employee accounts at the same time as they pay their salary, to avoid the SG charge. This is an effective and simple change that will allow payments to be more closely tracked by both the employee and the ATO and address the problem of unpaid super.

Other measures to address the problem of unpaid super

To comprehensively ensure the SG is paid, government should also implement the following measures:

- Better monitoring and stronger enforcement

Greater government oversight of the ATO’s approach to monitoring compliance is needed. 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.

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 effectively used for enforcement.

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.

- Utilising penalties

Although current laws allow for the imposition of financial penalties of up to 200 per cent of the amount of unpaid super, as noted in this submission, as at April this year these have not been applied.

The *Treasury Laws Amendment (2018 Measures No.4) Act 2019* includes criminal sanctions for employers who refuse to pay SG contributions. The ATO must use these penalties and sanctions if they are to have a deterrent effect on employers who seek to avoid their

⁸ *Ibid*, pp.3; 5; 7; 9; 27.

⁹ LeBorgne & Baer, *Tax Amnesties*, p.37.

