

13 February 2020

Committee Chair (Economic References)
Senate Standing Committees on Economics
PO Box 6100
Canberra ACT 2600

Dear Committee Chair,

Inquiry into the unlawful underpayment of employees' remuneration

Industry Super Australia (ISA) undertakes policy research and advocacy on behalf of over five million members of industry superannuation funds, to ensure that policy settings for superannuation are consistent with the objective of maximising their retirement incomes.

Given the role of superannuation as an important workplace entitlement, ISA welcomes the opportunity to provide input into the Senate Economic References Committee's inquiry into the unlawful underpayment of employees' remuneration. The recommendations we put forward here reflect those we have consistently made in other contexts; most recently to an Attorney-General's Department consultation paper on strengthening penalties for the non-compliance of wages and entitlements.

Summary of ISA's position

ISA welcomes the Committee's acknowledgement of the scale of the problem of wage and superannuation theft. The withholding of Superannuation Guarantee (SG) entitlements by employers – deliberate or unintentional – unfairly limits employees' capacity to prepare themselves financially for retirement. The practice also increases the burden on government to fund the age pension.

As the frequency of news reports covering SG non-compliance demonstrates, the problem has become unacceptably widespread. Household name companies such as Woolworths, Bunnings and the Commonwealth Bank have recently been revealed as underpaying staff entitlements, including wages and superannuation. Despite the publicity generated by such stories, and the efforts of regulators, the quantum of unpaid super is growing. ISA analysis, detailed in this submission, shows that the problem increased by 25 per cent in the three years between 2013-2014 and 2016-2017, with Australian workers short-changed \$5.9 billion in SG entitlements in 2016-2017 alone.

ISA has consistently proposed several preventative and prescriptive fixes to unpaid super, including:

- Aligning the payment of super with the payment of wages;
- Better monitoring and stronger enforcement by the ATO, including effective utilisation of penalties;

- Facilitating other agencies and actors to assist in recovery; and
- Extending the Fair Entitlements Guarantee (FEG) to cover SG contributions.

In this context, it is important to note that the Government's proposed amnesty for historical SG non-compliance would only serve to remedy *past* underpayments. As ISA has argued in consultations on the proposed *Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019*, any future success in reducing the occurrence of unpaid super rests on addressing the root cause of the problem. Aligning the payment of super and wages would facilitate much more effective real-time monitoring of SG compliance – by members, regulators, and superannuation funds. Accordingly, mandating payday super is likely to be the strongest measure to address the unpaid super problem.

In what follows are ISA's specific responses to relevant terms of reference in this Senate inquiry.

Forms of and reasons for wage (and super) theft and whether it is regarded by some businesses as 'a cost of doing business'

The causes of unpaid super, as with unpaid wages, vary. While administrative errors might often be the cause, other cases involve the calculated and deliberate withholding of SG contributions to which employees are legally entitled. Unfortunately, the current settings under the *Superannuation Guarantee (Administration) Act 1992* (SGAA) arguably serve to facilitate such activity.

Allowing SG contributions to be paid on a quarterly basis already gives some employers the opportunity to bolster their cash flows, at the expense of forgone compound interest that could have been generated on employees' super balances in the intervening period. This delay of up to three months – between when SG contributions are 'made' by an employee and when they are credited to their super account – is also critical in cases of insolvency. Accountants argue that the inability to meet SG obligations is a first sign that a business is having cash flow problems or heading towards insolvency. As such, SG underpayment is an early warning of the likelihood of significant underpayment of salary. The two are closely related. Given the level of SG contributions an employee is eligible for is contingent on their base salary, any underpayment of salary directly impacts on their SG entitlements. Of course, if wages are withheld entirely, then so too are the corresponding SG contributions.

Data on insolvencies in 2018-19, released by the Australian Securities and Investments Commission (ASIC), revealed that while 18.6 per cent of insolvencies involved unpaid wages, a much higher proportion – 48.1 per cent – included unpaid SG contributions. The total amounts of unpaid super were also higher than unpaid wages, and over time will have a more significant impact on impacted employees due to forgone compound interest. While 10.5 per cent of insolvencies featured SG debts of greater than \$100,000, just 2.3 per cent of reported insolvencies featured unpaid wage debts of at least \$50,000.¹

The cost of wage and superannuation theft to the national economy

In March 2017, ISA developed the most comprehensive analysis of the underpayment of employer SG contributions hitherto published. The analysis was based on data from the ATO's

¹ ASIC, *Insolvency statistics: External administrators' reports (July 2018 to June 2019)*, December 2019, pp.45-45

2 per cent sample file for the 2016-17 financial year. This file is a 2 per cent sample of individual income tax returns from that year. A sample size of 277,202 individuals out of a population of 13,860,100 – made up of approximately 2 per cent of the original records and of each sample subgroup (such as gender, age range, region and lodgment method) – ensures an appropriately representative, but manageable, sample size.

The ISA analysis estimates that in 2016-17 around 31 per cent of employees eligible for the SG received employer contributions of less than 8.75 per cent of their ordinary time earnings (OTE – the wage base used to calculate SG entitlements). In using this lower threshold of 8.75 per cent (compared to the actual legislated 9.5 per cent that applied in the 2016-17 financial year), our estimates are conservative, understating the extent of the underpaid and unpaid super problem. As shown in Table 1 below, the cohort of SG-eligible employees underpaid employer SG contributions in this analysis comprised 2,850,000 individuals. Well over half a million SG-eligible employees are estimated to have received no employer contributions at all.

Table 1 - Ratio of Employer Contributions to Ordinary Time Earnings

SG Population, including those without employer contributions 2016-17	Estimated Number SG Eligible	Cumulative Numbers	Cumulative Percentage
Employer Contributions to OTE Ratio			
Nil	604,400	604,400	7%
Above 0% Up to 5%	495,450	1,099,850	12%
5% up to 7%	531,650	1,631,500	18%
7% up to 8.75%	1,218,400	2,849,900	31%
8.75% up to 10%	2,850,950	5,700,850	63%
10% up to 11%	1,349,100	7,049,950	77%
11% up to 15%	1,159,300	8,209,250	90%
15% and above	903,050	9,112,300	100%

Based on this analysis, the total dollar amount of underpaid SG contributions in 2016-17 was an estimated \$5.9 billion.² This equates to each individual being underpaid an average of \$2,070.

Table 2 shows that the ISA estimates are fully consistent with the ATO's SG Gap estimates for 2015-16. The ATO Tax Gap is a dollar estimate which is the amount by which employer contributions do not reach a benchmark based on ABS data. In the aggregate, people with contributions above 11% hide people with contributions below the SG rate. When the high-level contributions 'mask' is added to the ATO number, the result exceeds the ISA estimate.

² Remembering, again, that the lower 8.75 per cent SG rate applied in ISA's estimates means this figure would in fact have been considerably higher.

Table 2 – Reconciliation of published ATO SG Gap for 2015-16 with ISA estimate

Estimate	\$m	Source
ATO Gross SG Gap	3,269	ATO
Value of employer SG contributions above 11% of Ordinary Time Wage	2,859	ISA analysis of ATO sample file for 2015-16
Total	6,128	
ISA estimate for 2015-16	5,939	ISA analysis of ATO sample file
Difference	-189	

The best means of identifying and uncovering wage and superannuation theft, including ensuring that those exposing wage/superannuation theft are adequately protected from adverse treatment

To reduce the incidence of SG non-compliance, ISA has consistently called for employer superannuation contributions to be required to be paid at the same time as wages and salary. Polling commissioned by ISA has found that around 70 per cent of workers believe that when their SG entitlements are listed on their payslip these contributions have been paid into their super account. The fact that payments can currently be made as infrequently as once a quarter makes it difficult for even the most engaged employee to monitor whether they are eventually paid their full entitlement. Aligning the payment of SG contributions with the payment of wages and salary would allow individuals and superannuation funds to more readily identify when expected payments have not been made, and to make enquiries as to why this is the case.

In terms of reducing administrative errors, it may be less likely that employers overlook the need to pay SG contributions if they needed to be paid at the same time as wages. The quarterly payment requirements under the SGAA were initially established in the early-1990s. Today, the ubiquity of modern payroll software – including the Single Touch Payroll system, which businesses of all sizes are now required to have adopted – means there should be little administrative difficulty in aligning the payment of wages and SG contributions. Indeed, in acknowledging the positive role it will play in improving the real-time monitoring of pay-as-you-go tax obligations, ATO Commissioner Chris Jordan has also suggested that Single Touch Payroll:

will enable us much better to check also the Super Guarantee, because that has to be paid, I think, quarterly. So maybe a policy thing would be to bring that forward a bit and say 'pay [super] when you make your pay,' and then we can check that off a lot better.³

The most effective means of recovering unpaid entitlements and deterring wage and superannuation theft, including changes to the existing legal framework that would assist with recovery and deterrence

³ Senate Economics Legislation Committee, 30 May 2017, p.29

On paper, existing penalties for egregious non-payment or underpayment of super are strong. As a base requirement, employers who do not comply with their SG obligations must pay the Superannuation Guarantee Charge (SGC) – comprising the full amount withheld, plus interest of 10 per cent and an administration fee of \$20 per employee, per quarter. In addition, employers who do not cooperate with the ATO – either by being late to notify of an SG shortfall, or by refusing to provide relevant paperwork – can incur further charges. Known as ‘Part 7 penalties’, these additional fines can be as high as 200 per cent of the original SGC amount.

Despite having this tool at its disposal, however, the ATO has been reluctant to apply Part 7 penalties in full. As of October 2019, the maximum penalty of 200 per cent had only been handed down on a single occasion.⁴ Instead, the ATO has consistently used its discretion under the SGAA to remit Part 7 charges, either partly or entirely. In the 2018-19 financial year, just 3 per cent of relevant cases attracted Part 7 penalties of 100 per cent or more of the base SGC.⁵

The proposed *Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019* has sought to address this issue relating to Part 7 penalty remission. Yet, rather than encouraging greater use of the 200 per cent maximum penalty, the Bill would simply require that Part 7 penalties could not be remitted below 100 per cent of the SGC. As a deterrent, a penalty regime is only as effective as regulators’ willingness to enforce it. Simply put, the ATO must be urged to punish serious SG non-compliance to the fullest extent allowed for by legislation.

ISA notes that since the commencement of the *Treasury Laws Amendment (2018 Measures No. 4) Act 2018*, the ATO Commissioner can now impose criminal penalties on employers culpable of serious SG non-compliance. Such penalties, however, only come into play if an employer fails to pay an unpaid SGC *after* receiving directions to do so by the Commissioner. While we continue to support the intent behind the *2018 Measures No. 4 Act*, the threshold for criminal liability for non-payment of SG obligations is too high. Furthermore, the ATO’s poor track record in imposing maximum Part 7 penalties means future use of these sanctions by the ATO should be subject to greater monitoring and oversight by the relevant Parliamentary Committee.

While enforcement of the existing penalty regime needs to be strengthened, more must also be done to ensure impacted employees can recover unpaid contributions. The Fair Entitlements Guarantee (FEG), a legislative safety net for the recovery of unpaid entitlements such as wages and annual leave in the case of employer insolvency, should be extended to also cover SG contributions. As detailed earlier, the quantum of unpaid SG contributions in the case of insolvencies can often be greater than that of unpaid wages, rendering as illogical the absence of superannuation from the FEG.

In terms of the recovery of unpaid super, it is clear the regulator responsible has struggled to deal with the full scale of the problem. While the ATO’s annual report for the 2018 financial year revealed some progress had been made to recover unpaid super through its compliance activities, the amount subsequently collected and distributed to employees or their super funds (considerably less than half a billion dollars)⁶ was insignificant compared to ISA’s estimates, outlined above.

⁴ Senate Economics Legislation Committee, *Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019* public hearings, 30 October 2019, p.31

⁵ *Ibid.*

⁶ Commissioner of Taxation, *Annual Report 2017-18*, October 2018, p.70

Any consideration of further ways to recover unpaid super must begin with understanding how the obligation to pay super arises and who has standing to enforce the obligation. The obligation arises in three scenarios:

1. Under the *Superannuation Guarantee (Administration) Act 1992* (SGAA);
2. Through an Enterprise Bargaining Agreement (EBA), Award or contract of employment; and
3. In some cases, by contractual agreement between an employer and a superannuation fund.

Only the ATO can pursue employers for breach of the SGAA and as noted above, despite some progress, the amounts collected fall far short of the amounts of unpaid super owed to employees.

The *Fair Work Act 2009* (FWA) gives the Fair Work Ombudsman and unions standing to sue employers under an EBA or an Award for unpaid super. It does not give a trustee such standing.

Where an enforceable agreement exists between a trustee and an employer, the trustee can sue to recover unpaid super contributions under the contract.

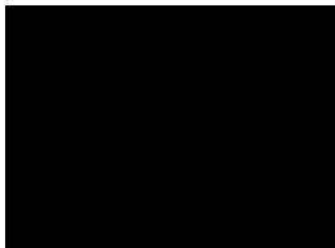
An employee can also pursue unpaid super under the terms of their EBA, Award or contract of employment. However, there are two issues. Firstly, not all employees are covered by an EBA, Award or contract of employment. Including the right to be paid the superannuation guarantee as part of the National Employee Standard would make it enforceable as an industrial entitlement for all workers and the Fair Work Ombudsman could sue for unpaid super. Secondly, it is costly and complex for an employee to sue an employer for unpaid super.

Industry Super Funds devote significant resources to assist employees to recover unpaid super. Industry Fund Services' (IFS) unpaid super compliance team have recovered more than \$1.2 billion in unpaid super entitlements over the past two decades. This work would be significantly enhanced if trustees were given unambiguous standing to take action to recover unpaid super on behalf of their members. This could be achieved if including the right to be paid the superannuation guarantee as part of the National Employee Standard (as suggested above) includes amendments to the FWA to give trustees standing to sue.

ISA thanks the Committee for the opportunity to provide a submission to this important inquiry. If you wish to discuss this submission, please contact Daniel Hannington-Pinto at [REDACTED]

[REDACTED] or [REDACTED]

Kind regards,



Daniel Hannington-Pinto
Campaign and Research Adviser.