

The Senate

Economics
Legislation Committee

Treasury Laws Amendment (2018 Superannuation
Measures No. 1) Bill 2018 [Provisions]

June 2018

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Table of Contents

Membership of the Committee	iii
Chapter 1.....	1
Introduction	1
Conduct of the inquiry.....	1
Overview of the bill.....	1
Financial impact	2
Background and content of the bill	2
Chapter 2.....	9
Views on the bill.....	9
Schedule 1: Superannuation Guarantee amnesty	9
Schedule 2: Multiple employers and the concessional contributions cap.....	12
Schedule 3: Non-arm's length income rules	13
Dissenting Report from Labor Senators.....	17
Appendix 1	25
Submissions and additional documents.....	25
Appendix 2.....	27
Public hearings.....	27

Chapter 1

Introduction

1.1 Pursuant to a resolution of the Senate on 9 May 2018,¹ the Senate on 24 May 2018 referred the provisions of the Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018 (the bill) to the Economics Legislation Committee for inquiry and report by 18 June 2018.

Conduct of the inquiry

1.2 The committee advertised the inquiry on its website. It also wrote to relevant stakeholders and interested parties inviting submissions by 6 June 2018. The committee received 11 submissions, which are listed at Appendix 1.

1.3 The committee held a public hearing in Canberra on 12 June 2018. The names of witnesses who appeared at the hearing are at Appendix 2.

1.4 Hansard references throughout this document relate to the Proof Hansard. Please note that page numbering may differ between the proof and final Hansard.

1.5 The committee thanks all individuals and organisations that contributed to the inquiry.

Overview of the bill

1.6 Schedule 1 of the bill provides for a year-long amnesty for employers who voluntarily report past shortfalls in payments of the superannuation guarantee (SG) to their employees.

1.7 Schedule 2 allows individuals to avoid unintentionally breaching their concessional contributions cap when they receive superannuation contributions from multiple employers by allowing them to apply to the Commissioner for an 'employer shortfall exemption certificate', which prevents their employer from having a superannuation guarantee shortfall if they do not make superannuation contributions for that individual for a period.

1.8 Schedule 2 allows individuals to avoid unintentionally breaching their concessional contributions cap when they receive superannuation contributions from multiple employers by allowing them to apply to the Commissioner for an 'employer shortfall exemption certificate', which prevents their employer from having a superannuation guarantee shortfall if they do not make superannuation contributions for that individual for a period.

1.9 Schedule 3 provides that the non-arm's length income rules for superannuation entities apply in situations where a superannuation entity incurs non-arm's length expenses in gaining or producing the income.

1 *Journals of the Senate No. 96, 24 May 2018, p. 3069.*

1.10 Schedule 4 amends the total superannuation balance rules to ensure that, in certain circumstances involving limited recourse borrowing arrangements, the total value of a superannuation fund's assets is taken into account in working out individual members' total superannuation balances.

Financial impact

1.11 According to the Explanatory Memorandum, the measure in Schedule 1 is expected to result in a gain to revenue of \$101 million.

1.12 Treasury estimates that the amnesty will result in the collection of a further \$230 million of employee's superannuation entitlements, over and above what would have been collected without the amnesty through usual compliance activities.²

1.13 The treatment of non-arm's length transactions is expected to result in a gain to revenue of \$30 million over the forward estimates. The other measures have small positive impacts.

Background and content of the bill

Schedule 1: Superannuation Guarantee amnesty

1.14 Compulsory superannuation is provided for in the Superannuation Guarantee (Administration) Act 1992 (the SGAA). Under the SGAA, an employer who does not pay the prescribed minimum superannuation contribution into the employee's superannuation fund is liable to a tax (the SG charge) equal to the amount of the superannuation shortfall, plus interest, plus an administration charge. The Australian Taxation Office (ATO), which administers the SG, can impose additional penalties of up to 200 per cent of the super guarantee charge.

1.15 The superannuation shortfall amount and interest are paid by the ATO into the employee's superannuation account³

1.16 Interest is calculated at a simple rate of 10 per cent a year. This is a higher rate than the average returns on funds, but it does not compound.

1.17 The administration charge and any additional penalties are retained by the ATO and paid into consolidated revenue.

1.18 Unlike the payment of employee SG within prescribed timeframes, SG charge and penalties are not tax deductible.

1.19 The ATO estimates a gross shortfall in superannuation payments of \$3.26 billion in 2014–15 or about 5 per cent of contributions payable. This is reduced to \$2.85 billion by the \$414 million retrieved through ATO's compliance activities.⁴

2 Mr Robert Jeremenko, Division Head, Retirement Income Policy Division, Treasury, *Committee Hansard*, 12 June 2018, p. 30.

3 Explanatory Memorandum, p. 18.

4 Australian Taxation Office (ATO), *Super Guarantee System: Superannuation guarantee gap*, <https://www.ato.gov.au/about-ato/research-and-statistics/in-detail/tax-gap/superannuation-guarantee-gap/?page=2> (accessed 5 June 2018).

1.20 There are current arrangements to encourage employers to report SG shortfalls, including reductions in penalties.

1.21 The ATO makes the following observations about reports of non-compliance:

- About 20,000 reports of unpaid super guarantee are made (by employees and former employees) to the ATO each year.
- Reports of unpaid super guarantee are received mostly from employees and former employees of small businesses.
- Non-compliance is reported more often about employers in accommodation and food services, construction, manufacturing and retail trade industries.
- Drivers of non-compliance include poor cash flow management by employers, poor record keeping and low levels of business experience.
- Insolvency amongst employers means that debts are sometimes difficult to collect on behalf of employees. Around 50% of collectable super guarantee charge debt is subject to insolvency.⁵

1.22 The Treasury Laws Amendment (2018 Measures No. 4) Bill 2018, which is before the Parliament, includes changes which are intended to improve compliance with the SGAA. Increased penalties including prison terms and improved collection tools, programs such as Single Touch Payroll being extended by the bill and more frequent reporting by superannuation funds being implemented by the ATO will make earlier detection of non-compliance possible.⁶

What the bill does

1.23 The bill provides a 12-month amnesty, dating from the introduction of the bill (24 May 2018), during which employers can rectify outstanding shortfalls for employees. On repaying the shortfall and interest owing, employers can then claim the tax deduction for payments made during the amnesty and have penalties and charges for non-payment reduced to zero.⁷

1.24 The amnesty is available only in respect of quarters up to and including the January 2018 to March 2018 quarter, and only to employers who voluntarily disclose the shortfall. It is not available to an employer who has already been informed that their compliance is being examined. It is available to any disclosure which results in an increased shortfall.⁸

1.25 The amnesty is available only to employers who voluntarily disclose the shortfall. It is not available to an employer who has already been informed that their

5 ATO, *Super Guarantee System, Superannuation guarantee gap*.

6 The Hon Kelly O'Dwyer, Minister for Revenue and Financial Services, *House of Representatives Hansard*, 28 March 2018, p. 3042.

7 Explanatory Memorandum, p. 10.

8 Explanatory Memorandum, pp. 10, 13.

compliance is being examined. It is available to any disclosure which results in an increased shortfall, for example relating to a different earnings quarter from the one being examined.⁹

1.26 The bill also provides that, where the ATO pays contributions recovered under the amnesty into the employee's account, the Commissioner can disregard the contributions cap, without the employee having to apply. If shortfall amounts are paid directly by the employer into the employee's fund, the employee can apply for the cap to be disregarded.¹⁰

1.27 There is also a provision to ensure that employees receiving shortfall payments are not disadvantaged with regard to their total taxable income.¹¹

1.28 The Explanatory Memorandum foreshadows that employers who are found to be in shortfall after the amnesty has expired will attract higher penalties if they could have taken advantage of the amnesty and did not.¹²

1.29 The amnesty provided for in this bill is a complement to the improved SG visibility, collection and enforcement measures contained in Treasury Laws Amendment (2018 Measures No. 4) Bill 2018. It is intended both to collect outstanding superannuation on behalf of employees and create a basis for improved compliance in the future.¹³

Schedule 2: Multiple employers and the concessional contributions cap

1.30 There is a cap on the amount of concessional superannuation contributions (that is, contributions taxed at 15 per cent rather than the individual's marginal rate) an individual make in any one year. From 1 July 2017 the cap is \$25 000.

1.31 Any concessional contributions above the cap are taxed at the individual's marginal rate, less a 15 per cent offset (representing the tax paid in the superannuation fund) and plus an interest charge to reflect the fact that the tax is collected later than it would normally be. At present the interest charge is around 4.75 per cent of the excess contributions a year.¹⁴ Individuals who breach their cap can choose to keep their excess contributions in their superannuation as a non-concessional contribution, or remove 85 per cent of the excess contributions.

1.32 Compulsory contributions paid by an individual employer to an employee under the SG regime are included in the employee's concessional contributions cap. The amount of compulsory contributions paid by an employer in respect of a single

9 Explanatory Memorandum, pp. 10, 13.

10 Explanatory Memorandum, p. 18.

11 Explanatory Memorandum, p. 19.

12 Explanatory Memorandum, p. 10.

13 Mr Robert Jeremenko, *Committee Hansard*, 12 June 2018, p. 30.

14 ATO, *Excess concessional contribution charge*, https://www.ato.gov.au/rates/key-superannuation-rates-and-thresholds/?page=4#Excess_concessional_contribution_charge (accessed 6 June 2018).

employee is capped so that the employee does not breach their concessional contributions cap.

1.33 However, this only operates in respect of individual employers. There is no mechanism to prevent a breach of an individual's concessional contributions cap as a result of multiple employers making compulsory contributions.

1.34 By way of example, an individual with two employers, each paying her \$150 000 a year, would receive compulsory superannuation contributions of \$14 250 a year from each. Taken alone these contributions are below the individual's concessional contributions cap, but together they total \$28 500. This amount would breach the individual's concessional contributions cap. However, each employer must make these contributions, as if they did not make the contribution, they would be in breach of their SG obligations under the SGAA.

What the bill does

1.35 The measure in Schedule 2 enables an employee to apply to the Commissioner of Taxation for a certificate for one or more of their employers, exempting that employers from having to pay the SG for that employee for a specified quarter. The assumption is that the employee will negotiate an alternative remuneration package, but there is no requirement that this must have happened.¹⁵ The existence of a shortfall exemption certificate does not prevent an employer from making contributions on behalf of that employee.¹⁶

1.36 It is up to the Commissioner to be sure that the individual is receiving superannuation contributions from at least one employer, but there is no specification as to the level of these contributions.¹⁷

1.37 An employee can make an application covering more than one employer and more than one quarter.¹⁸ However, the employee must have at least one employer making SG contributions on their behalf.

Schedule 3: Non-arm's length income rules

1.38 Because the favourable taxation treatment of superannuation creates an incentive to put as much money as possible into superannuation, transactions of superannuation funds are required to be at arm's length.

1.39 An arm's length transaction is where the buyers and sellers of a product act independently and do not have any relationship to each other. Each party would be acting in their own best interest.¹⁹

15 Explanatory Memorandum, p. 26.

16 Explanatory Memorandum, pp. 24–5.

17 Explanatory Memorandum, p. 27.

18 Explanatory Memorandum, p. 28.

19 Investopedia, *Arm's Length Transaction*, <https://www.investopedia.com/terms/a/armslength.asp> (accessed 6 June 2018).

1.40 The ATO says that income is non-arm's length income if the parties were not dealing with each other at arm's length, and the fund gains more than it would have if the parties had been dealing with each other at arm's length. Income derived by a fund as a beneficiary of a discretionary trust is non-arm's length income, as are dividends from a private company (unless the dividend is consistent with arm's length dealing).²⁰

1.41 The taxable income of a superannuation fund is generally taxed at 15 per cent. However, if the income is derived from a non-arm's length transaction, it is taxed at the top marginal rate.²¹

1.42 A fund's taxable income is affected by the amount of expenses (for example, interest payments) incurred in earning the income. These expenses also need to be at arm's length. This is provided for in Subdivision 295-H of the *Income Tax Assessment Act 1997*, but there is a concern that there is some ambiguity.

What the bill does

1.43 Schedule 3 of the bill amends subsection 295-550 of the *Income Tax Assessment Act 1997* to make clear that superannuation funds cannot circumvent the non-arm's length income rules by entering into schemes involving non-arm's length expenditure (including where expenses are not incurred).

1.44 Schedule 3 does so by inserting in the definitions of non-arm's length income more explicit references to 'loss, outgoing or expenditure' that is less than the entity might have been expected to incur, or 'loss, outgoing or expenditure' that is not incurred that the entity might have been expected to incur. These apply to income earned directly by a fund or received as beneficiary of a trust.

1.45 The new definitions apply to capital expenditure that results in revenue or capital gains.

1.46 The amendments apply to income for 2018–19 and future years, regardless of when the arrangement was entered into.

1.47 The amendments are aimed at ensuring that superannuation funds cannot circumvent the contribution caps by using non-arm's-length expenditure to inflate their overall income, for example, by borrowing money from a member at a reduced interest rate.²²

Schedule 4: Limited recourse borrowing arrangements

1.48 SMSFs are allowed to borrow, but only in very restricted circumstances. One form of borrowing that is allowed is through limited recourse borrowing arrangements. A limited recourse loan is a loan that is secured against a specific asset

20 ATO, *Non-arm's length income*, <https://www.ato.gov.au/super/self-managed-super-funds/investing/tax-on-income/non-arm-s-length-income/> (accessed 6 June 2018).

21 Explanatory Memorandum, p. 32.

22 The Hon Kelly O'Dwyer, Minister for Revenue and Financial Services, House of Representatives Hansard, 24 May 2018, p. 6.

only. In case of default, the lender would have a claim only on the specific asset, and not the other assets of the fund.²³

1.49 Reforms to the taxation of superannuation in 2016 introduced the concept of 'total superannuation balance', which is used to establish an individual's concessional and non-concessional contributions caps and eligibility for other measures such as the unused concessional cap carry forward and the spouse tax offset.²⁴

1.50 This has led to some SMSFs to attempt to utilise limited recourse loans to manipulate their total superannuation balance in order to retain contribution cap space and eligibility for certain measures.

What the bill does

1.51 Schedule 4 of the bill provides that, in a limited number of cases, for SMSFs or funds with fewer than five members, the value of the balance of a limited recourse loan that is attributable to an individual member of a fund will be included in the member's total superannuation balance. In effect, this means the total value of the asset will be counted, even though there is a loan outstanding against it. Without the amendment, the value of the asset would have been reduced by the loan outstanding against it, so the total superannuation balance would be lower.

1.52 The cases where the amendment applies are:

- where the limited recourse borrowing arrangement is between the fund and one of its associates; or
- where the member has satisfied a condition of release with a nil cashing restriction (that is, they are retired or have reached the age where they are able to withdraw their funds).

1.53 The application of the amendment is targeted to these situations only, as these are the preconditions which have been identified as giving rise to the potential for the gaming behaviour which the amendments are designed to prevent.

1.54 The amendment also only applies to borrowings arising under contracts entered into on or after 1 July 2018. It does not apply to refinancing of contracts entered into prior to 1 July 2018, or to borrowings arising under a contract that was entered into prior 1 July 2018.

23 ATO, *Limited recourse borrowing arrangements—questions and answers*, <https://www.ato.gov.au/Super/Self-managed-super-funds/In-detail/SMSF-resources/SMSF-technical/Limited-recourse-borrowing-arrangements---questions-and-answers/> (accessed 7 June 2018).

24 ATO, *Total superannuation balance*, <https://www.ato.gov.au/individuals/super/super-changes/total-superannuation-balance/> (accessed 13 June 2018).

Chapter 2

Views on the bill

Schedule 1: Superannuation Guarantee amnesty

2.1 Most of the people and organisations who gave evidence to the inquiry supported the amnesty.

2.2 Organisations representing small businesses welcomed the amnesty as encouraging small businesses to come forward and do the right thing by their employees, and as a means of establishing a base of compliance for when the increased visibility, stronger enforcement and higher penalties in the Treasury Laws Amendment (2018 Measures No. 4) Bill 2018 come into operation.

2.3 Small business organisations also sought to emphasise that complying with the Superannuation Guarantee can be onerous. The Council of Small Business Australia (COSBOA), while recognising that the amnesty is 'a very obvious thing that needs to happen', argued that employers should be taken out of the process of collection of superannuation altogether, or at least paid for handling contributions.¹ Mr Strong of COSBOA emphasised the difficulty for an employer of dealing with several different funds, each of which demands that contributions made on their forms and in their way.²

2.4 Mr Dick Grozier of the Australian Council of Chamber and Industry, declared that the amnesty 'has a role to play in improving recovery of missed contributions', and noted that the new SuperStream arrangements had made continuing compliance easier, but suggested that setting up a new account is still a hurdle.³ Ms Kate Carnell, the Australian Small Business and Family Ombudsman, also suggested that she was "very positive" about the amnesty, but observed that the complexity of the system and the lack of sophistication of many small businesses, some of which do not even use a computer, are barriers to compliance.⁴

2.5 Small business representatives argued that failure to comply was more often due to inadvertence due to other pressures on the business, or cash flow problems.⁵ Several witnesses argued that the system made it difficult for a business to retrieve

1 Council of Small Business Organisations of Australia (COSBOA), *Submission 11*, p.1–2; see also Ms Kate Carnell, Australian Small Business and Family Enterprise Ombudsman (ASBFEO), *Committee Hansard*, 12 June 2018, p. 26.

2 Mr Peter Strong, Chief Executive Officer, COSBOA, *Committee Hansard*, 12 June 2018, pp. 1, 3.

3 Mr Dick Grozier, Associate Director, Workplace Relations, Australian Chamber of Commerce and Industry (ACCI), *Committee Hansard*, 12 June 2018, p. 7.

4 Ms Kate Carnell, *Committee Hansard*, 12 June 2018, p. 27.

5 Council of Small Business Organisations of Australia (CISBOA), *Submission 11*, p.1; Ms Kate Carnell, *Committee Hansard*, 12 June 2018, p. 25; ACCI, *Submission 8*, p. 9.

this situation. The associated charges mounted up so quickly that they became prohibitive.⁶

2.6 Several changes to the bill were suggested. ASFBEQ suggested that the amnesty should take effect from the date the legislation was passed (rather than the date of introduction) to give businesses time to do the necessary preparation. Mr Grozier similarly emphasised the importance of speedy enactment.⁷ ASFBEQ also argued that the amnesty should last for the life of any payment plan negotiated with the ATO, recognising that many small businesses would not have the funds to make a single payment.⁸

2.7 The Tax Institute argued that the amnesty conditions should apply to all employers, including those whose shortfall is identified by the ATO and those who have come forward before the date of the amnesty.⁹ Minter Ellison expressed concern that the amnesty does nothing for employers who did make SG payments but were later than the quarterly cut off points before the amnesty started. Such employers will be in a worse position than those who made no payments at all until the amnesty. Minter Ellison believes that the tax deductions allowed under the amnesty should be available retrospectively for employers who disclosed late payments.¹⁰

2.8 The Tax Institute raised concerns about the breadth of the term 'examination' by the ATO, and believes that employers may be uncertain as to whether they are entitled to the amnesty if they have had any contact with the ATO.¹¹ The Law Council of Australia expressed similar reservations about the term 'examine'.¹²

2.9 The importance of advertising the amnesty widely and through a variety of mediums was stressed by several submitters and witnesses.¹³

2.10 The amnesty was also welcomed by most superannuation organisations. The Association of Superannuation Funds of Australia believed that superannuation compliance was not particularly onerous, but that the amnesty might result in the recovery of some funds that would otherwise go unpaid.¹⁴ The Financial Services

6 For example, Mr Dick Grozier, *Committee Hansard*, 12 June 2018, pp.3, 6; Housing Industry Association, *Submission 1*, p. 2; COSBOA, *Submission 8*, p. 1.

7 ASFBEQ, *Submission 2*, p. 1; Mr Dick Grozier, *Committee Hansard*, 12 June 2018, p. 4.

8 ASFBEQ, *Submission 2*, p. 1.

9 The Tax Institute, *Submission 6*, [p. 1].

10 Minter Ellison, *Submission 7*, pp. 1–2.

11 The Tax Institute, *Submission 6*, [p. 2].

12 Law Council of Australia, *Submission 4*, [p. 1].

13 Mr Peter Strong, *Committee Hansard*, 12 June 2018, p. 3; Ms Kate Carnell, *Committee Hansard*, 12 June 2018, p. 26; Ms Jane Macnamara, Policy Manager, Superannuation and Investment, Financial Services Council, *Committee Hansard*, 12 June 2018, p. 17.

14 Mr Glen McCrea, Deputy Chief Executive Officer, Association of Superannuation Funds of Australia, *Committee Hansard*, 12 June 2018, pp. 14–16.

Council believed that the amnesty would be taken up by employers who were inadvertently non-compliant or non-compliant for only a short period.¹⁵

2.11 Mr Matthew Linden of Industry Super Australia observed that amnesties are in fact rare in Australia. He noted that the evidence on tax amnesties is mixed, but that they work best in conjunction with sanctions, as this proposed amnesty is designed to. However, he believed that the existing penalty regime (that is, without the changed proposed in the Treasury Laws Amendment (2018 Measures No. 4) Bill 2018) combined with the low probability of being detected meant that many employers would simply continue in non-compliance.¹⁶

2.12 Mr Linden also suggested that the introduction of Single Touch Payroll would have a much greater impact on compliance than the amnesty would. This point was also made by Mr Michael Potter of the Financial Services Council.¹⁷

2.13 The Australian Council of Trade Unions (ACTU) deplored the amnesty as sanctioning theft of workers' wages, suggesting that the bill would do nothing to help workers whose employers were insolvent.¹⁸ Despite decrying the benefits accruing to employers who voluntarily rectify historical shortfalls under the terms of the amnesty, the ACTU also simultaneously asserted that the amnesty did not create an incentive for employers to pay unpaid superannuation. Take up would be low because there is so little risk of non-payment being detected.¹⁹

2.14 ACTU believed the amnesty should be scrapped in favour of more active enforcement and recovery. In particular, the ACTU suggests that unions should have more power to inspect payment records and to take action against employers who default and that superannuation should be included in the National Employment Standards in the Fair Work Act.²⁰

2.15 Representatives of the Treasury and the ATO, alongside a number of other witnesses, emphasised the complementarity between the amnesty in this bill and the measures to improve visibility of superannuation payments and increase penalties for non-payment in the Treasury Laws Amendment (2018 Measures No. 4) Bill 2018. It

15 Ms Jane Macnamara, *Committee Hansard*, 12 June 2018, p. 17.

16 Mr Matthew Linden, Director, Public Affairs, Industry Super Australia, *Committee Hansard*, 12 June 2018, pp.20, 22.

17 Mr Matthew Linden, *Committee Hansard*, 12 June 2018, p. 23; Mr Michael Potter, Senior Policy Manager, Economics and Tax, Financial Services Council, Mr Matthew Linden, Director, Public Affairs, Industry Super Australia, *Committee Hansard*, 12 June 2018, p. 17.

18 Australian Council of Trade Unions (ACTU), *Submission 3*, pp. 4, 5.

19 Mr Joseph Mitchell, Workers' Capital Organising Officer, ACTU, *Committee Hansard*, 12 June 2018, p. 10.

20 Mr Joseph Mitchell, *Committee Hansard*, 12 June 2018, p. 9.

is intended that in combination the two sets of measures would result in behavioural change and a higher rate of compliance in the future.²¹

2.16 Treasury noted that amnesties in Australia are so rare that it is unlikely that the bill will create any expectation of future lenient treatment. This possibility had been discussed by Mr McCrea of the Association of Superannuation Funds of Australia and Mr Linden of Industry Super Australia.²²

Committee view

2.17 The committee has heard evidence that the amnesty proposed in Schedule 1 will leave no workers worse off and will result in repayments of superannuation that would otherwise not be paid. It notes that the amount that will be collected, estimated at \$230 million, whilst no doubt valuable for those employees who would otherwise miss out, does represent a small part of the estimated total superannuation gap of almost \$3 billion a year.

2.18 The committee believes that changes to the way superannuation is collected and remitted to date have simplified and improved the system, with further proposed changes set to continue this trend.

2.19 The committee is concerned that the ramping up of penalties may create a big disincentive for employers to disclose relatively minor shortfalls, with the result that they fall further into arrears. It suggests that it be made easier to correct shortfalls early, and more generally to come forward and rectify underpayments and non-payment.

2.20 Finally, the committee heard from a number of witnesses about the need to ensure that considerable effort is made in developing and implementing an extensive communication strategy to ensure all employers are aware of the amnesty and engage early.

Schedule 2: Multiple employers and the concessional contributions cap

2.21 Only a few submitters and witnesses addressed Schedule 2 of the bill. The SMSF Association supported the measure, noting that it will reduce a compliance burden on individuals who may exceed the cap.²³ The Financial Services Council also supports the measure.²⁴

21 Mr Robert Jeremenko, Division Head, Retirement Income Policy Division, Treasury, *Committee Hansard*, 12 June 2018, p. 30; Mr James O'Halloran, Deputy Commissioner, Superannuation, Australian Taxation Office, *Committee Hansard*, 12 June 2018, p. 32; Mr Robb Preston, manager, Retirement Income Policy Division, Treasury, *Committee Hansard*, 12 June 2018, p. 32.

22 Mr Robert Jeremenko, *Committee Hansard*, 12 June 2018, p. 31; Mr Glen McCrea, *Committee Hansard*, 12 June 2018, p. 14; Mr Matthew Linden, *Committee Hansard*, 12 June 2018, p. 21.

23 Self-managed Superannuation Funds Association, *Submission 9*.

24 Ms Jane Macnamara, *Committee Hansard*, 12 June 2018, p.17.

2.22 ACCI supported the measure. It pointed out that unavoidable breaches of the concessional contributions cap became more common with the reduction of the cap to \$25 000 in 2017–18.²⁵ It welcomes the provision that the issuing of a certificate does not prevent an employer from making contributions, because some Single Touch Payroll will make it difficult for some payroll systems to make exceptions.²⁶

2.23 Some organisations representing superannuation funds expressed caution, warning that there should be no replication of the provision for opting out. The essence of the superannuation system is that it is compulsory.²⁷

2.24 Dixon Advisory suggested that, in deciding whether to issue a certificate, the Commissioner should consider whether the employee will receive an offset for the superannuation that will not be paid if the employee opts out of SG payments. There should also be a mechanism for ensuring that the agreement is honoured. However, Dixon Advisory also noted that the employees involved will generally be in a good bargaining position.²⁸

2.25 It was pointed out that this was a minor issue and that there was already provision for remedying a breach of the cap.²⁹ However, Mr Jeremenko of the Treasury argued that it was anomalous for a law to cause someone to breach another law, and this should be fixed.³⁰

Schedule 3: Non-arm's length income rules

2.26 Few submitters and witnesses offered a view on Schedule 3 of the bill. It was supported, along with Schedule 4, as an integrity measure applying to SMSFs by Industry Super Australia.³¹ Dixon Advisory welcomed the clarification of treatment of non-arm's length borrowing, suggesting that it would reduce disputes.³²

2.27 However, the Tax Institute argued that the contributions rules are sufficient to deal with transactions that are not at arm's length, and values should be adjusted at the time an asset is acquired. It would be inappropriate to tax subsequent income and gains from the assets. Even if some action is required, the changes should be prospective only, as existing arrangements would be difficult to unwind. The Tax Institute argued that some grandfathering of existing arrangements should be allowed.

25 ACCI, *Submission 8*, p. 18.

26 Mr Dick Grozier, *Committee Hansard*, 12 June 2018, p. 2.

27 Mr Glen McCrea, *Committee Hansard*, 12 June 2018, p. 15; Mr Matthew Linden, *Committee Hansard*, 12 June 2018, p. 22.

28 Dixon Advisory, *Submission 5*, pp. 1–2.

29 Mr Matthew Linden, *Committee Hansard*, 12 June 2018, p. 20.

30 Mr Robert Jeremenko, *Committee Hansard*, 12 June 2018, p. 34.

31 Mr Matthew Linden, *Committee Hansard*, 12 June 2018, p. 21.

32 Dixon Advisory, *Submission 5*, p. 2.

It questions whether employer contributions could be seen to be not at arm's length. Further, the changes should be confined to expenses, and not include capital outlays.³³

2.28 The Tax Institute also argued that the application of the non-arm's length principle to minor expenses could taint a much bigger transaction.³⁴

2.29 Finally, the Tax Institute pointed out that trustees perform many tasks on behalf of their SMSF. It is not clear which of these tasks might constitute non-arm's length income.³⁵

2.30 The Law Council of Australia also expresses concern about the retrospective application of the non-arm's length provisions to existing arrangements, which could affect quite large funds, not just SMSFs.³⁶

Committee view

2.31 The committee welcomes the clarification of the non-arm's length provision to ensure that expenses are included in the definition.

2.32 It notes that Schedule 3 provides that the amendments apply in relation to income derived in the 2018–19 income year and later income years, that is, to future income. income only. The amendments will apply to income sources that were acquired before 1 July 2018, but, of course, only applies to non-arm's length arrangements.

2.33 Schedule 4: Limited recourse borrowing arrangements

2.34 Very few submitters and witnesses addressed Schedule 4 of the bill.

2.35 The SMSF Association noted that the provisions regarding limited recourse borrowing arrangements would have narrower application than was originally suggested, and welcomed the change.³⁷

2.36 The Tax Institute warned of a possible interaction between the non-arm's length provisions and the provisions regarding limited recourse borrowing arrangements, with double counting a possibility. It regarded contributions caps as an adequate existing measure for dealing with the issues.

Committee view

2.37 The committee welcomes the measure preventing borrowing as a way of inflating superannuation balances.

33 The Tax Institute, *Submission 6*, pp. 3–4.

34 The Tax Institute, *Submission 6*, p. 4.

35 The Tax Institute, *Submission 6*, p. 5.

36 Law Council of Australia, *Submission 4*, p. 2.

37 Self-managed Superannuation Funds Association, *Submission 9*.

Recommendation 1

2.38 The committee recommends that the bill be passed.

**Senator Jane Hume
Chair**

Dissenting Report from Labor Senators

1.1 Labor Senators strongly dispute the need for an amnesty for unpaid superannuation guarantee (SG) entitlements. The inquiry uncovered a distinct lack of stakeholder advocacy for the amnesty as well as concerns that the amnesty could even be counterproductive to broader compliance efforts.

Schedules 1: Superannuation Guarantee amnesty

1.2 This bill was introduced with a great deal of secrecy. The bill was introduced to the Parliament on Thursday 24th June 2018 and was deemed time critical, meaning that this report had to be tabled on Monday 18th June, giving just over three weeks to scrutinise the provisions of this legislation.

1.3 The superannuation guarantee amnesty was not announced on budget night, and as Treasury officials confirmed, work on establishing the amnesty was occurring in late 2017 and the decision to adopt this policy was taken before budget night 2018. The fiscal implications of this measure were included in the budget under the provision for ‘decisions taken but not yet announced’, meaning that the budget documents included no policy detail about the amnesty.

Mr Jeremenko: I would have to take the exact timing on notice. It was certainly under advanced consideration, if you like, within government from the time that the measures No. 4 package—if I can call it that—was being looked at. From the second half of last year, we were looking at this as the two arms to the one package on unpaid SG.

Senator KETTER: Why wasn't it then included in the budget?

Mr Jeremenko: The policy decision to proceed is something that was only made recently.

Senator KETTER: That's the question I'm asking.

Mr Jeremenko: Sorry. I was talking about the thinking within government and Treasury, not necessarily that there was a decision to proceed. Again, I would have to take exactly when on notice.

Senator KETTER: So it was post the budget.

Mr Preston: No. It was pre-budget. It was a decision taken but not yet announced. The fiscal implications of the policy were reflected in the budget, but the measure wasn't announced through the budget for the reasons that we've explained previously.¹

1.4 Furthermore, there are no recent Parliamentary or Government reports into SG non-compliance that have actually recommended such a measure.

1 *Committee Hansard*, 12 June 2018, p. 35.

1.5 Evidence received during the inquiry found that very few stakeholders advocated for this policy:

- (a) The Australian Chamber of Commerce and Industry (ACCI) stated in their submission that they “for some time advocated for a superannuation guarantee amnesty to allow employers who have missed contributions to catch up and rectify the missed contribution without facing the full operation of the SG charge system.”² and that of the ACCI membership, only one member had advocated for an amnesty:

Mr Grozier: It actually arose from one of the chamber's members, the New South Wales Business Chamber, and was first raised by a member in a meeting with the then Minister for Small Business. It was then considered by the New South Wales Business Chamber, which decided that it would support that.³

- (b) The Council of Small Business of Australia (COSBOA) also confirmed that they had expressed support for this policy to the Government:

Senator KETTER: ... And Mr Strong, have you met with government about the issue of the amnesty?

Mr Strong: We haven't done anything in public about this that I can recall. There may have been a tweet or something. But I remember discussing this with Mr Billson just in a general conversation about the management of superannuation, because, as you know, we don't think we should be involved in PAYG. And then I had a discussion with Kelly O'Dwyer. Again, it was a very quick discussion—just a mention of it—and I said that yes, we'd support that.⁴

1.6 In justifying the amnesty, ACCI and COSBOA used the following reasons to support their arguments in favour of an amnesty for unpaid SG entitlements:

Missed payments can also arise because of natural disasters and system outages.⁵

They may have forgotten because they had a sick child or a personal health problem or some other pressing issue.⁶

1.7 When these comments were put to Treasury, Treasury officials ruled out these as valid reasons for SG non-compliance:

Senator KETTER: Sometimes people offer arguments that the SG compliance system is burdensome. There are events like natural disasters and people get sick and what have you. Are these valid arguments for SG noncompliance?

2 *Submission 8*, p. 3.

3 *Committee Hansard*, 12 June 2018, p. 4.

4 *Committee Hansard*, 12 June 2018, p. 4.

5 ACCI, *Submission 8*, p. 9.

6 COSBOA, *Submission 11*, p. 1.

Mr Jeremenko: No. From a policy point of view, absolutely not. The government believes that, barring some changes we're making and have been making over the years—making it easier with Single Touch Payroll and technology more generally, not that that's an excuse—the current legal settings are very appropriate for employers paying the right amount of SG.⁷

1.8 Overall, this inquiry found that the calls for an amnesty were largely coming from employers, not the superannuation industry or employee representatives.

1.9 When defining superannuation, almost all stakeholders agreed that superannuation can be considered deferred wages:

(a) ACCI:

“It's come into being so that at least in some cases it looks like someone's wages are being deducted from before they get them in hand. On the other hand, it could also be argued that it looks a little bit like a workers' compensation premium. All those additional costs on wages clearly have an impact on wages, and to that extent it's true that all those could be regarded as either wages for insurance purposes or deferred wages.”⁸

(b) ACTU:

“Superannuation is workers' deferred wages”⁹

(c) Association of Super Funds of Australia (ASFA):

Senator KETTER: Do you support the notion that superannuation is deferred wages?

Mr McCrea: Yes, we do.¹⁰

(d) Financial Services Council (FSC):

Senator KETTER: Do you support the notion that superannuation is deferred wages?

Mr Potter: Yes. That is not the only way to define super but it is a pretty useful way to define it.¹¹

(e) Australian Small Business and Family Enterprise Ombudsman (ASBFEO):

Senator KETTER: I've asked this question of a number of witnesses. Do you support the notion of superannuation as deferred wages?

Ms Carnell: Yes, simply.¹²

7 *Committee Hansard*, 12 June 2018, p. 35.

8 Mr Nick Grozier, *Committee Hansard*, 12 June 2018, p. 5.

9 Mr Joseph Mitchell, *Committee Hansard*, 12 June 2018, p. 12.

10 *Committee Hansard*, 12 June 2018, p. 15.

11 *Committee Hansard*, 12 June 2018, p. 18.

12 *Committee Hansard*, 12 June 2018, p. 28.

(f) Treasury:

Senator KETTER: Do you support the notion that superannuation is deferred wages?

Mr Jeremenko: I certainly think that, economically speaking, that is correct.¹³

1.10 Treasury officials also stated in a previous inquiry that:

The position that the government takes, and Treasury, is that any level of underpayment of SG is unacceptable.¹⁴

1.11 When Treasury officials were offered the opportunity to explain how the Government's proposed amnesty for unpaid SG entitlements was consistent with both defining superannuation as deferred wages and a policy position that any level of underpayment is unacceptable, the response was far from convincing:

Senator KETTER: How is an SG amnesty consistent with that principle? Presumably we don't have amnesties for nonpayment of wages. Why is it different for superannuation?

Mr Jeremenko: As I was saying earlier, the super amnesty needs to be seen in the context of the bill No. 4 measures. It is not something that is a simple 'get out of jail free' card for employers; it is bringing forward payment of historical super underpayment that would not otherwise occur.¹⁵

1.12 It is also clear that an amnesty for unpaid SG sends the wrong message to those employers who have complied with the law for all these years:

The committee should also consider what sort of message the amnesty sends to employers who have done the right thing and paid their obligations as required under the law.¹⁶

1.13 The committee also heard evidence that academic literature on the effect of amnesties is mixed and that some amnesties can even be counterproductive:

In the Australian context, we've had relatively few precedents for amnesties of this type. I'm not aware of any for superannuation. In the international context, there is a good deal of academic literature on tax amnesties, which would appear to be the closest parallel. That academic literature is mixed on the effect of amnesties, with recent work from the International Monetary Fund suggesting they may in fact be counterproductive and reduce future compliance, particularly if amnesties become a regular occurrence.¹⁷

13 *Committee Hansard*, 12 June 2018, p. 35.

14 Senate Economics Legislation Committee, Treasury Law Amendment (2018 Measures No. 4) Bill 2018, *Committee Hansard*, 1 June 2018, p. 42.

15 *Committee Hansard*, 12 June 2018, p. 35.

16 Mr Matthew Linden, *Committee Hansard*, 12 June 2018, p. 20.

17 Mr Matthew Linden, *Committee Hansard*, 12 June 2018, p. 20.

1.14 Treasury confirmed that \$230m is expected to come forward under this amnesty, a very small amount when this once-off amount for a 26 year period is compared to ISA's estimated annual SG gap of \$5.9 billion dollars and the ATO's estimated annual SG gap of \$2.8 billion dollars. The amnesty raises only a small amount of money relatively speaking for a large compromise in policy position:

Senator KETTER: If you keep having amnesties, they send a perverse message out there. I think your estimate was that the SG gap was something like \$3 billion—

Mr O'Halloran: Yes, \$2.8 billion.

Senator KETTER: and here we are recovering \$230 million—a very small proportion of the overall gap—and yet there's this risk of sending the wrong message to employers on this very important issue.¹⁸

1.15 Treasury officials also confirmed that the inclusion of tax deductibility for payments made under the amnesty is intended to be a key driver of encouraging better behaviour from shonky employers (added emphasis):

CHAIR: Allowing the deductibility of payments made by employers under the amnesty was something that came up from previous witnesses as well. Is that a crucial part of ensuring success—to ensure that more employers take up the opportunity—or is it, as was implied by other witnesses, potentially rewarding employers that have failed to meet their SG obligations?

...

Mr Preston: When thinking about take-up rates—and this is based on my understanding of discussions between our Tax Analysis Division and the ATO—they looked at the holistic set of incentives that the amnesty provides, both before and after, and the view was that that was a key driver of future compliance.¹⁹

1.16 ISA also highlighted that the nature of the tax deductibility of payments made under this amnesty might actually incur a net negative impact on revenue:

Whilst there are contribution taxes which government collects, these are also tax deductible, and the amnesty bill, of course, allows for these historical amounts to be tax deductible. If the firms which are paying these amounts are paying the headline company tax rate of 30 per cent, those tax deductions could exceed the amount of contribution tax revenue which is received on these amounts, so in fact there could be a net negative impact on revenue.²⁰

1.17 Treasury and ATO officials also confirmed that payments made under the amnesty will not fully compensate employees for lost earnings, due to the current rules around simple interest calculations:

18 *Committee Hansard*, 12 June 2018, p. 37.

19 *Committee Hansard*, 12 June 2018, p. 32.

20 Mr Matthew Linden, *Committee Hansard*, 12 June 2018, p. 20.

Senator KETTER: Let's say we have an employer who hasn't been paying the correct level of superannuation for, say, 10 years—I'm not sure if shortfall is the correct terminology in that circumstance—and you identify that there is an underpayment. Under normal circumstances, without an amnesty, would that interest rate, that 10 per cent, be applied on a compounding basis or would it just be a global figure?

Mr O'Halloran: I agree with Mr Preston—I'm happy to double-check, but it's a flat rate; it's not compounded. However, I will need to have it confirmed; I just haven't got it in front of me.

Senator KETTER: That becomes a significant issue, if we're talking about 26 years, for example, which is when the system commenced. It might be larger—10 per cent might compare favourably in one year to the six per cent annual, but if we're talking about compounding that's a fairly large difference.

Mr Jeremenko: Yes. What I would reiterate is that that isn't changing under this provision.²¹

1.18 COSBOA also stated in their evidence that they might use claims of excessive superannuation administrative burden to recommend that small businesses replace all employees with contractors and labour hire, despite cost effective software costing as little as \$5 per month, the introduction of SuperStream, the introduction of the small business clearing house and the future introduction of Single Touch Payroll. Labor Senators are concerned that the SG framework might be used as an excuse by some employers to erode basic, decent working rights:

If this does not change COSBOA will have to recommend that a business does not directly employ staff and they only use contractors or labour hire firms. The risk to the individual employer, to his or her family and personal relationships, to their health and to their property would be too high.²²

1.19 While employees have the book thrown at them for stealing from employers, the Government, by introducing an SG amnesty, is establishing a different rule for employers who steal deferred wages from employees. As the ACTU succinctly stated:

This Bill allows employers who have been underpaying their workers for 26 years to not only escape penalties, but to gain a tax advantage. Rather than taking steps to rectifying the ongoing injustice, the Government, once again, takes the side of unscrupulous bosses who have been ripping off their workforce. The Superannuation Guarantee Charge has been in place for a generation, despite this the Government is claiming that ignorance is a justifiable defence for breaking the law. Workers suffer real hardship due to unpaid superannuation and this is particularly acute for those immediately facing retirement or recently retired.²³

21 *Committee Hansard*, 12 June 2018, p. 39.

22 COSBOA, *Submission 11*, p. 2.

23 Australian Council of Trade Unions, *Submission 3*, p. 3.

1.20 In summary, Labor Senators reject the introduction of an amnesty for unpaid SG entitlements and believe it is not consistent with Labor values. Evidence received during this inquiry clearly demonstrated that this Government is out of touch and only has the interests of employers at heart, rather than governing for all Australians. Not only does the amnesty for unpaid SG entitlements undermine retirement outcomes, it is also a slap in the face to employers who have complied with the law for the last 26 years.

Schedule 2: Superannuation – employees with multiple employers

1.21 Labor Senators support this measure but note ISA testimony:

I have some brief remarks around schedule 2, which is the SG exemption for multiple employers. We're generally supportive of these provisions in the bill, but we do wonder why the government is going to the trouble of providing a legislative framework for employees and their employers to opt out of the super guarantee. It wouldn't appear that this is a significant issue affecting many people, given the circumstances.²⁴

Schedule 3: Non-arm's length income of superannuation entities

1.22 Labor Senators support this measure.

Schedule 4: Limited recourse borrowing arrangements

1.23 Labor Senators do not oppose this measure, but note statements by the Leader of the Opposition that a Shorten Labor Government will take the responsible decision and adopt the recommendation of the Financial System Inquiry to restore the prohibition on direct borrowing by superannuation funds on a prospective basis.

Labor's position on the bill

1.24 This Government only listens to one stakeholder – business. The most ardent advocates for the amnesty were employers and it appears that the superannuation industry as well as employee representatives were left out of the policy development process.

1.25 Almost no-one has been advocating for this policy. Evidence received by the committee confirmed that amnesty seems to have largely originated from ACCI and COSBOA. This Government is looking out for their mates at the top end of town rather than looking out for everyday Australians.

1.26 This bill was introduced with haste and secrecy. Such tactics further underscore the Government's intention to limit public debate on the amnesty, hoping that the public would not pay attention to this issue.

1.27 The inquiry confirmed that only a relatively small amount of unpaid SG will come forward relative to the very large annual SG gap. The amnesty is a substantial compromise in long standing policy and may even have counterproductive compliance outcomes.

24 Mr Matthew Linden, *Committee Hansard*, 12 June 2018, p. 20.

1.28 Any payments made under the amnesty are also unlikely to fully compensate employees for lost earnings between the unpaid SG period and today due to the simple interest calculation. Furthermore, the amnesty is a slap in the face to employers who have complied with the law for the last 26 years. In fact, dodgy employers who make use of this amnesty will receive a tax deduction, which will ultimately be paid for by every other Australian taxpayer.

1.29 Superannuation theft is just as bad as wages theft. Dodgy employers should not be able to get away with stealing hard-earned money from their employees.

1.30 When employees steal from employers, they rightly have the book thrown at them. It is not appropriate to have one rule for business and another rule for everyone else.

Recommendation 1

1.31 That the bill be amended such that schedule 1, relating to the superannuation guarantee amnesty, be opposed.

Senator Chris Ketter
Deputy Chair

Senator Jenny McAllister
Senator for New South Wales

Appendix 1

Submissions and additional documents

Submissions

1. Housing Industry Association Ltd
2. Australian Small Business and Family Enterprise Ombudsman (ASBFEO)
3. Australian Council of Trade Unions (ACTU)
4. Law Council of Australia
5. Dixon Advisory
6. The Tax Institute
7. MinterEllison
8. Australian Chamber of Commerce and Industry
9. SMSF Association
10. AI Group
11. Council of Small Business Australia (COSBOA)

Answers to questions on notice

1. Association of Superannuation Funds of Australia: Answers to questions taken on notice from a public hearing on 12 June 2018 (received 13 June 2018).
2. Australian Taxation Office: Answers to questions taken on notice from a public hearing on 12 June 2018 (received 14 June 2018).
3. Australian Chamber of Commerce and Industry: Answers to questions taken on notice from a public hearing on 12 June 2018 (received 15 June 2018).
4. Australian Taxation Office: Answers to questions taken on notice from a public hearing on 12 June 2018 (received 15 June 2018).

Appendix 2

Public hearings

Canberra, 12 June 2018

Members in attendance: Senators Hume, Ketter.

CARNELL, Ms Anne Katherine (Kate), AO, Ombudsman, Australian Small Business and Family Enterprise Ombudsman

GALBRAITH, Ms Fiona, Director, Policy, Association of Superannuation Funds of Australia

GROZIER, Mr Dick, Associate Director, Workplace Relations, Australian Chamber of Commerce and Industry

JEREMENKO, Mr Robert, Division Head, Retirement Income Policy Division, Treasury

LAWRENCE, Ms Jill, Advocacy Manager, Australian Small Business and Family Enterprise Ombudsman

LINDEN, Mr Matthew, Director, Public Affairs, Industry Super Australia

MACNAMARA, Ms Jane, Policy Manager, Superannuation and Investment, Financial Services Council

McCREA, Mr Glen, Deputy Chief Executive and Chief Policy Officer, Association of Superannuation Funds of Australia

MITCHELL, Mr Joseph, Workers' Capital Organising Officer, Australian Council of Trade Unions

O'HALLORAN, Mr James, Deputy Commissioner, Superannuation, Australian Taxation Office

POTTER, Mr Michael, Senior Policy Manager, Economics and Tax, Financial Services Council

PRESTON, Mr Robb John, Manager, Retirement Income Policy Division, Treasury

STRONG, Mr Peter, Chief Executive Officer, Council of Small Business Organisations of Australia

