

Chapter 2

Views on the bill

2.1 The measures in the Treasury Laws Amendment (2018 Measures No. 4) Bill 2018 [Provisions] (the bill) seek to amend various Acts relating to taxation, superannuation, competition and consumers' enhancement to the tax and superannuation system, ensuring employers make the contributions they owe to employees, protecting the system against misuse, and supporting philanthropy.

2.1 The bill contains nine schedules in total. Evidence received by the committee focussed mainly on those measures contained in Schedules 1 to 6, which relate to the Superannuation Guarantee Integrity package. As such, this chapter predominately examines issues raised relating to Schedules 1 to 6.

2.2 The remainder of the chapter will then focus on views expressed in relation to Schedule 8, MySuper, the taxation treatment of deferred annuities and reversionary transition to retirement income streams, and the disclosure of information by the Superannuation Complaints Tribunal (SCT) to the Australian Financial Complaints Authority (AFCA).

The need to address superannuation guarantee non-compliance

2.3 The majority of submissions observed that action was needed to address superannuation guarantee non-compliance and voiced support for the Superannuation Guarantee Integrity package. However, there were differing views on whether the measures in the bill went far enough, or indeed too far, in their attempt to address the issue.

2.4 Industry Super Australia noted that non-payment of the superannuation guarantee was a 'major problem'. It estimated that 2.76 million people were affected in the 2013–14 financial year by an average amount of \$2,025 per person, or an aggregate amount of \$5.6 billion.¹

2.5 It was noted during the course of the inquiry that Industry Super Australia's figures differed from those of Treasury and the ATO. Treasury noted the differences were likely due to differing modelling assumptions and that a cross agency working group found that for 2016–17, the underpayment was around five per cent, about \$2.85 billion.² Mr Robert Jeremenko from Treasury noted that:

The position that the government takes, and Treasury, is that any level of underpayment of SG [superannuation guarantee] is unacceptable. Regardless of the differing numbers, I think everyone would agree that it's

1 Industry Super Australia, *Submission 17*, p. 1.

2 Mr Robert Jeremenko, Division Head, Retirement Income Policy Division, Department of the Treasury, *Committee Hansard*, 1 June 2018, p. 42.

something that needs to be addressed, and that's what the government is attempting to do with this package.³

2.6 The committee heard that Chartered Accountants Australia and New Zealand did not consider the current regulatory settings were adequate to provide any further improvements to superannuation guarantee non-compliance. They observed that 'in simple terms there are some employers who do whatever they can—sometimes fair but more likely foul, unethical and illegal—to avoid their legal obligations'.⁴

2.7 Conversely, the Association of Superannuation Funds of Australia (ASFA) welcomed the commitment by government to lift retirement income payments by protecting workers' superannuation entitlements as part of the bill. ASFA informed the committee that it expected that the bill would have a positive impact on addressing the non-payment of superannuation guarantee.⁵

2.8 The Australian Restructuring Insolvency and Turnaround Association (ARITA) argued that the bill would help reduce illegal phoenixing activities and strongly supported the measures, stating:

Firstly, it's [ARITA's] view that these measures will assist with resolving the issue of employers using unpaid superannuation as an easy source of funding, which arises because of the current lack of transparency around outstanding superannuation obligations...

Secondly, improved reporting will also assist insolvency practitioners and the ATO in quantifying the amount of outstanding superannuation and each employee's entitlements to that superannuation in the event of a formal insolvency appointment. This ensures that where the funds are available employees receive the amounts they are actually entitled to.⁶

2.9 The Australian Institute of Superannuation Trustees (AIST) broadly supported the bill, but believed further reform was still necessary, stating:

The measures contained in this Bill will go a long way to solving the problems associated with the underpayment of superannuation by employers, however, at a high level, there are still a substantial number of issues that cannot be dealt with as part of this Bill which require attention, including the issues that non-SG contributions are difficult to enforce, or the many issues related to Australians who are not considered employees.⁷

2.10 The Housing Industry Association (HIA) held a different view, expressing concern that the proposed measures in the bill would 'go well beyond that necessary to

3 Mr Robert Jeremenko, Division Head, Retirement Income Policy Division, Department of the Treasury, *Committee Hansard*, 1 June 2018, p. 42.

4 Chartered Accountants Australia and New Zealand, *Submission 8*, p. 2.

5 Mr Glen James McCrea, Deputy Chief Executive Officer and Chief Policy Officer, Association of Superannuation Funds of Australia, *Committee Hansard*, 1 June 2018, p. 1.

6 Mr John Winter, Chief Executive Officer, Australian Restructuring Insolvency and Turnaround Association, *Committee Hansard*, 1 June 2018, p. 30.

7 Australian Institute of Superannuation Trustees, *Submission 11*, p. 2.

target those abusing the corporate form and intentionally avoiding their legal obligations and on this basis may not achieve the Governments stated objectives.⁸

2.11 A number of submitters expressed concerns regarding the ATO's ability to manage the necessary compliance to oversee the new arrangements. Dixon Advisory noted:

For the increased powers and responsibilities of the ATO to be effective in increasing the compliance, the ATO will need to consider how best to administer these new functions. Specifically, proactive compliance work (as opposed to reviews and audits triggered by employee complaints) is likely to increase, and the ATO will need to develop systems and procedures to review Single Touch Payroll reporting for compliance breaches.⁹

2.12 The Australian Council of Trade Unions (ACTU) also considered that the ATO resources would need to be increased in order to implement the new compliance measures.¹⁰

2.13 The Financial Services Council (FSC) considered that the bill was timely and supported the expanded power of the ATO to address superannuation guarantee non-compliance. However, it recommended that the government ensure that the ATO is adequately resourced to make use of the powers it's provided.¹¹

2.14 Dixon Advisory submitted that consideration should be given to extending the superannuation guarantee to the self-employed:

Noting the objective of the draft legislation is to increase superannuation coverage for Australian's, Dixon Advisory believes further amendments could be considered in the future that go beyond the current scope of the package, which is limited to employers paying wages to employees. The current focus on compulsory super only for employees means that a significant percentage of the population will reach retirement with little or no super. One solution would be to extend superannuation guarantee integrity requirements to self-employed people.¹²

2.15 Industry Super Australia recommended that the SGA should be amended to remove the wage threshold of \$450 per month for superannuation guarantee entitlement.¹³ The Queensland Council of Unions also maintained that this threshold was no longer necessary, noting:

8 Housing Industry Association, *Submission 16*, p. 4.

9 Dixon Advisory, *Submission 6*, p. 1.

10 Australian Council of Trade Unions, *Submission 9*, p. 3.

11 Ms Jane Macnamara, Policy Manager, Superannuation and Investment Financial Services Council, *Committee Hansard*, 1 June 2018, p. 15.

12 Dixon Advisory, *Submission 6*, p. 1.

13 Industry Super Australia, *Submission 17*, p. 7.

The threshold for superannuation was introduced for fear that small contributions made on behalf of low income earners would place an administrative drain on superannuation funds. With \$2,324.4 Billion in superannuation assets as at 30 June 2017, it is probable that funds will be able to withstand this administrative burden.¹⁴

Schedule 1: Directions and penalties in relation to superannuation guarantee charge

2.16 The National Retail Association (NRA), an organisation representing retail and associated industries, raised concerns in relation to the proposed new powers under Schedule 1 to the bill which enable the Commissioner of Taxation to issue a direction to an employer to pay an outstanding superannuation guarantee liability. In particular, the NRA objected to the proposed new subsection 265-95 of the TAA, which would introduce a maximum penalty of 50 penalty units, imprisonment for 12 months, or both, where an employer has not discharged the outstanding superannuation liability within the period specified in the direction. The NRA raised another matter which is also being considered by the Senate Standing Committee for the Scrutiny of Bills in relation to the appropriateness of creating a strict liability offence where the penalty is imprisonment.¹⁵ The committee notes that the Senate Standing Committee for the Scrutiny of Bills has written to the Minister for Revenue and Financial Services, the Hon. Kelly O'Dwyer, requesting a detailed justification for the proposed strict liability offences, particularly the imposition of up to 12 months imprisonment, with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.¹⁶¹⁷

2.17 The Explanatory Memorandum (EM) states that the direction issued by the Commissioner must set out:

- The amount that the employer is required to pay and the quarter to which the amount relates;
- The consequences of failing to comply with the direction and explain the review rights available to the employer; and
- Specify the period within which the employer must comply with the direction. This period must be at least 21 days after the day that the direction is given.¹⁸

2.18 It is noted in the EM that the intention of the measure is that directions issued by the Commissioner will only be in relation to serious contraventions of the

14 Queensland Council of Unions, *Submission 5*, p. 2.

15 National Retail Association, *Submission 3*, pp. 13–14.

16 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2018*, 9 May 2018, p. 58.

17 See Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 22–25.

18 Explanatory Memorandum, p. 11.

obligations to pay superannuation guarantee related liabilities by employers whose actions are consistent with an ongoing and intentional disregard of those obligations.¹⁹

2.19 Cbus considered that the introduction of potential criminal penalties for failing to comply with a direction to pay will send a strong signal to employers regarding the seriousness of superannuation guarantee non-compliance.²⁰ It stated:

Non-payment of superannuation guarantee is essentially non-payment of wages and should be treated with the same degree of seriousness. In this regard we welcome the introduction of criminal penalties for some employers who fail to pay SG following an ATO direction.²¹

2.20 Unions NSW noted that while the intention of the Commissioner's new power is to issue a direction, it also provides for an additional tool to enforce compliance. The union stated that, in its view, the proposed amendments should make it compulsory for directions to be issued to non-compliant employers.²² Job Watch Inc, an employment rights community legal centre, also questioned the decision to limit the scope to serious contraventions as it 'constrains the Commissioner's ability to deal with the underlying issue of wide spread non-payment of [superannuation guarantee]'.²³

2.21 The ACTU did not believe this measure would offer any real deterrence to employers who have not paid the superannuation guarantee. It considered:

The most the employer will suffer is a direction to pay the superannuation owed, and a direction to attend an approved education course. Real penalties only apply to those who have been ordered to pay the unpaid superannuation or attend an approved course and have not complied. This will apply to so few cases it will do nothing to change behavior and penalties can still be waived at the discretion of the Commissioner. The proposed legislation will be treated as an acceptable gamble to those who wish to flout the law. The only way to ensure the superannuation guarantee is paid is through proactive compliance and the empowerment of workers to pursue their unpaid super.²⁴

2.22 The NRA questioned the adequacy of the use of the defence of taking 'reasonable steps' by employers for failure to comply with a direction as well as the capacity for an employer to dispute the accuracy of a liability outlined in a direction.²⁵

2.23 The EM notes that the defence for 'reasonable steps' would be available to an employer where it can show that all 'reasonable steps' within the required period to

19 Explanatory Memorandum, p. 13.

20 Cbus, *Submission 12*, p. 4.

21 Cbus, *Submission 12*, p. 2.

22 Union NSW, *Submission 4*, p. 3.

23 JobWatch Inc, *Submission 5*, p. 2.

24 Australian Council of Trade Unions, *Submission 9*, p. 2.

25 National Retail Association, *Submission 3*, pp. 8–10.

both comply with the direction and to ensure that the original liability were discharged before the direction was given. The 'reasonable steps' defence is intended to protect employers from criminal charges for failing to comply with a direction to pay where they are genuinely unable to do so.²⁶

2.24 The committee understands that the Commissioner may vary a direction to reduce the amount required to be paid by an employer or to extend the period within which the employer must comply. For example, where the Commissioner is provided with additional information about the employer's circumstances regarding the level of the liability or where the employer provides a commitment to discharge the liability over a longer period of time. The Commissioner will also have the power to revoke a direction in circumstances where it is no longer considered it appropriate for an employer to be subject to the direction.²⁷

2.25 The EM notes that the proposed measure includes objection rights, whereby an employer that is dissatisfied with a decision of the Commissioner to give a direction to pay an unpaid liability may object to the decision in the manner specified in Part IVC of TAA. Such objections must be made before the end of the period specified in the direction by the Commissioner.²⁸

2.26 The FSC was supportive of the introduction of penalties in Schedule 1, stating:

We really think that the ATO needs to have enforcement powers and resources behind them to ensure that it can respond effectively to superannuation guarantee noncompliance. We are supportive of additional penalties, if that's going to assist the ATO in ensuring that the legislation is complied with.²⁹

2.27 Mr James O'Halloran from the ATO noted that the measures in the bill give the ATO an ability to:

...hopefully apply our action or intervention according to the circumstances of particular cases—in other words, the behaviour—be it across the full spectrum of reasons for noncompliance. I hope the responses will be seen to be fit for purpose rather than blanket or perhaps too hard or too soft...to make sure that the ATO applies them judiciously, appropriately but also open to review as we are starting to use some of these tools and information sources.³⁰

26 Explanatory Memorandum, p. 14.

27 Explanatory Memorandum, pp. 17–18.

28 Explanatory Memorandum, p. 19.

29 Ms Jane Macnamara, Policy Manager, Superannuation and Investment Financial Services Council, *Committee Hansard*, 1 June 2018, p. 17.

30 Mr James O'Halloran, Deputy Commissioner, Superannuation, Australian Taxation Office, *Committee Hansard*, 1 June 2018, p. 42.

Schedule 2: Disclosure of information about non-compliance

2.28 Schedule 2 to the bill seeks to amend the TAA to provide the Commissioner with the ability to disclose information that relates to a failure or a suspected failure by an individual's employer or former employer to comply with their obligations under the SGAA or related obligations under the TAA.³¹

2.29 The AIST supported this measure as 'employees need to know that their employer has not paid SG on their behalf so that they can act and protect their retirement futures'. However, it made a further point that:

Identifying non-compliance is an important first step, however employees themselves should not be expected to recover unpaid SG. Instead, the ATO should be required to take pro-active action to recover unpaid SG on behalf of employees where it identifies non-compliance.

If members were simply advised by the ATO of their employer's non-compliance and were then required to make a complaint to the ATO to recover the superannuation, this would be unsatisfactory.³²

2.30 JobWatch Inc believed this measure would improve the capacity of employees to ensure they are receiving their entitlements. However, it considered the measure should go further by including a right of redress, enabling employees to take action against employers for unpaid superannuation guarantee contributions.³³

2.31 The ACTU argued the measure should mandate action by the ATO whereby 'if the ATO suspects any worker of suffering underpayment, they should be immediately alerted to the fact and informed of all paths of recourse'.³⁴

2.32 Cbus considered that the proposed measures appeared to be 'reasonable and appropriate'. It noted:

Payslips generally show superannuation amounts which (understandably) give workers the impression that 'the money is in the fund'; however, this is not always the case and employees are often not aware of the non-payment of SG.³⁵

2.33 The Australian Chamber of Commerce and Industry (ACCI) put forward the proposal that the Commissioner should inform an employer of the intention to disclose before approaching individual employees or former employees. ACCI noted that such disclosure may need to be limited, particularly in circumstances where the Commissioner reasonably believed that such advice would jeopardise the investigation of the employer.³⁶

31 Explanatory Memorandum, p. 33.

32 Australian Institute of Superannuation Trustees, *Submission 11*, p. 3.

33 JobWatch Inc, *Submission 5*, p. 2.

34 Australian Council of Trade Unions, *Submission 9*, p. 2.

35 Cbus, *Submission 12*, p. 4.

36 Australian Chamber of Commerce and Industry, *Submission 15*, p. 15.

2.34 HIA also advised that its preference would be for the ATO to notify the employer of any intention to disclose information prior to the notification.³⁷

Schedule 3: Single touch payroll reporting

2.35 Schedule 3 seeks to amend the TAA to broaden the Single Touch Payroll reporting requirements so they apply to all employers, regardless of the number of employees. Single Touch Payroll is the reporting framework for employers to provide payroll and superannuation information to the Commissioner at the time the employment liabilities are paid or withheld.³⁸ This measure will commence on 1 July 2019.

2.36 Cbus supported the extension of Single Touch Payroll to small businesses as it believed the measure would provide valuable information to help improve compliance. It observed:

It is also Cbus' experience that some employers choose to only pay superannuation for sections of their workforce and not for all employees in order to avoid their full obligations while not triggering 'arrears' detection and remediation activities at the fund level. Congruent payment of wages and superannuation facilitated by single touch payroll would deter such efforts at gaming the system.³⁹

2.37 Industry Super Australia pointed out that Single Touch Payroll does not cover contractors and labour hire workers if they are not paid through a payroll system, and as such there may be a group of workers who are eligible for superannuation guarantee but are not covered in the compliance regime.⁴⁰ The ACTU expressed concern that this effective exclusion of labour hire and contract workers from the compliance regime may encourage employers wishing to avoid their superannuation guarantee obligations to increase this type of employment practice.⁴¹

2.38 The Council of Small Business Organisations Australia (COSBOA) noted that there are currently approximately 80,000 small business employers who do not use any form of software for payroll purposes. Mr Peter Strong, CEO of COSBOA, commented:

We're hoping that Single Touch Payroll eventually will remove the compliance burden. Somewhere in the future you won't have to do a business activity statement because that information will travel from your software. That is also about GST and that's further in the future, but that's what we're looking at. Part of this system that has been set up is that, at some stage in the future when there is a pay rise—as announced today—the

37 Housing Industry Association, *Submission 16*, p. 8.

38 Explanatory Memorandum, p. 50.

39 Cbus, *Submission 12*, pp. 4–5.

40 Mr Matthew Linden, Director, Public Affairs, Industry Super Australia, *Committee Hansard*, 1 June 2018, p. 9.

41 Mr Joseph Mitchell, Workers' Capital Organising Officer, Australian Council of Trade Unions, *Committee Hansard*, 1 June 2018, p. 21.

software developers will be able to talk to the Fair Work Commission system, so the information will come into the software, then the employer would know that this is how it affects their pay run in two months, or whenever it takes effect. This is all about getting rid of compliance as we go forward.⁴²

2.39 A numbers of submissions expressed concern about the logistical challenges of rolling out Single Touch Payroll to all small businesses by 1 July 2019.

2.40 Chartered Accountants Australia and New Zealand noted that, while a significant proportion of superannuation guarantee non-compliance was attributable to small businesses, it still had concerns regarding the capacity of small and medium sized businesses to implement the rollout of Single Touch Payroll.⁴³ Similarly, the Tax Institute did not believe the proposed commencement date would provide sufficient time for employers to comply.⁴⁴

2.41 HIA noted that while there are potential advantages to simplifying and streamlining payroll and reporting systems it should be noted that:

...some small businesses in the residential building industry do not currently use accounting or payroll software and as such would face increased costs in business administration as a result of the expansion of this measure.⁴⁵

2.42 Unions NSW noted that there was no information available regarding how the rollout will be managed and what training will be required. It noted:

While the amendment is a welcome step towards ensuring the superannuation guarantee is complied with, it would be inequitable to enforce such a law if it was not physically possible for all small businesses to be properly equipped by the deadline.

Developing a staggered implementation process would ensure that all businesses nationwide have access to the system and would also allow for more certainty as the process would be more easily monitored if rolled-out incrementally prior to 1 July 2019.⁴⁶

2.43 The Australian Small Business and Family Ombudsman (ASBFEO) supported the implementation of Single Touch Payroll as it would help strengthen employer compliance with superannuation guarantee obligations. However, it raised concerns about the capacity for some small businesses to become complaint by the proposed commencement date. It stated:

42 Mr Peter Strong, Chief Executive Officer, Council of Small Business Organisations Australia, *Committee Hansard*, 1 June 2018, p. 23.

43 Chartered Accountants Australia and New Zealand, *Submission 8*, p. 3.

44 The Tax Institute, *Submission 14*, p. 5.

45 Housing Industry Association, *Submission 16*, p. 4.

46 Unions NSW, *Submission 4*, pp. 3–4.

As noted in the Regulatory Impact Statement for the Bill changes will be required to the systems and processes of businesses and small businesses will incur a cost in order to implement the STP reporting system. For around the 40 per cent of small businesses which have payroll software it may simply be adding a new function to their system. For the remaining 60 per cent it will mean implementing a payroll system with the STP function plus a significant investment of time to learn how to use the system.

[ASBFEO] recommend using the next 12 months to provide funding and education through industry associations and SME trusted advisers, such as accountants, to support SMEs to become STP ready. [ASBFEO] further ask that consideration be given for micro and small businesses to combine STP reporting with existing reports such as their Business Activity Statements.⁴⁷

2.44 ACCI suggested that the government may wish to consider a compensation scheme to assist microbusinesses to transition into Single touch Payroll.⁴⁸

2.45 The ATO advised that it is currently working with industry and software providers to develop software with small business and micro-business functionality as well as developing strategies for communication, engagement, webinars and educational material. Mr O'Halloran observed:

It's really so that people can comply with the law but also, as importantly, get value out of Single Touch Payroll, even though it should be quite seamless for them. But it does require more work, and we're very focused on that.⁴⁹

Reporting sacrificed amounts by employers

2.46 The proposed amendments seek to extend the reporting requirements for Single Touch Payroll to include any salary sacrificed amounts to ensure that superannuation guarantee is paid on the pre-salary sacrifice base and prevent employers from using their employees' salary sacrificed superannuation contributions to reduce their own superannuation guarantee contributions.⁵⁰

2.47 Chartered Accountants Australia and New Zealand noted that these amendments may raise a number of issues:

- Is there enough time to educate employers\payroll functions? We note that superannuation salary sacrifice arrangements are not unique to the private sector. They are widely used in the public sector and the charitable sector.
- 'Aggressive' salary sacrifice arrangements (e.g. where an individual employee's entire salary is sacrificed into superannuation) whilst

47 Australian Small Business and Family Ombudsman, *Submission 18*, p. 1.

48 Australian Chamber of Commerce and Industry, *Submission 15*, p. 17.

49 Mr James O'Halloran, Deputy Commissioner, Superannuation, Australian Taxation Office, *Committee Hansard*, 1 June 2018, p. 44.

50 Explanatory Memorandum, pp. 40–41.

reduced because of lower contribution caps will need to be revisited as a result of the proposed amendments.

- It is not always clear what salary sacrifice contributions are being made, and when (e.g. a year-end bonus where the employee has earlier selected that any bonus entitlement be paid into superannuation). Additional time may be needed to calculate and report under STP these year end, one-off salary sacrifice arrangements.
- Existing ATO guidance on salary sacrifice arrangements will need to be updated to reflect the new measures. The revised guidance will also need to note the difference between salary sacrificing into superannuation and salary sacrificing to obtain other benefits.⁵¹

2.48 AIST welcomed the introduction of compulsory reporting of salary sacrificed amounts. However, it noted that:

...it is important that the loopholes that allow employers to use salary sacrificed amounts to reduce their mandated SG obligations are closed. The Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017 contains mechanisms to close these loopholes, however it remains before the Senate.⁵²

2.49 Cbus also welcomed this measure as it will 'assist in facilitating the closing of loopholes that allow employers to discount SG obligations'.⁵³

2.50 Industry Super Australia raised a concern about the drafting of the amendments to section 389-5 of the TAA, requiring the reporting of the ordinary time earnings base and the sacrificed ordinary time earnings base. It did not believe the drafting of the bill reflected the intent of the measure.⁵⁴

2.51 Treasury advised the committee that it had sought advice from its Law Design Office, who advises the Office of Parliamentary Counsel, the drafters of the provision. Treasury confirmed that they are confident that the bill, as drafted, gives effect to the intended outcome. In addition, the ATO, through the standard quality assurance process, advised that the law acts as intended and as spelt out in the EM.⁵⁵

2.52 Treasury also advised the committee that once the bill has been enacted, the ATO will update its guidance to clearly reflect the new requirements.⁵⁶

51 Chartered Accountants Australia and New Zealand, *Submission 8*, p. 4.

52 Australian Institute of Superannuation Trustees, *Submission 11*, p. 3.

53 Cbus, *Submission 12*, pp. 5–6.

54 Mr Phil Gallagher PSM, Special Retirement Policy Adviser, Industry Super Australia, *Committee Hansard*, 1 June 2018, p. 8.

55 Mr Robb Preston, Manager, Retirement Income Policy Division, Department of the Treasury, *Committee Hansard*, 1 June 2018, p. 45.

56 Mr Murray Crowe, Principal Adviser, Revenue Group, Department of the Treasury, *Committee Hansard*, 1 June 2018, p. 46.

Schedule 4: Fund reporting

2.53 Schedule 4 seeks to amend the law to allow the Commissioner to provide superannuation providers with a grace period for correcting false or misleading statements in relation to member information statements without giving rise to penalties.

2.54 Schedule 4 reintroduces a previous measure to remove the requirement for superannuation funds to lodge bi-annual statements for lost members.⁵⁷

2.55 AIST expressed its support for Schedule 4, stating:

AIST supports the measures which will see the ATO given powers to allow corrections to statements made under events-based reporting within a suitable grace period. Regular reporting is essential for visibility and compliance, however due to the inflated risk of errors, it is only appropriate that there be the ability to correct such errors.

Removing the requirement for funds to lodge lost member statements twice a year with the ATO is also welcomed because it harmonises reporting obligations under the law. However, we believe that it is critical for the ATO to undertake a reunification workstream whereby they attempt to reunite members with ATO-held super monies.⁵⁸

2.56 Cbus supported the move to more regular reporting by superannuation funds. However, in order to minimise delays in detection created by the disparity in wages and superannuation payment timings, it proposed:

Given the advancements in technology supporting payment transfers and the advantages to business of managing cash flow more correctly, Cbus submits that the most efficient and effective measure to better data matching and ensuring compliance with SG is to amend the Act to ensure real time payment aligning the payment and reporting of superannuation with wages. Payment receipts could be readily generated from superfunds to both employers and the ATO.⁵⁹

2.57 Schedule 4 also seeks to remove the requirement for employers to report superannuation guarantee contributions paid to superannuation providers under the Single Touch Payroll reporting rules. ACCI supported the measure as, for small employers in particular, this will remove a separate reporting obligation and reduce the number of system messages.⁶⁰

Schedule 5: Compliance measures

2.58 Schedule 5 to the bill seeks to amend the TAA to enhance compliance with superannuation guarantee charge and other tax related liabilities. The EM states that the amendments will achieve this in the following ways:

57 Explanatory Memorandum, p. 63.

58 Australian Institute of Superannuation Trustees, *Submission 11*, p. 4.

59 Cbus, *Submission 12*, p. 5.

60 Australian Chamber of Commerce and Industry, *Submission 15*, p. 20.

- Strengthening the integrity of the director penalty provisions for directors who fail to comply with their superannuation guarantee charge and PAYG withholding obligations; and
- Enhancing compliance with the requirement to provide security through the use of Court orders.⁶¹

2.59 AIST strongly supported the enhanced director penalty regime outlined in the exposure draft bill and welcomed 'the proposed lock down rule for director penalties as this prevents directors from liquidating a company to avoid various superannuation obligations'.⁶²

2.60 Cbus supported these measures stating:

We especially welcome the closing of the loophole regarding Director Penalty Notices which gave directors 21 days to wind up a company before they were liable for unpaid super and wages.⁶³

2.61 For similar reasons, Industry Super Australia also supported this measure.⁶⁴

Schedule 6: Amendments relating to employee commencement

2.62 Schedule 6 to the bill contains amendments to allow the pre-filling of an individual's tax file number declaration and superannuation standard choice form by the Commissioner to the individual's employer.⁶⁵

2.63 While the ASFA strongly supported the measures in Schedules 1 to 5 of the bill, it considered that the proposed measures in Schedule 6 should be 'tightened so the legislation—not merely the explanatory material—explicitly requires an employee's consent to each pre-filling of information by the Commissioner'.⁶⁶

2.64 ASFA noted that it appreciated that the EM included some additional information around an expectation of consent that had not been included in the exposure draft's explanatory material, however it noted its preference for this to be included in the legislation.⁶⁷

2.65 AIST also expressed concern about the need for more information regarding employee consent mechanisms and controls. AIST argued that the ATO should be expressly tasked with developing guidance to outline how the consent framework will operate in practice.⁶⁸

61 Explanatory Memorandum, p. 74.

62 Australian Institute of Superannuation Trustees, *Submission 11*, p. 4.

63 Cbus, *Submission 12*, pp. 5–6.

64 Industry Super Australia, *Submission 17*, p. 9.

65 Explanatory Memorandum, p. 85.

66 Association of Superannuation Funds of Australia, *Submission 10*, p. 1.

67 Ms Julia Stannard, Senior Policy Advisor, Association of Superannuation Funds of Australia, *Committee Hansard*, 1 June 2018, p. 2.

68 Australian Institute of Superannuation Trustees, *Submission 11*, p. 4.

2.66 The Australian Securities and Investments Commission (ASIC) supported the aim of the measures, as outlined in the EM, to reduce the proliferation of superannuation member accounts for individuals. ASIC suggested that the EM be amended to note that the pre-filled form would constitute factual information and not financial product advice for the purposes of the *Corporations Act 2001* (Corporations Act) and also noted that recommendations by an employer in relation to choice of superannuation funds might give rise to concerns under the Corporations Act in relation to the provision of unlicensed financial advice.⁶⁹

Schedule 8: Miscellaneous amendments

2.67 Schedule 8 seeks to make minor amendments to taxation, superannuation and other legislation in the Treasury portfolio to ensure that the law operates as intended by clarifying the law, correcting technical or drafting defects, removing anomalies and addressing unintended outcomes.⁷⁰

2.68 ASFA supported the amendments proposed in Parts 1, 6 and 7 of Schedule 8 in relation to MySuper, the taxation treatment of deferred annuities and reversionary transition to retirement income streams, and the disclosure of information by the Superannuation Complaints Tribunal (SCT) to the Australian Financial Complaints Authority (AFCA), noting:

...some of these amendments are substantive in nature and their need had been identified by industry to address inadvertent consequences or omissions from earlier reforms.⁷¹

2.69 Part 6 in Schedule 8 includes a proposed amendment which seeks to ensure consistent treatment between deferred annuities. Currently, subsection 159GP(1) of the *Income Tax Assessment Act 1936* contains a definition of 'ineligible annuity' providing a carve-out from the definition of qualifying security. The carve-out applies to a deferred annuity purchased directly by an individual from a life assurance company⁷², but not to an annuity purchased by a superannuation fund to underwrite the liabilities it has in respect of its members. The result of this carve-out is that annuities that are issued by life assurance companies to complying superannuation funds to meet their liabilities to provide deferred superannuation income streams may be subject to double taxation during the accumulation (pre-retirement) phase.⁷³

2.70 This amendment seeks to change the definition of 'ineligible annuity' to include annuities that are issued by a life assurance company to a complying

69 Australian Securities and Investments Commission, *Submission 13*, p. 2.

70 Explanatory Memorandum, p. 95.

71 Association of Superannuation Funds of Australia, *Submission 10*, p. 2.

72 For the purpose of the *Income Tax Assessment Act 1936*, 'life assurance company' has the meaning given to life insurance company by the *Income Tax Assessment Act 1997*, Part 1, Section 6.

73 Explanatory Memorandum, p. 106.

superannuation fund for the sole purpose of the fund meeting its liabilities to provide a deferred superannuation income stream to one or more of its members.⁷⁴

2.71 In addition, Part 6 in Schedule 8 also seeks to make equivalent amendments in respect of annuities issued to retirement savings account providers that are held by a provider for the purposes of meeting its liabilities to provide a deferred income stream to one or more of its holders.⁷⁵

2.72 Challenger Limited, an investment management firm, supported the proposed amendments to address the inconsistent treatment of deferred annuities. It noted that these amendments were the result of discussions with the ATO and Treasury.⁷⁶

Committee view

2.73 The committee considers that any level of underpayment of superannuation guarantee is unacceptable and needs to be rectified. The committee acknowledges that the superannuation integrity package contained in Schedules 1 to 6 of the bill will go a long way to reducing superannuation guarantee non-compliance.

2.74 The committee believes that the bill's measures will provide the necessary support to address non-compliance, and the new enforcement options will provide the correct balance between compliance and enforcement. The improvements the bill offers to increase the transparency in the system will also enhance the ATO's ability to provide early detection of superannuation guarantee non-compliance.

2.75 The committee is also supportive of the rollout of Single Touch Payroll to all businesses from 1 July 2019 in that it will provide the ATO with more timely information, supporting earlier detection and enabling quick action against employers identified as not paying the superannuation owed to employees. The committee notes the concerns raised by stakeholders regarding additional regulatory burden on small businesses which may warrant extra resourcing to the ATO in order to ensure adequate monitoring and compliance.

2.76 The committee also notes the support from submitters in relation to Parts 1, 6 and 7 of Schedule 8 (which contain various miscellaneous amendments), in relation to MySuper, the taxation treatment of deferred annuities and reversionary transition to retirement income streams, and the disclosure of information by the SCT to the AFCA.

2.77 The committee notes that the Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017 which contains mechanisms to close loopholes that allow employers to use salary sacrificed amounts to reduce their superannuation guarantee obligations is currently before the Senate. In addition, the committee is conducting an inquiry into the provisions of the Treasury Laws Amendment (2018 Superannuation Measures No. 1)

74 Explanatory Memorandum, p. 106.

75 Explanatory Memorandum, p. 107.

76 Challenger Limited, *Submission 2*, p. 1.

Bill 2018 which includes a measure which will provide for a one-off 12-month amnesty to encourage employers to self-correct historical SG non-compliance.

Recommendation 1

2.78 The committee recommends that the bill be passed.

Senator Jane Hume
Chair