

The Senate

Economics
Legislation Committee

Treasury Laws Amendment (2018 Measures
No. 4) Bill 2018 [Provisions]

June 2018

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Chapter 1

Introduction

1.1 On 10 May 2018, the Senate referred the provisions of the Treasury Laws Amendment (2018 Measures No. 4) Bill 2018 (the bill) to the Economics Legislation Committee for inquiry and report by 13 June 2018.¹

1.2 The bill seeks to amend various Acts relating to taxation, superannuation, competition and consumers. In her second reading speech, the Hon. Kelly O'Dwyer, Minister for Revenue and Financial Services, stated:

Together, the measures in this bill represent a substantial 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

1.3 The bill contains nine schedules:

- Schedules 1 to 6 of the bill pertain to the Superannuation Guarantee Integrity package, which seeks to implement several recommendations contained in the Superannuation Guarantee Cross-Agency Working Group's report to strengthen compliance with taxation and superannuation guarantee obligations. The package contains amendments to:
 - allow the Commissioner of Taxation (Commissioner) in cases where employers fail to comply with their superannuation guarantee obligations, to issue directions to pay unpaid superannuation guarantee and undertake superannuation guarantee education courses;
 - allow the Commissioner to disclose more information about superannuation guarantee non-compliance to affected employees;
 - extend Single Touch Payroll reporting to all employers;
 - facilitate more regular reporting by superannuation funds;
 - improve the operation of the Commissioner's collection and compliance measures; and
 - streamline employee commencement processes.
- Schedule 7 seeks to enable the sharing and verification of tax file numbers, which have been obtained in accordance with a Commonwealth law, between the Commissioner and Commonwealth agencies.

1 *Journals of the Senate*, No. 97, 10 May 2018, p. 3093.

2 The Hon. Kelly O'Dwyer, Minister for Revenue and Financial Services, Second reading speech, *House of Representatives Hansard*, 28 March 2018, p. 3043.

- 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.
- Schedule 9 seeks to amend the Income Tax Assessment Act 1997 (ITAA 1997) to allow the following entities to be deductible gift recipients (DGR) under the income tax law:
 - Australian Philanthropic Services Limited;
 - Foundation 1901 Limited; and
 - Sydney Chevra Kadisha.³

Conduct of the inquiry

1.4 The committee advertised the inquiry on its website and wrote to relevant stakeholders and interested parties inviting submissions. The committee received 18 submissions, which are listed at Appendix 1.

1.5 The committee held a public hearing in Canberra on 1 June 2018 for this inquiry. A list of witnesses who appeared at the hearing can be found at Appendix 2.

1.6 References to the Committee Hansard are to the Proof Hansard and page numbers may vary between Proof and Official Hansard transcripts.

1.7 The committee thanks all individuals and organisations that made written submissions and participated in the public hearing.

Background—Superannuation Guarantee Integrity package

1.8 The majority of the submissions to the committee's inquiry relate to Schedules 1 to 6—Superannuation Guarantee Integrity.

Senate Economics References Committee inquiry into superannuation guarantee non-payment

1.9 On 1 December 2016, the Senate referred an inquiry to the Senate Economics References Committee (References Committee) into the impact of non-payment of the superannuation guarantee. In May 2017, the References Committee tabled its report, *Superbad—Wage theft and non-compliance of the Superannuation Guarantee*. Evidence presented to the References Committee during this inquiry from the housing industry, community stakeholders and academics raised concerns about the negative impacts of non-payment of the superannuation guarantee including:

- the economic impacts on the employees, including a loss of retirement income and the benefits of compounding interest;
- the competitive disadvantage to employers who are compliant; and
- the increased burden on government services such as the age pension, which results in increased government expenditure.⁴

3 Explanatory Memorandum, pp. 3–6.

Superannuation Guarantee Cross-Agency Working Group

1.10 The Superannuation Guarantee Cross-Agency Working Group (Working Group) was established by the Minister for Revenue and Financial Services in December 2016 to report on the operation, administration and extent of non-compliance in the Superannuation Guarantee system in Australia. The Working Group was chaired by the Australian Taxation Office (ATO) and also comprised officials from Treasury, the Department of Employment, the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA).

1.11 The Working Group provided its report to the Minister for Revenue and Financial Services on 31 March 2017. The report was publicly released on 14 July 2017.

1.12 The Working Group made nine recommendations to improve Superannuation Guarantee compliance, and identified eight actions that the relevant agencies could take to facilitate compliance and enforcement.⁵

Policy announced on 29 August 2017

1.13 On 29 August 2017, the Hon. Kelly O'Dwyer, Minister for Revenue and Financial Services announced the Superannuation Guarantee Integrity package. The announcement stated that the Superannuation Guarantee Integrity package seeks to implement several recommendations contained in the Working Group's report and noted that the Government did not accept the Working Group's recommendations to soften penalties for non-compliant employers. The Minister stated:

[E]mployers' failure to meet their SG obligations to their employees has been a problem ever since the SG was introduced in 1992.

Employers who deliberately do not pay their workers' superannuation entitlements are robbing their workers of their wages. This is illegal and won't be tolerated...

The Turnbull Government is taking action to safeguard and modernise the SG so employers can't hide from their legal duty. We will give all Australians confidence that the superannuation system is working in their best interests.⁶

4 Senate Economics References Committee, *Superbad—Wage theft and non-compliance of the Superannuation Guarantee*, 2 May 2017.

5 Superannuation Guarantee Cross-Agency Working Group, *Superannuation Guarantee Non-Compliance—A report to the Minister for Revenue and Financial Services*, 31 March 2017, <https://treasury.gov.au/publication/superannuation-guarantee-non-compliance/> (accessed 30 May 2018).

6 The Hon. Kelly O'Dwyer, Minister for Revenue and Financial Services, 'Turnbull Government backs workers on superannuation', *Media Release*, 29 August 2017, <http://kmo.ministers.treasury.gov.au/media-release/086-2017/> (accessed 30 May 2018).

Treasury consultation on the Superannuation Guarantee Integrity Package

1.14 Treasury released exposure draft legislation for the Superannuation Guarantee Integrity Package and conducted a consultation process from 24 January to 16 February 2018.⁷

Overview of the bill

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

1.15 Schedule 1 to the bill seeks to amend the *Taxation Administration Act 1953* (TAA) to allow the Commissioner to issue directions to employers who fail to comply with statutory obligations under the *Superannuation Guarantee (Administration) Act 1992* (SGAA) or an obligation under the TAA as it relates to the SGAA (superannuation guarantee obligations).

1.16 The amendments are based on recommendation 6 contained in the Working Group's report:

Ensure the penalty framework surrounding superannuation guarantee is sufficiently flexible to appropriately deal with the spectrum of employer culpability in non-compliance.⁸

1.17 The amendments in Schedule 1 seek to empower the Commissioner to issue directions to employers to undertake specific actions where the Commissioner is satisfied that there has been a failure to comply with an obligation or a failure to pay a charge. These directions are designed to enhance employer compliance with their superannuation guarantee obligations.

1.18 The amendments will also allow the Commissioner to direct employers to undertake an approved course, relating to their superannuation guarantee obligations, where the Commissioner reasonably believes there has been a failure by an employer to comply with those obligations.

Direction to pay superannuation guarantee charge

1.19 The key features of the direction to pay superannuation guarantee charge are as follows:

- The Commissioner can issue a direction to an employer if the employer has failed to pay an amount of superannuation guarantee charge, or an estimate of superannuation guarantee charge, for a quarter.
- The employer must ensure that the amount of the unpaid liability is paid within the period specified in the direction.

7 Treasury, 'Superannuation Guarantee Integrity Package', <https://treasury.gov.au/consultation/c2018-t256652/> (accessed 13 June 2018).

8 Superannuation Guarantee Cross-Agency Working Group, *Superannuation Guarantee Non-Compliance—A report to the Minister for Revenue and Financial Services*, 31 March 2017, p. 10, <https://treasury.gov.au/publication/superannuation-guarantee-non-compliance/> (accessed 30 May 2018).

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- Failure to comply with the direction can result in criminal penalties.
- 1.20 The key features of the education direction are as follows:
- The Commissioner can issue a direction to an employer if the Commissioner reasonably believes the employer has failed to comply with a superannuation obligation.
 - The employer who has received the direction must complete the approved course, or for non-individual employers, ensure an individual who participates in the decision making of the business completes the course.
 - The employer must provide proof of completion to the Commissioner.
 - Failure to comply with the direction can result in administrative and/or criminal penalties.⁹

Offence

1.21 An employer commits an offence if they are given a direction to pay the amount of an outstanding liability and the amount of the liability is not discharged within the period specified in the direction. The maximum penalty for the offence is 50 penalty units, imprisonment for 12 months, or both.¹⁰

Defence of reasonable steps

1.22 If the liability that is identified in a direction is not discharged within the required period, the employer that was issued with the direction will not commit an offence if they took all reasonable steps within the required period to both comply with the direction and to ensure that the original liability was discharged before the direction was given.¹¹

Interaction with the insolvency and bankruptcy laws

1.23 The direction to pay superannuation guarantee charge or an estimate of superannuation guarantee charge does not create a separate liability and operates concurrently with the existing corporate insolvency and bankruptcy laws. The current insolvency regime, as it applies to superannuation guarantee charge, remains unchanged.

1.24 The direction to pay an outstanding liability is not intended to be issued to entities that are insolvent or on the brink of becoming insolvent.¹²

Education directions

1.25 The amendment will allow the Commissioner to issue an education direction to an entity if the Commissioner reasonably believes that the entity has failed to

9 Explanatory Memorandum, pp. 7–9.

10 Explanatory Memorandum, p. 12.

11 Explanatory Memorandum, p. 14.

12 Explanatory Memorandum, p. 15.

comply with one of the following obligations in relation to a specified tax-related liability or under a specified taxation law:

- Failing to pay an amount of a tax-related liability;
- Failing to comply with an obligation to give a statement or information to the Commissioner under a taxation law;
- Failing to comply with an obligation to keep records under a taxation law; or
- Failing to comply with an obligation under the TAA that relates to a taxation law.¹³

1.26 An education direction would require an employer, or an individual who makes management decisions of the business, to undertake an approved course of education and provide the Commissioner with evidence of completion of the course by the individual. It is expected that education directions will be issued to an employer where the employer's lack of knowledge or understanding of their obligations has contributed to a failure to comply with their obligations under the SGAA or the TAA. An education direction is intended to address knowledge gaps and reduce future cases of non-compliance by employers.¹⁴

Schedule 2: Disclosure of information about non-compliance

1.27 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.

1.28 The proposed amendments are based on recommendation 3 contained in the Working Group's report:

The ATO should inform employees of its actions to collect their superannuation guarantee, including in ATO-initiated cases where this communication is currently constrained by current secrecy provisions. The ATO and Treasury will advise of the administrative and legal changes needed to inform employees that have not self-reported suspected non-payment to the ATO.¹⁵

1.29 These proposed amendments expand a taxation officer's ability to disclose information in relation to an employee by providing an exception to allow the making of a record or disclosure of protected information to current and former employees which relate to the following:

13 Explanatory Memorandum, p. 22–23.

14 Explanatory Memorandum, p. 22.

15 Superannuation Guarantee Cross-Agency Working Group, *Superannuation Guarantee Non-Compliance—A report to the Minister for Revenue and Financial Services*, 31 March 2017, p. 9, <https://treasury.gov.au/publication/superannuation-guarantee-non-compliance/> (accessed 30 May 2018).

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- A failure by the individual's employer or former employer to comply with the employer's obligations under the SGAA or the TAA;
 - Where the Commissioner reasonably suspects there has been a failure to comply with the employer or former employer's obligations under the SGAA or the TAA; or
 - Any actions taken by the Commissioner in relation to such a failure or suspected failure.

1.30 These proposed amendments supplement the existing law, which allows the Commissioner to disclose protected information relating to the Commissioner's response to a complaint by an employee about their employer's failure to comply with the employer's obligations under the SGAA or the TAA in relation to the employee.¹⁶

Consequential amendments

1.31 The bill also contains a proposed amendment to ensure that a disclosure that is made under item 7 to the table in subsection 355-65(3) in Schedule 1 of the TAA also includes a failure to comply with an obligation under the TAA as it relates to the SGAA. This is to capture all of the information that the Commissioner can disclose in their response to a complaint by an employee where there has been a failure of an obligation under the TAA.

1.32 Further, the proposed legislation seeks to clarify that a taxation officer is able to provide disclosures to an employee if there is a dispute to whether they are an employee.¹⁷

Application and transitional provisions

1.33 The proposed amendments in relation to the disclosure of protected information relating to a failure or a suspected failure of an employer to comply with obligations under the SGAA or under the TAA apply to records and disclosures made on or after 1 July 2018 (regardless of whether the failure or suspected failure to comply with the obligation occurred before, on or after 1 July 2018).

1.34 The disclosures can apply to a failure or a suspected failure to comply with an employer's superannuation obligation that has or is suspected to have occurred before 1 July 2018 because the event would have already occurred. The amendments allow the Commissioner to disclose historical information relating to the potential affected employee which can impact on their superannuation entitlements.¹⁸

Schedule 3: Single touch payroll reporting

1.35 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

16 Explanatory Memorandum, p. 33.

17 Explanatory Memorandum, p. 36.

18 Explanatory Memorandum, p. 36.

payroll and superannuation information to the Commissioner at the time the employment liabilities are paid or withheld.

1.36 Schedule 3 also seeks to amend the TAA to require employers to include salary sacrificed amounts paid to their employees' superannuation funds in the amounts reported under the Single Touch Payroll reporting rules.

1.37 The proposed amendments are based on recommendation 1 contained in the Working Group's report:

That subject to the findings of the current small business pilot being conducted by the ATO, to improve the ATO's visibility of superannuation obligations it is recommended by the Working Group that all businesses (including small business) comply with Single Touch Payroll.¹⁹

1.38 The explanatory memorandum outlines the reason government intervention is necessary:

Government intervention will address the failure of the current regulatory regime to achieve its compliance objectives, as demonstrated by the significant and ongoing employer non-compliance with SG, and to transform reporting of employee tax and superannuation reporting obligations to a digital, real-time basis. The latter will align reporting to government of tax and superannuation with normal payroll functions undertaken by employers (rather than it being on different timelines) thereby reducing duplication of effort and record-keeping.²⁰

Single Touch Payroll

1.39 Single Touch Payroll rules were first introduced in the *Budget Savings (Omnibus) Act 2016*. Single Touch Payroll reporting currently requires the real-time reporting of withholding payments and amounts withheld from them, employee salary or wages and ordinary time earnings, and superannuation contributions to the Commissioner at the time these amounts are withheld or paid by employers.

1.40 The Single Touch Payroll rules are designed to enhance compliance by providing the Commissioner with increased visibility to monitor the payment of employee entitlements. This enables the Commissioner to identify non-compliance by employers earlier and to better inform affected employees.

1.41 Division 389 in Schedule 1 of the TAA currently applies to 'substantial employers' from 1 July 2018 or from 1 July of the year that they become a substantial employer. An entity is a substantial employer at a particular time if on the most recent 1 April before that time, commencing 1 April 2018, the entity had 20 or more employees, inclusive of the total number of employees employed by all member companies of the wholly-owned group. Entities that do not have 20 or more

19 Superannuation Guarantee Cross-Agency Working Group, *Superannuation Guarantee Non-Compliance—A report to the Minister for Revenue and Financial Services*, 31 March 2017, p. 8, <https://treasury.gov.au/publication/superannuation-guarantee-non-compliance/> (accessed 30 May 2018).

20 Explanatory Memorandum, p. 50.

employees can choose to report under the Single Touch Payroll rules on a voluntary basis.

1.42 The proposed amendment in Schedule 3 will change the Single Touch Payroll reporting rules so that it applies to all employers, regardless of the number of employees they have. For small employers who are not 'substantial employers' (entities with 20 or more employees), Single Touch Payroll reporting commences from 1 July 2019.²¹

Reporting sacrificed amounts by employers

1.43 The current Single Touch Payroll reporting rules require employers to report any amounts that constitute ordinary time earnings that are paid to an employee. Employers are also required to report any amounts that constitute salary and wages that are paid to an employee.

1.44 The proposed amendments seek to extend these reporting requirements to include any salary sacrificed amounts that would have constituted ordinary time earnings or salary and wages, had they been paid directly to the employee. The Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 2) Bill 2017, which is currently before the Senate, introduced amendments to the SGAA which are intended 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. Requiring employers to report sacrificed amounts under the Single Touch Payroll regime is intended to ensure the Commissioner has access to information on employee's pre-salary sacrifice base in order to ensure superannuation guarantee entitlements are correctly calculated.²²

1.45 The amendments requiring all employers to report ordinary time earnings and salary or wage amounts including any sacrificed amounts apply in relation to quarters beginning on or after the day Part 2 of Schedule 3 commences.²³

Consequential amendments

1.46 Schedule 3 seeks to make amendments as a consequence of expanding the Single Touch Payroll reporting to all employers, including the repeal of the definition of 'substantial employer', provisions and headings which explain and reference 'substantial employer' and Guide material. The definition is no longer required as a result of expanding Single Touch Payroll reporting to all employers.

1.47 In addition, Schedule 3 seeks to make consequential amendments to include references to new item 2A in the table in subsection 389-5(1) in Schedule 1 of the

21 Explanatory Memorandum, pp. 37–38, 40.

22 Explanatory Memorandum, pp. 40–41.

23 Explanatory Memorandum, pp. 42–43.

TAA for the reporting of salary sacrificed amounts in a number of provisions that currently reference items 1 or 2 in that table.²⁴

Schedule 4: Fund reporting

1.48 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.

1.49 Schedule 4 seeks to remove the requirement for employers to report superannuation guarantee contributions paid to superannuation providers under the Single Touch Payroll reporting rules.

1.50 Schedule 4 also reintroduces a previous measure to remove the requirement for superannuation funds to lodge bi-annual statements for lost members.²⁵

1.51 The proposed amendments are based on recommendation 2 contained in the Working Group's report:

To improve the ATO's visibility of superannuation guarantee contributions made to employees' superannuation funds, require superannuation funds to report detailed contributions payment information more frequently. It is understood this can be enacted through the creation of a legislative instrument by the Commissioner of Taxation to move from a requirement for superannuation funds to report superannuation contributions annually.²⁶

APRA-regulated superannuation fund reporting

1.52 The Working Group's final report recommended more frequent and detailed superannuation fund reporting, in conjunction with the expansion of Single Touch Payroll reporting to all employers. The proposed measure in Schedule 4 seeks to move the responsibility for reporting superannuation guarantee contributions paid into employee superannuation accounts to the superannuation funds, and away from employers. These changes strengthen both the Commissioner's capacity to monitor compliance, identify non-compliance when it occurs, and assist in developing strategies to prevent further non-compliance.

1.53 As part of this measure, the frequency of the APRA regulated superannuation fund reporting increases to an 'event-based' reporting, replacing the current annual member contribution statement. These changes are being enforced through the Commissioner's existing powers to require reporting from superannuation providers under section 390-5 in Schedule 1 of the TAA.

24 Explanatory Memorandum, p. 43.

25 Explanatory Memorandum, p. 63.

26 Superannuation Guarantee Cross-Agency Working Group, *Superannuation Guarantee Non-Compliance—A report to the Minister for Revenue and Financial Services*, 31 March 2017, p. 8, <https://treasury.gov.au/publication/superannuation-guarantee-non-compliance/> (accessed 30 May 2018).

1.54 The measure does not apply to self-managed super funds.²⁷

Statements for lost members

1.55 A measure to remove the requirement for superannuation funds to provide bi-annual lost member statements²⁸ to the Commissioner was previously introduced to Parliament as part of the lapsed Treasury Legislation Amendment (Repeal Day 2015) Bill 2016.

1.56 This measure is being reintroduced as part of the superannuation guarantee integrity package.

1.57 Superannuation funds are currently required to lodge a bi-annual lost members statement with the Commissioner, identifying all superannuation balances of lost members. This statement provides information to the Commissioner to display on a register of lost members. The Commissioner also collects member information through the annual member information statement, some of which is duplicated in the lost member statement.²⁹

Consequential amendments

1.58 Schedule 4 seeks to make consequential amendments to repeal headings and add an additional note to clarify when a superannuation provider will be able to rely on the grace period.

1.59 Schedule 4 also seeks to make a consequential amendment to allow the Commissioner to request information from superannuation providers relating to the *Superannuation (Unclaimed Money and Lost Members) Act 1999* (SUMLMA) under the existing section 390-5 in Schedule 1 of the TAA.³⁰

Schedule 5: Compliance measures

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

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

1.61 The proposed amendments are based on recommendation 4 contained in the Working Group's report:

27 Explanatory Memorandum, p. 64.

28 A lost member is a member of a super fund who is inactive, uncontactable, or transferred from another super provider as a lost member.

29 Explanatory Memorandum, p. 64.

30 Explanatory Memorandum, p. 69.

To improve the overall framework for superannuation guarantee compliance and the collection of superannuation guarantee charge debts, enhancements should be made to the Director Penalty Notice regime and to the Security Bonds Regime.³¹

1.62 The amendments also seek to strengthen the Commissioner's ability to collect superannuation guarantee charge and PAYG withholding liabilities in the following ways:

- With respect to director penalties under Division 269 in Schedule 1 of the TAA, a director's obligations in relation to ensuring their company pays an estimate of superannuation guarantee charge or withholding liability commence at the same time as their obligations in relation to ensuring the company pays the underlying liability to which the estimate relates;
- Removal of the three month period before director penalties are 'locked down' in respect of unpaid superannuation guarantee charge liabilities; and
- Allowing the Commissioner to apply for a Court order to compel entities to comply with a security deposit requirement.³²

Timing of obligation to pay estimates for the purposes of Division 269 in Schedule 1 of the TAA

1.63 These amendments seek to alter the time at which a director is taken to be under an obligation to ensure the company pays an estimate of an underlying superannuation guarantee charge or PAYG withholding liability for the purposes of the director penalty provisions in Division 269 in Schedule 1 of the TAA.

1.64 Consistent with the scope of the director penalty provisions generally, the amendments apply in relation to the directors of companies which have been issued with a notice to pay an estimate under Division 268 in Schedule 1 of the TAA.³³

1.65 The proposed amendments apply in relation to an estimate made under Division 268 in Schedule 1 of the TAA on or after 1 July 2018 (regardless of whether the underlying liability to which the estimate relates arose before, on or after 1 July 2018).³⁴

Circumstances where a director penalty is remitted

1.66 These amendments seek to remove the three month period before a director penalty is 'locked down' and cannot be remitted if a company is placed into voluntary

31 Superannuation Guarantee Cross-Agency Working Group, *Superannuation Guarantee Non-Compliance—A report to the Minister for Revenue and Financial Services*, 31 March 2017, p. 9, <https://treasury.gov.au/publication/superannuation-guarantee-non-compliance/> (accessed 30 May 2018).

32 Explanatory Memorandum, p. 74.

33 Explanatory Memorandum, p. 76.

34 Explanatory Memorandum, p. 80.

administration or insolvency. This change is restricted to superannuation guarantee charges and estimates of superannuation guarantee charge.

1.67 Under the new law, a director penalty cannot be remitted if a company is placed into voluntary administration or insolvency where the company has an obligation to pay a superannuation guarantee charge and the company does not report the superannuation guarantee liability to the Commissioner on or before the due date.³⁵

1.68 The proposed amendments apply in relation to PAYG withholding liabilities and superannuation guarantee charge liabilities that first become payable on or after 1 July 2018.

1.69 The proposed amendments apply in relation to estimates of superannuation guarantee charge liabilities and PAYG withholding liabilities made on or after 1 July 2018 (regardless of whether the underlying liability to which the estimate relates arose before, on or after 1 July 2018).³⁶

Order to provide security

1.70 These amendments seek to allow the Commissioner to apply to the Federal Court to order an entity to comply with a requirement to give a security. The Commissioner must have given a notice of the requirement to provide a security deposit.

1.71 Enabling the Commissioner to make these applications, and for the Court to make these orders, is intended to address the instances of non-compliance with the security deposit rules. Non-compliance predominantly arises where the value of the security deposit (which reflects the value of the tax related liability) exceeds the penalty for failing to provide the security deposit. Entities who fail to comply with a Court order risk committing a criminal offence resulting in criminal penalties. These consequences are designed to drive taxpayer behaviour into complying with the Court order and providing the security deposit to the Commissioner.³⁷

1.72 The amendments apply in relation to a requirement to give security in relation to a tax-related liability if the Commissioner provides the notice of the requirement on or after 1 July 2018.³⁸

Consequential amendments

1.73 Schedule 5 seeks to make consequential amendments to remove item 4 to the table in subsection 269-10(1) in Schedule 1 of the TAA and the note which are no longer required. Schedule 5 also makes consequential amendments to include a note under the existing reasonably arguable position defence contained in

35 Explanatory Memorandum, p. 80.

36 Explanatory Memorandum, p. 82.

37 Explanatory Memorandum, p. 82.

38 Explanatory Memorandum, p. 84.

section 269-35(3A) which clarifies that the defence may be available to times before the notice of an estimate of a superannuation guarantee charge liability is given.

1.74 Schedule 5 seeks to make consequential amendments to remove the reference to the three month rule in respect of superannuation guarantee liabilities and estimates. The amendments retain the three month rule in respect of PAYG withholding liabilities and estimates.³⁹

Schedule 6: Amendments relating to employee commencement

1.75 Schedule 6 to the bill contains amendments to allow the pre-filling of an individual's tax file number (TFN) declaration and superannuation standard choice form by the Commissioner to the individual's employer to assist the individual to complete these forms using information held by the Commissioner.

1.76 Currently, individuals must provide a TFN declaration and superannuation standard choice form to either the Commissioner or to the individual's employer (usually, via paper). The TFN declaration allows an individual the option to disclose their TFN to an employer or claim an exemption from quoting their TFN, and provides information which can affect their withholding rates. These disclosure obligations for individuals are not mandatory under the tax law.

1.77 A taxation officer is permitted to disclose an individual's TFN to an individual's employer if the individual provided the number to the Commissioner in a TFN declaration. However, there are situations where an employee may not know their TFN or may be enquiring about their TFN to the Commissioner which are not covered by this exception.

1.78 The current disclosure rules do not permit any pre-filling of information relating to an individual to their employer.⁴⁰

1.79 The amendments achieve this by providing a range of new exceptions to the tax file number offence and the confidentiality of taxpayer information rules to enable the disclosure of TFNs, withholding information and the superannuation member accounts of individuals.⁴¹

Application and transitional provisions

1.80 The amendments allowing the disclosure of an employee's TFN to an employer applies in relation to a TFN declaration made on or after 1 July 2018.

1.81 The amendments pertaining to the disclosure of protected information including information relating to the withholding matters of the employee or for the purpose of the employee making a superannuation fund choice will apply from commencement.⁴²

39 Explanatory Memorandum, p. 84.

40 Explanatory Memorandum, p. 85.

41 Explanatory Memorandum, pp. 89–90.

42 Explanatory Memorandum, p. 88.

Schedule 7: Information sharing

1.82 Schedule 7 enables the sharing and verification of TFNs which have been obtained in accordance with a Commonwealth law, between the Commissioner and Commonwealth agencies.

1.83 Division 355 in Schedule 1 to the TAA contains the taxpayer confidentiality rules. Subject to certain exceptions, it is an offence for taxation officers to disclose or make a record of 'protected information' in respect of an entity, if the information is acquired in their capacity as a taxation officer.

1.84 'Protected information' is information that is disclosed or obtained under or for the purposes of a taxation law. The information must relate to the affairs of the entity (although not limited to their taxation affairs) and must identify, or be reasonably capable of being used to identify the entity.

1.85 The prohibition on disclosure does not apply where an exception to the offence applies. These exceptions include disclosures for a range of purposes including for Government purposes relating to social welfare, health or safety.

1.86 TFNs are not subject to the general taxpayer confidentiality laws for 'protected information', on the basis that they are not, in and of themselves, reasonably capable of identifying an entity.

1.87 The amendments contained in Schedule 7 seek to allow a Commonwealth agency to provide a person's TFN, where they have obtained it under a Commonwealth law, to the Commissioner for the purpose of verifying the TFN and enable the Commissioner to verify and share a person's TFN with that Commonwealth agency who has requested the verification.⁴³

Schedule 8: Miscellaneous amendments

1.88 Schedule 8 to this Bill makes a number of miscellaneous amendments to the taxation, superannuation and other laws. These amendments are part of the Government's commitment to the care and maintenance of the Treasury portfolio legislation including the taxation and superannuation systems.

1.89 These amendments make minor technical changes to correct spelling errors, bring provisions in line with drafting conventions, repeal inoperative provisions and update references in the tax law to reflect changes to the names of State and Territory legislation and specifically listed deductible gift recipients. The Schedule also makes consequential amendments as a result of other recent changes to the law, makes minor technical amendments to remove administrative inefficiencies, clarifies the law (ensuring it operates in accordance with the policy intent), and rewrites certain provisions to standardise rules across various types of tax, improving efficiency, coherency and simplicity in tax administration.

1.90 Schedule 8 contains the following parts:

- Part 1—Amendments to commencement provisions of amending Bills;

43 Explanatory Memorandum, p. 88.

- Part 2—Amendments to application provisions of amending Bills;
- Part 3—Road user charge;
- Part 4—Seasonal Workers Program;
- Part 5—Offshore information notices;
- Part 6—Various amendments; and
- Part 7—Transitional arrangements relating to the disclosure of information.⁴⁴

Schedule 9: Deductible gift recipients

1.91 Schedule 9 to this Bill amends the ITAA 1997 to include three entities as DGRs. These are the Australian Philanthropic Services Limited, Foundation 1901 Limited and Sydney Chevra Kadisha.

1.92 The income tax law allows income tax deductions for taxpayers who make gifts of \$2 or more to a DGR. DGRs are entities which fall within one of the general categories set out in Division 30 of the ITAA 1997 or are specifically listed by name in that Division.

1.93 DGR status helps eligible organisations attract public financial support for their activities.⁴⁵

Financial impact

1.94 The financial impact (including departmental expenses) of all the measures contained in the Superannuation Guarantee Integrity package (Schedules 1 to 6) is as follows:

Table 1: Financial impact (as set out in Explanatory Memorandum)⁴⁶

<i>2016–17</i>	<i>2017–18</i>	<i>2018–19</i>	<i>2019–20</i>	<i>2020–21</i>
-	-\$7.5m	-\$19.9m	-\$17.7m	-\$9.2m

1.95 The financial impact of Schedule 7, information sharing, is nil.⁴⁷

1.96 The financial impact of Schedule 8, miscellaneous amendments, is expected to have a negligible impact on revenue over the forward estimates.⁴⁸

1.97 The financial impact over the next three years of the measures contained in Schedule 9 is a cost to revenue of \$1.1m as set out in the 2017–18 MYEFO.

44 Explanatory Memorandum, pp. 94–95.

45 Explanatory Memorandum, p. 115.

46 Explanatory Memorandum, p. 3.

47 Explanatory Memorandum, p. 4.

48 Explanatory Memorandum, p. 5.

Table 2: Financial impact (as set out in Explanatory Memorandum)⁴⁹

<i>2016–17</i>	<i>2017–18</i>	<i>2018–19</i>	<i>2019–20</i>	<i>2020–21</i>
-	...	-\$0.4m	-\$0.5m	-\$0.2m

-Nil

...not zero but rounded to zero

Legislative scrutiny committees

1.98 In its *Scrutiny Report 4 of 2018*, the Parliamentary Joint Committee on Human Rights raised concerns about strict liability and absolute liability offences contained in the bill.

1.99 Schedule 1 of the bill seeks to amend the TAA to introduce a strict liability offence for employers who fail to comply with a direction from the Commissioner to pay a superannuation guarantee charge.

1.100 A person will not commit an offence if they took all reasonable steps within the required period to both comply with the direction and to ensure that the original liability was discharged before the direction was given.

1.101 Schedule 1 would also allow the Commissioner to direct an employer to attend an approved education course where that employer has failed to comply with their superannuation guarantee obligations. Failure to comply with the education direction would be an absolute liability offence.

1.102 Schedule 5 of the bill seeks to amend the TAA to introduce a strict liability offence for failing to provide security where ordered to do so by the Federal Court. A person will not commit an offence to the extent that they are not capable of complying with the order.⁵⁰

1.103 The Parliamentary Joint Committee on Human Rights expressed concern that the strict liability and absolute liability offences introduced by Schedules 1 and 5 of the bill engage and limit the presumption of innocence.⁵¹

49 Explanatory Memorandum, p. 6.

50 Parliamentary Joint Committee on Human Rights, *Scrutiny Report 4 of 2018*, p. 30.

51 Parliamentary Joint Committee on Human Rights, *Scrutiny Report 4 of 2018*, p. 32.

1.104 In its *Scrutiny Digest 5 of 2018*, the Senate Standing Committee for the Scrutiny of Bills raised a number of concerns in relation to the bill. These include:

- Part 1 of Schedule 1 and Schedule 5 that seek to create strict liability offences;⁵²
- Item 3 of Schedule 1 that seeks to create absolute liability offences;⁵³
- Schedule 4, items 1 and 2 that seek to establish a reversal of evidential burden of proof;⁵⁴
- Item 3 of Schedule 8 seeks to allow the Minister to determine road user charges for taxable fuel by delegated legislation;⁵⁵ and
- Schedule 8, item 19, proposed subsection 353-30(4) that seeks to establish a no-invalidity clause.⁵⁶

52 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2018*, 9 May 2018, pp. 56–58.

53 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2018*, 9 May 2018, pp. 58–60.

54 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2018*, 9 May 2018, pp. 60–61.

55 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2018*, 9 May 2018, pp. 61–62.

56 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2018*, 9 May 2018, pp. 62–63. A legislative provision that indicates that an act done or decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity of that act or decision, may be described as a 'no-invalidity' clause.

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

Additional Comments from Labor Senators

1.1 Labor Senators broadly support the measures set out in this bill and note the majority support from stakeholders, but continue to reiterate that the Government is slow to action on unpaid super and has a lacklustre approach to enforcement.

Schedules 1–6—Superannuation Guarantee Integrity

1.2 Labor Senators note the general support for these schedules but note that they will not close the entire superannuation guarantee (SG) gap. Labor Senators are of the view that any level of underpayment should be considered unacceptable.

1.3 The Financial Services Council (FSC) support strong action on unpaid superannuation guarantee payments:

It is unacceptable that some employers deliberately and systematically withhold their staff's contributions. This can significantly impact on an individual's savings by the time they retire. This mustn't be tolerated. The level of SG noncompliance is shockingly high. It allows some unscrupulous businesses to compete unfairly with other businesses that comply with the law.¹

1.4 The Australian Council of Trade Unions (ACTU) characterised the Government's approach this way:

Workers lose \$5.6 billion per year in unpaid superannuation, and the Government's piecemeal and post hoc approach unpaid super shows it is not serious, nor does it intend to take real action on unpaid super. The Government has willfully ignored the Senate Economic References Committee report *Superbad – Wage theft and non-compliance of the Superannuation Guarantee* which recommends real action on unpaid super, and would represent a significant first step in addressing the systemic shortfall of superannuation payments.²

1.5 Industry Super Australia (ISA) support the intent of this legislation but highlighted that the Government's current action is insufficient:

This legislation is a strong step in the right direction. However, on balance, it is not adequate to deal with the scale of the problem, particularly the changing nature of work and fully harnessing technological improvements that have occurred since the introduction of the SG a quarter of a century ago.³

1.6 ISA also indicated that the SG gap is widening, not closing:

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

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

3 Mr Matthew Linden, Director, Public Affairs, Industry Super Australia, *Committee Hansard*, 1 June 2018, p. 7.

We have estimated the number of eligible SG employees underpaid in 2013-14 at 2.76 million. Our estimate for 2015-16, which is largely about labour force growth, is 2.98 million. Back in 2013-14 the estimate was that 32 per cent of employees were affected. We are now saying 33.4 per cent. Senator Ketter referred to the figure of \$5.6 billion earlier. The estimate for 2015-16 is \$5.9 billion.⁴

1.7 The Association of Superannuation Funds of Australia (ASFA) said that:

Will the SG gap go from \$2.85 billion to zero? No.⁵

1.8 Labor Senators also note comments of Treasury officials confirming that any level of underpayment is unacceptable:

Mr Jeremenko: Thank you, Chair. The position that the government takes, and Treasury, is that any level of underpayment of SG is unacceptable.⁶

1.9 Both ISA and the ACTU stated that the scope of single touch payroll was not sufficient—that there are contractors who are eligible for superannuation guarantee payments under the *Superannuation Guarantee (Administration) Act 1992* but will not be covered by the Government's primary superannuation guarantee integrity scheme—Single Touch Payroll (STP):

The legislation fails to cover any labour hire or other contractors—even though they are eligible for SG under the SGAA—leaving out one of the most frequently underpaid groups and potentially incentivising employers who wish to avoid paying SG to engage more workers in this way to avoid detection.⁷

1.10 The ACTU provided the following evidence to the committee:

Senator KETTER: What about the issue of the carve out of labour hire staff and contractors? Do you see an issue with that?

Mr Mitchell: I do. I think that for no real reason it carves it out, other than for the idea it might incentivise labour hiring contractors to be used more, which further increases the level of insecure work in the country.⁸

1.11 The Australian Restructuring Insolvency and Turnaround Association also supported the idea of labour hire staff and contract workers being covered by an SG integrity scheme:

4 Mr Phil Gallagher PSM, Special Retirement Policy Adviser, Industry Super Australia, *Committee Hansard*, 1 June 2018, p. 7.

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. 5.

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

7 Industry Super Australia, *Submission 17*, p. 6

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

Senator KETTER: On Single Touch Payroll, do you have concerns about the fact that some groups of workers aren't covered—people who aren't employees?

Mr Winter: To keep it to our own backyard, Senator, wherever we see capacity for better financial information to be provided at that point of financial distress, we believe that's valuable. Insofar as you can keep proper account of who you owe money to, and that includes all types of workers, that's of significant concern to insolvency practitioners. From our point of view, in terms of the recoveries and paying what's due to people, we would see extending it as far as possible as a positive.

Senator KETTER: So you'd support the inclusion of labour hire staff or contract workers?

Mr Winter: Again, and for that same reason. And part of that is obviously the financial responsibility piece that comes for all sorts of organisations to keep track of where their obligations are at any point in time. Of course, the definition of solvency is the requirement to be able to meet your debts as and when they fall due. That language is really important here. That includes payments to contractors. It includes payments to the ATO [Australian Taxation Office] et cetera.⁹

1.12 The Australian Chamber of Commerce and Industry also supported this proposal:

Senator KETTER: Logically, they should be included in the reporting mechanism, shouldn't they, so as to avoid the underpayment issue?

Mr Grozier: I think employees should be included, and that includes deemed employees.

Senator KETTER: Contractors who are, essentially, entitled to superannuation by virtue of the nature of their engagement. You believe they should be included in the Single Touch Payroll regime?

Mr Grozier: I accept that that may not be how every employer's payroll system operates. But my understanding of the legislation is that, for those employers who have a Single Touch Payroll reporting obligation, it would extend to deemed employees.¹⁰

1.13 When questions were put to Treasury about expanding STP coverage to everyone eligible for SG purposes, Treasury officials made it clear that contractors on payroll would be reported through STP, but contractors paid via accounts payable will not be covered by this regime, in response to industry consultation:

Mr Crowe: Senator, all I can rely on in forming the ultimate advice that brought about the current arrangements in the bill, as I said, had its genesis in 2014 and that started a very, very extensive industry consultation process. Almost immediately, the notion of changing the timing of payments under the withholding system was removed from the table

9 *Committee Hansard*, 1 June 2018, p. 32.

10 *Committee Hansard*, 1 June 2018, p. 4.

because of the feedback that you've heard today from COSBOA [Council of Small Business Organisations Australia], et cetera, saying, 'Don't go there.' As we grew the consultative arrangements, there was a very, very strong shot across our bow not to include contract payments in a payroll environment. Now, we are predominantly working with the software industry, who understand payroll very, very well. It was a strong shot across our bow informing the legislation that went through in the budget omnibus bill to not include contract payments. They advised us that they do not appear in payroll. They are generally outside of payroll. So we heard, we listened and we've delivered in that fashion in order to make Single Touch Payroll the success we hope it to become.

Senator KETTER: In doing so, Mr Crowe, you have carved out a group of quite vulnerable people, in my personal opinion, because they might be considered to be contractors, yet we come across this sham contracting arrangement quite frequently and these people are paid through the payroll system. So I'm not quite understanding. We are trying to improve visibility, particularly, and if we are going to create a perverse incentive for more people to be put into this category—

Mr Crowe: If they are paid through a payroll system—and the narrative for STP is what is in your payroll system—you simply transmit that data to the tax office and it is likely to be picked up, without going to the definitional issues. We were very clearly advised in the construct of our law that to include any form of contract arrangements in what is a narrative around dumping a payroll system was the wrong thing to do. So, if they are in payroll, it is most likely we will get the data. The reason for that is they have to acquit that withholding component. So, if the employer is taking tax off people and treating them otherwise like an employee and paying them through payroll—that's what it does; it takes tax off people—the employer is likely to include that in the STP dataset, and Mr O'Halloran will be able to make full use of it.¹¹

1.14 On penalties, the ACTU made it clear that the strong penalties used in media releases¹² are not as strong as claimed by the Government:

The penalties proposed by the government may sound exciting, and tougher penalties for rogue employers are warranted—but that is if the employers are caught and only if they fail to pay after they're caught, and then only at the discretion of the commissioner. It's ridiculous to think that many employers will face harsher penalties as a result of this law, especially given the amnesty the government is giving to employers who've ripped off their staff for more than 26 years.¹³

11 *Committee Hansard*, 1 June 2018, p. 4.

12 The Hon. Kelly O'Dwyer MP, Minister for Revenue and Financial Services, *Protecting workers' superannuation*, accessed via <http://kmo.ministers.treasury.gov.au/media-release/031-2018/> (accessed 12 June 2018).

13 Industry Super Australia, *Submission 17*, p. 6.

1.15 In evaluating these measures, Labor Senators hold vision of a superannuation guarantee compliance system that covers everyone eligible for superannuation guarantee payments.

Schedule 7—Information Sharing

1.16 Labor Senators support this measure.

Schedule 8—Miscellaneous

1.17 Labor Senators support this measure, but also believe that this schedule fixes problems of the Government's own making.

1.18 When commenting on amendments in respect of changes to reversionary transition to retirement income streams, Treasury officials confirmed that this schedule fixes a problem that was created with the introduction of the Government's 2016 superannuation changes, a measure which industry has been calling for:

Senator KETTER: I've heard that. In schedule 8 there are two amendments that relate to previous government bills. Can you confirm that the changes to reversionary transition-to-retirement income streams fix up the problem that was created with the introduction of the government's 2016 superannuation changes and that this fix has been called for by industry?

Mr Jeremenko: That's correct, it does. It's a minor amendment to ensure that the original intent is met of those 2016-17 changes.¹⁴

1.19 Another amendment is in respect of transitional arrangements relating to the Australian Financial Complaints Authority (AFCA). The amendment allows the Superannuation Complaints Tribunal to share information about complaints with AFCA to facilitate a coordinated approach to handling complaints during the transition period. It is not clear why this provision was not included in the Government's bill that passed the Parliament in February 2018:

Senator KETTER: Can Treasury confirm that changes to the transitional arrangements relating to the Australian Financial Complaints Authority are to allow the Superannuation Complaints Tribunal to share information about complaints with AFCA to facilitate a coordinated approach to handling complaints during the transition period?

Mr Preston: That's correct.

Senator KETTER: Why was this provision not included in the government's bill that passed in February of this year?

Mr Jeremenko: I'm not sure which bill you're referring to, sorry. Do you mean in terms of AFCA?

Senator KETTER: Yes.

Mr Jeremenko: Unless my colleagues know I would have to take that on notice.

14 *Committee Hansard*, 1 June 2018, p. 49.

Senator KETTER: Could you tell me who made the decision not to have that—

Mr Jeremenko: As you know, all decisions as to what goes into bills, when they're introduced and what they're called is a matter for government.¹⁵

Schedule 9—Deductible Gift Recipients

1.20 Labor Senators support this measure.

Labor's strong stance on unpaid SG is delivering results, and in contrast the Government is trying to play catch-up

1.21 The Association of Superannuation Funds of Australia has noted the stronger action the ATO has taken since the tabling of the *Superbad – Wage theft and non-compliance of the Superannuation Guarantee (Superbad)* report:

Senator KETTER: And do you have a view that the ATO should make SG a higher priority in its actions?

Mr McCrea: Absolutely. We think it's an important issue because of that reason with the SG gap, and that's why we're very supportive of the bill today.

Senator KETTER: And, at the time of the Senate inquiry you were fairly dissatisfied with the fact that ATO was being reactive rather than proactive.

Mr McCrea: We're certainly pleased that they're being more proactive. Certainly in our dealings with the ATO there's a greater sense of urgency, and we're very pleased with that.¹⁶

1.22 Testimony given by the ATO confirmed that Labor Senator's *Superbad* report (Superbad – Wage theft and non-compliance of the Superannuation Guarantee) has had a positive impact in getting the Government, Treasury and the ATO to take action, acknowledging that much more needs to be done:

Mr O'Halloran: We have achieved 40 per cent of all of our case work for super guarantee—ATO-initiated cases, which is a term I think you may be familiar with. We've also improved our data modelling. You might recall, Senator, that last time we discussed a whole range of information around different data models. We have introduced what's called a 'nearest neighbour' model. I won't bore you with the details. I think the main point is that that has provided improved information—some from some funds, some from continued work across our other sources of data. We're now achieving, off a sample—it's a bit more than a sample—of the 300 cases, a 93 per cent strike rate. In other words, there's been an assessment raised in 93 per cent of the cases.

You might be aware that we also had a range of other models, including cases that had come from employee notifications where that contributes. We've increased the strike rate on that by 10 per cent. We've also

15 *Committee Hansard*, 1 June 2018, p. 49.

16 *Committee Hansard*, 1 June 2018, p. 4.

introduced other models. Our overall strike rate has improved by 15 per cent across all our models, and, at the same time, the selection has been taking up 40 per cent of our total case loads. Finally—I'll be brief—

Senator KETTER: That's okay.

Mr O'Halloran: There are associated increases, obviously, in the amount of revenue, the number of employers that have been spoken to and the amount of appropriately issued director penalty notices. Also, from a debt collection point of view, which is perhaps what this is as much about—how much money is going to an employee at the end of the day—for the year to date, we've been able to collect \$352 million up until April. For the same time last year it was \$263 million. So there's been significant increases in relation to our proactive work and also our intervention. Obviously the government has flagged that it will give the ATO funding coming out of MYEFO [Mid-Year Economic and Fiscal Outlook] for the super guarantee taskforce, and that again will draw heavily from our more targeted, nearest-neighbour model, as it's called, and that body of work has about 350 cases ready to go from 1 July, and, obviously, associated data improvements. So what I'm painting—I hope I'm answering your question—is: Single Touch Payroll probably gives us a macro view of much more than we've ever seen out of an annual cycle. We will use that to inform and shape. I'm aware that there's a view that there's a lot of rich information held by superannuation funds around debt collection and those sorts of things. I would just say that we've been in very detailed discussions with a number of funds and associated service providers within that industry. We are drawing from some of that progressively. It's perhaps not as rich as I thought it might be, but, through increased drawing from some of that referral material or information, subject to a bit of data settling, it certainly is adding. Certainly it has some spots where there are heavy caveats around the quality of the data and the format. But we are in active discussions across industry and with others to tap into that much more than we have. Also we have obviously increased our exchange of data with other agencies, particularly the Fair Work Ombudsman and so forth. I'll leave it at that.

Senator KETTER: Mr O'Halloran, I'm going to be so bold as to suggest that perhaps it was the report of this committee that shone a light on this issue and provided an incentive for the ATO to act in this regard. Would you agree with that?

Mr O'Halloran: Certainly the committee raised fair and reasonable questions—similar to, if I may say, the report to government that the SG working group did. As a bureaucrat, there wasn't a lot of material difference to some of the things, but certainly the focus on SG has, I think, reminded us all—and I'm happy to accept that good reminder on behalf of the ATO—that employees are disadvantaged in their retirement through this, and therefore we must improve. We, quite appropriately, have sharpened our efforts, and also we've got more community support about some of this, from employees and a range of other areas and other agencies.¹⁷

1.23 Labor Senators note the new abilities provided by STP and will monitor its usage by the ATO in closing the SG gap.

1.24 In contrast to Labor's thirty-two recommendations in the *Superbad* report, the Government has only taken limited steps to addressing superannuation guarantee compliance. As stated by the ACTU:

This bill, like each of the government's attempts to address the urgent problem of unpaid super, is inadequate, unenthusiastic and weak.¹⁸

1.25 Without going through all thirty-two recommendations, this bill as well other bills introduced by this Government have failed to consider issues such as the \$450 threshold, aligning superannuation payments to regular pay cycles, reviewing the definition of ordinary time earnings, extending liabilities of unpaid SG to corporate entities and ATO resourcing levels.

1.26 One issue in particular that was raised through this inquiry was the lack of empowerment for superannuation trustees and employee representatives, such as unions, being enabled to pursue unpaid SG amounts on behalf of an employee. Both the ISA and the ACTU continue to support Recommendation 14 in the *Superbad* report, which would have the Government consider a legislated option for employees, or third parties acting on their behalf, such as unions or superannuation funds, to take private legal action in the relevant courts against their employers for unpaid SG:

Mr Linden: Just to add to that, one of the key issues here is whether or not there is legal standing for them to take action in any case, and currently that's not the case. The SCG regime, ultimately, means that the only party that has legal standing when it comes to unpaid superannuation is the ATO, unless of course there is specific superannuation guarantee obligations written into an employment contract. But under the SGC regime, it is the ATO, even for individuals.¹⁹

Mr Mitchell: ... to empower workers and their representatives, such as a superannuation fund or union, to take action against employers for the non-payment of the superannuation guarantee or superannuation contributions.²⁰

1.27 In summary, the evidence noted here makes it abundantly clear that Labor has dragged the Government into acting on irrefutable evidence of a large SG gap, and that even when brought to this point, the Government has failed to provide a robust, comprehensive approach to uncovering and then acting on such underpayment. The Government claims that any level of SG underpayment is unacceptable, but has failed to provide a serious response to closing this large, widening SG gap.

18 Mr Joseph Mitchell, Workers' Capital Organising Officer, Australian Council of Trade Unions, *Committee Hansard*, 1 June 2018, p. 18.

19 Mr Matthew Linden, Director, Public Affairs, Industry Super Australia, *Committee Hansard*, 1 June 2018, p. 12.

20 Mr Joseph Mitchell, Workers' Capital Organising Officer, Australian Council of Trade Unions, *Committee Hansard*, 1 June 2018, p. 18.

Senator Chris Ketter
Deputy Chair

Senator Jenny McAllister
Senator for New South Wales

Australian Greens – Additional Comments

1.1 For most Australians, superannuation is compulsorily deferred wages. It is intrinsically tied to their employment. Without a job, there would be no superannuation.

1.2 It follows that unpaid superannuation is not working capital for businesses. It is employee's money that should be disbursed as regularly and consistently as employees turn up for work. It should be that simple.

1.3 So it makes little sense that the payment of superannuation is not legislatively aligned with the payment of wages; and that the non-payment of superannuation is not seen as being as heinous as the non-payment of wages.

1.4 In the digital age, with fully electronic payrolls and banking, there is no excuse for employees not to pay the superannuation guarantee each and every payday. While this bill makes some inroads towards addressing the imbalance between the treatment of superannuation and the treatment of wages, it doesn't finish the job.

1.5 The Australian Greens support a comprehensive range of measures designed to address the mismatch between superannuation and wages. The Senate Economics References Committee 2017 report, *Superbad – Wage theft and non-compliance of the Superannuation Guarantee* explored the problem extensively and identified the relevant issues. But even it fell short of making some simple and unequivocal recommendations that would help ensure employees get paid their superannuation.

Recommendation 1

1.6 That legislative changes be made to remove the \$450 threshold; and require superannuation be paid to all employees regardless of their age, hours of work or wage rate.

Recommendation 2

1.7 That legislative changes be made to require superannuation to be paid in alignment with regular pay cycles, or on a monthly basis, whichever is the lesser period.

**Senator Peter Whish-Wilson
Senator for Tasmania**

Appendix 1

Submissions and additional documents

Submissions

1. Australian Restructuring Insolvency and Turnaround Association
2. Challenger Limited
3. National Retail Association
4. Unions NSW
5. Queensland Council of Unions
6. Dixon Advisory
7. Job Watch Inc
8. Chartered Accountants Australia and New Zealand
9. Australian Council of Trade Unions
10. Association of Superannuation Funds of Australia
11. Australian Institute of Superannuation Trustees
12. Cbus
13. Australian Securities and Investments Commission
14. The Tax Institute
15. Australian Chamber of Commerce and Industry
16. Housing Industry Association Ltd
17. Industry Super Australia
18. Australian Small Business and Family Enterprise Ombudsman

Answers to questions on notice

1. Answers to questions on notice, received from the Association of Superannuation Funds of Australia (ASFA) on 6 June 2018, following a public hearing in Canberra on 1 June 2018.
2. Answers to questions on notice, received from the Australian Taxation Office on 7 June 2018, following a public hearing in Canberra on 1 June 2018.
3. Answers to questions on notice, received from the Australian Council of Trade Unions (ACTU) on 7 June 2018, following a public hearing in Canberra on 1 June 2018.
4. Answers to questions on notice, received from the Department of the Treasury on 8 June 2018, following a public hearing in Canberra on 1 June 2018.

Tabled documents

1. Opening statement tabled by Mr Matthew Linden from Industry Super Australia at a public hearing in Canberra on 1 June 2018.
2. Opening statement tabled by Ms Jane Macnamara from the Financial Services Council at a public hearing in Canberra on 1 June 2018.
3. Document tabled by Mr Peter Strong from the Council of Small Business Australia (COSBOA) at a public hearing in Canberra on 1 June 2018.

Appendix 2

Public hearings

Canberra, 1 June 2018

Members in attendance: Senators Hume, Ketter, Stoker.

ARNOLD, Ms Kim, Policy and Education Director, Australian Restructuring Insolvency and Turnaround Association

CROWE, Mr Murray, Principal Adviser, Revenue Group, Department of the Treasury

GALLAGHER, Mr Phil, PSM, Special Retirement Policy Adviser, Industry Super Australia

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

JEREMENKO, Mr Robert, Division Head, Retirement Income Policy Division, Department of the Treasury

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

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

McCREA, Mr Glen James, Deputy Chief Executive Officer 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, Manager, Retirement Income Policy Division, Department of the Treasury

RAWLINGS, Ms Debbie, Assistant Commissioner, Employer and Individual Client Engagement, Superannuation, Australian Taxation Office

STANNARD, Ms Julia, Senior Policy Advisor, Association of Superannuation Funds of Australia

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

WINTER, Mr John, Chief Executive Officer, Australian Restructuring Insolvency and Turnaround Association

