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Senior Adviser  
Contributions and Accumulation Unit  
Personal and Retirement Income Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Dear Senior Adviser,

**Simplifying and reducing the harshness of the Superannuation Guarantee Charge**

ISA welcomes the opportunity to comment on the Exposure Draft of the *Superannuation Guarantee Legislation Amendment (Simplification) Bill 2015*.

ISA opposes the proposed changes on the basis that they:

- Weaken important compliance measures which ensure integrity of the compulsory super system
- Reduce the penalty for employers who don't comply
- Will exacerbate the already high level of under and non payment of compulsory super
- Risk a deterioration in Australians' trust of, and engagement in, our retirement income framework.

Instead of weakening laws designed to protect consumers from employers out to gain a competitive advantage, the Government should address the growing rates of non-compliance that will reduce the retirement incomes of everyday Australians.

**Background**

The primary objective of the superannuation system is to improve the potential retirement income of all Australians. The SG is the cornerstone of our superannuation system and seeks to provide a genuine retirement savings vehicle for all Australians, increase the level of superannuation savings per individual and provide an efficient means for employers to comply with their superannuation obligations.<sup>1</sup>

The Superannuation Guarantee Charge (SGC) was introduced as part of the original Super Guarantee (SG) legislation. The purpose of the charge was to create 'an incentive for employers to meet their own obligations and to be a support mechanism for employees, where those obligations are not met'.<sup>2</sup>

In its current form, the SGC consists of the amount of SG not contributed, an interest component and an administrative fee of \$20 per employee per quarter. Employers who do not meet their statutory obligations are required to lodge an SGC Statement with the ATO, calculate the amount of SGC payable and pay the charge by the due date for the relevant quarter.

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<sup>1</sup> Second Reading Speech, Superannuation Guarantee (Administration) Bill 1992, Treasurer the Hon John Dawkins

<sup>2</sup> Second Reading Speech, Superannuation Guarantee (Administration) Bill 1992, Treasurer the Hon John Dawkins

The proposed changes to the SGC are stated to be part of the Government's commitment to simplify processes and cut excessive red tape,<sup>3</sup> reducing the harshness of the SGC and the impact of punitive costs on small employers.<sup>4</sup> The justification that the proposals are necessary to support small businesses is quite misconceived. The Bill does not discern or discriminate, positively or otherwise, as between small and large employers, rather it applies to all businesses, regardless of size.

Today almost all Australian workers can look forward to a better standard of living in retirement than can be provided by the Age Pension alone. Compulsory superannuation savings are largely additional savings that would not have been accrued in the absence of the SG. The Government must, therefore, act to ensure that the SG is met through appropriately enforced regulation.

These changes should not be described or promoted as purely administrative or red-tape cutting measures. In reducing the penalties against employers who fail to pay their employees' superannuation, they ignore the growing and well-documented problem of non-compliance.

### **SG Non-Compliance**

The scale and significance of existing non-compliance by employers with their SG obligations is well documented and provides an evidentiary basis against weakening regulation designed to promote compliance. Non-compliance primarily affects lower paid employees and those who are most likely to rely on the age pension in later years.<sup>5</sup> Construction is the industry with the highest non-compliance rates, with mining, property, manufacturing and hospitality also impacted by elevated levels of non-compliance.<sup>6</sup>

Research undertaken by Tria Partners in 2012 found that non-compliance with the SG in 2012 alone affected around 650,000 Australians<sup>7</sup> costing them \$2.5 billion dollars in forgone retirement income. In arriving at this estimation, Tria identified key areas of non-compliance as being:

- \$1.3 billion in employer non-compliance (SG contributions are not made, or only in part)
- \$0.7 billion cash economy (SG is part of avoidance of PAYG and other employer obligations)
- \$0.2 billion in sham contracting, and
- \$0.2 billion of employer insolvencies (the non-payment of SG being correlated to the pre-insolvency and practically avoided post-insolvency).

Such non-compliance can and does have a dramatic effect on a worker's retirement income. Tria Partners estimated that an average 25-year-old impacted by non-compliance for five years loses 14% of their retirement savings.

The recent report from the National Audit Office (NAO), *Promoting Compliance with Superannuation Guarantee Obligations*, released in June 2015 provides further evidence of the need to maintain and strengthen the regulatory framework for SG compliance. The NAO found that the ATO's own internal risk assessment indicated that as many as 11 to 20 per cent of employers could be non-compliant with their SG obligations, and that non-compliance was especially endemic in small businesses and industries reliant on

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<sup>3</sup> <http://bfb.ministers.treasury.gov.au/media-release/005-2015/>

<sup>4</sup> <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2015/Simplifying-the-superannuation-guarantee-charge> – See Exposure Draft, 1.3

<sup>5</sup> The Australian National Audit Office, *Promoting Compliance with Superannuation Guarantee Obligations*, 2015, Key Findings

<sup>6</sup> Key findings, TRIA Report, final report for Cbus, AustralianSuper and Rest, 15 September 2014

<sup>7</sup> Key findings, TRIA Report, final report for Cbus, AustralianSuper and Rest, 15 September 2014

cash transactions and contracts.<sup>8</sup> The need for greater awareness around the SG is highlighted by the fact most employers are unaware of the ATO's role in relation to the operation of the SG scheme and are not concerned about being penalised in the event of non-compliance.<sup>9</sup>

ISA agrees with the recommendations arising from both of these reports that suggest that the ATO needs to be better equipped to improve compliance, including at the industry sector levels and among the categories of employees most at risk. The Explanatory Materials to the Exposure Draft, describes compulsory super as 'an important part of Australia's superannuation system'<sup>10</sup>. The focus should be on strengthening SG compliance rates instead of weakening them with the proposed measures.

### **Specific comments on proposed changes**

#### **Change to the calculation of SGC**

The draft legislation seeks to amend the current law to provide that an employer's liability to incur the SGC is calculated based on Ordinary Time Earnings (OTE).

Under the current system, an employer's liability to pay SGC is calculated based on the employee's wages or salary, which may include payments and remuneration over and above OTE. This may result in an SG shortfall amount that is higher than the original contribution to be made. ISA supports this system, on the basis that it acts as a deterrent to non-compliance and is an inherent penalty for employers who fail to meet their SG obligations. While aligning the calculations may reduce the complexity and cost for non-compliant employers, it increases the potential for non-compliance by removing the punitive element from the shortfall charge.

Under the proposed change non-compliant employers are subject to the same SG as compliant ones. While aligning the calculations may reduce the complexity and cost for non-compliant employers, it increases the potential for non-compliance by removing the punitive element from the shortfall charge. This increases the disincentive for employers to comply.

#### **Aligning the nominal interest on the SGC**

The draft legislation also seeks to align the nominal interest rate on unpaid or late SG contributions with the period such payments are outstanding.

Under the current regime, nominal interest is imposed on the total of the employer's individual SG shortfalls from the beginning of the relevant quarter until the employer lodges an SG statement or the Commissioner makes a default assessment. The nominal interest is redistributed to employees who have foregone compounding interest as a result of the employer's non-compliance.

The draft bill provides for nominal interest to instead be imposed "from the 29th day after the end of the relevant quarter until the day that late contributions are paid in full for the employee, or the day before the day on which SGC is payable." The effect of this change is a significant reduction to the amount of nominal interest paid, which in turn reduces the incentive for employers to comply with their obligation to pay SG.

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<sup>8</sup> The Australian National Audit Office, Promoting Compliance with Superannuation Guarantee Obligations, 2015 p 17

<sup>9</sup> The Australian National Audit Office, Promoting Compliance with Superannuation Guarantee Obligations, 2015 p24

<sup>10</sup> Explanatory Materials to Exposure Draft

ISA does not support the view that such a penalty is inequitable or harsh. Rather, it supports a system that places the collective objective of the SGC regime before the failure of employers to fulfil their legal obligations.

### **SGC penalty**

Under the proposed legislation if an employer refuses or fails to give the Commissioner an SG statement or information when required they are liable to an administrative penalty under the TAA.

The current legislation provides that if an employer fails to provide an SG statement or information relevant to assessing their SGC liability, they are liable for the additional SGC penalty equal to up to 200 per cent of the SGC payable by the employer for the quarter.

The Part 7 penalty regime is an important part of the SG system, 'demonstrated by Parliament imposing a penalty of double the SGC payable<sup>11</sup>' by the employer. In addition, the Commissioner has a discretion to remit any part of this penalty to ensure that employers are treated appropriately having regard to their circumstances. In our view, this power is appropriate and can be exercised based on an employer's submission of facts and any extenuating circumstances which we further contend provides otherwise law abiding employers with the an appropriate mechanism to have an penalty imposed reconsidered by the Commissioner.

The proposed charge for failure to provide a statement is an Administrative penalty under 284-75(3) of the TAA. The Administrative penalty is 75% SGC, which is significantly less than the current system. The proposed change will dilute the penalty for non-compliant employers and risks an increase in rates of non-compliance. For this reason, ISA strongly opposes this proposal.

### **Recommendations**

As documented in reports undertaken by The National Audit Office, Tria Investment Partners, and the Inspector-General of Taxation, there are significant weaknesses in the current framework for SG compliance. These weaknesses include limited resources of the ATO, indifference by non-complying employers and a need for strengthening enforcement powers.

Instead of focussing on reducing the impact of the SGC, the Government should consider policy reforms to address the growing problem of non-compliance.

ISA welcomes the recent work undertaken by the ATO to address these weaknesses and in addition to these measures, makes the following recommendations to strengthen, not dilute and weaken compliance:

- Strengthen the ATO's resourcing and role in addressing the already unacceptably high levels of systemic non-compliance by increasing more timely early detection, educating employers on their legal obligations and the penalty regime for not meeting these obligations at law and improving timely and effective enforcement.
- Investigate the alignment of super payments with wage payments to ease the administrative burden on employers, and to take advantage of current payment systems technology.

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<sup>11</sup> Review into the Australian Taxation Office's administration of the Superannuation Guarantee Charge, A report to the Assistant Treasurer Inspector-General of Taxation March, 2010 p 75

- Consider stronger, not weaker, SGC penalties and greater publicity around the SGC regime to act as deterrence for non-compliance.
- Investigate the capacity of other bodies to provide education and regulatory enforcement around SG non-compliance.
- To provide better protection for employees who report SG non-compliance.

Please contact Ailsa Goodwin on (03) 9923 7172 to arrange a meeting or if you have any questions about this submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Robbie Campo'.

Robbie Campo  
Deputy Chief Executive