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Superannuation Guarantee Integrity Package

Cbus broadly welcomes the measures included in the draft legislation and the opportunity to provide some comments on their efficacy.

The Broader Problem of Unpaid Super

Unpaid superannuation is a serious issue which significantly undermines the integrity of the super system and erodes the level of adequacy of retirement income for many Australians. Cbus, along with other organisations, including the Inspector-General of Taxation and the Australian National Audit Office, have been highlighting the issue for many years.

A series of Cbus research papers have documented the disturbingly high level of non-compliance with superannuation guarantee obligations over recent years.¹ The joint report published by Cbus Industry Super Australia in December 2016 estimated that the annual cost of non-compliance is between \$3.6 billion and \$5.6 billion.² This equates to \$1,489 or almost four months of super for the average worker affected.

In response to this report the ATO estimated the gap in superannuation compliance to be \$2.85 billion.³ Regardless of which amount is correct this is a staggering amount of unpaid superannuation that creates;

1. A delayed and detrimental impact on individuals' retirement savings, robbing them of the benefits of investment earnings and compound interest;
2. The creation of an unfair and unlawful competitive advantage against employers who are obeying the law and doing the right thing by their employees;

¹ <https://www.cbussuper.com.au/about-us/news/media-release/new-research-shows-44-billion-could-be-lost-to-retirement-savings-in-next-10-years-through-non-compliance-with-superannuation-laws>

² *Overdue: Time for Action on Unpaid Super* – Industry Super Australia & Cbus 2016 - <https://www.cbussuper.com.au/about-us/news/media-release/one-third-australians-short-changed-on-super>

³ ATO, August <https://www.ato.gov.au/Media-centre/Media-releases/ATO-releases-Super-Guarantee-gap-estimate/> The figure of \$2.85 billion was an extremely conservative figure discounted for the amount the ATO claimed to have recovered and failing to take into account the cash economy impact and the discounting of SG payments through supplementation of salary sacrifice amounts.

3. An immediate and negative effect on the collection of government revenue through lost taxation; eg 15% of \$3.6 billion is \$540 million.
4. Greater reliance on the age pension and other government services which results in higher future expenditure by governments; and
5. An undermining of the broader social and economic benefits of a compulsory retirement savings system.

Unpaid super = Unpaid wages

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.

However, super payments under the SG Act are only required on a quarterly basis which creates a significant risk of non-compliance. The quarterly cycle means that detection of non-payment can be significantly delayed which can reduce the likelihood of recovery.

Cbus continue to advocate that SG contributions should be paid congruently with the payment of wages. This would provide an important compliance framework for SG and ensure non-payment becomes visible in a far timelier manner. This measure could help to expose both non-payment and underpayment of superannuation to employees.

It is 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 'arrear' 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.

We welcome the heightened awareness around the issue of unpaid super and Cbus is broadly supportive of the measures in the draft Bill; however, they are essentially small steps towards fixing a large problem.

It will also be important that adequate resources are provided to the ATO to effectively deploy the new powers and tools to reduce the incidents of non-compliance and recover superannuation.

Whilst welcoming the measures in the draft legislation, we believe the response to the problem of non-compliance with the Superannuation Guarantee would be more effective if the comprehensive recommendations made by the Senate Economics Committee in *Superbad – Wage theft and non-compliance of the Superannuation Guarantee*⁴ were also advanced.

⁴ http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/SuperannuationGuarantee/Report/b01

Cbus endorses all 32 recommendations from the report and specifically notes the following:

Recommendation 5

The committee recommends that the government strongly consider introducing amendments to the SGA Act to require SG to be paid at least monthly, and preferably in alignment with regular pay cycles.

Recommendation 13

The committee recommends that the government review ATO resource levels to ensure that the agency is well-equipped to undertake effective and comprehensive compliance activities to combat SG non-payment.

Recommendation 14

The committee recommends that 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.

Recommendation 15

The committee recommends that superannuation funds seeking default status in industry awards be required to have a rigorous arrears collection process in place.

We further submit that the measures contained in the draft legislation be subject to review to determine their effectiveness at least every two years or as part of the ATO's reporting on the extent of SG non-compliance and recovery efforts.

Our brief comments in relation to the measures in the draft Bill appear below.

Chapter 1 – Directions and penalties

The draft Bill would allow the ATO to issue directions to pay unpaid super and/or undertake SG education courses. Cbus welcomes these measures and notes that a lack of knowledge is sometimes a factor in cases of SG non-compliance.

In addition, 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 SG non-compliance.

Obviously, the effectiveness of these measures will also depend on how the ATO uses the new powers and tools for its compliance and enforcement activities and the level of resources made available to it to successfully deploy them.

Chapter 2 – Disclosure of information about non-compliance

The proposal to allow the ATO to disclose SG non-compliance to affected employees appears reasonable and appropriate. 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.⁵

While we agree that individuals have the right to know and should be informed of non-compliance related to them, even in cases where it may not have been them personally that raised a concern, it should not be left to the individual to then pursue the recovery of their superannuation. The ATO, in disclosing such information to individuals should also make clear:

- a) the steps that the ATO is taking to recover the monies; or
- b) to contact their fund for advice and assistance; or
- c) contact their union to assist in the recovery of their monies.

Chapter 3 – Single Touch Payroll

Extending Single Touch Payroll to all employers from 1 July 2019 is welcome and has been supported by Cbus in previous submissions. It is Cbus' experience that the bulk of non-compliance with SG occurs in smaller businesses. Extending STP to these smaller employers will provide valuable information to help improve compliance across this segment.

Such a measure must be supported by appropriate information and education campaigns and will require further compliance activity. Again, the ATO must be appropriately resourced to ensure the effectiveness of such a measure.

Chapter 4 – Fund reporting

The move to facilitate more regular reporting by superannuation funds is supported and would be greeted as a business process that is moving towards meeting members' best interest by Cbus, despite the potential extra administrative requirement.

However, caution would still be required in matching fund data against STP data because of the continued disparity in payment (wages and superannuation) timings. It is presumed that such data would not be called for by the ATO until post the payment timings prescribed in the SG Act – ie. FY Quarter + 28 days.

Issues associated with possible delays in clearing house payments and other administrative errors may require two or three quarters of data matching to achieve a correct picture of payment regularity, avoidance or discrepancy.

As has been discussed elsewhere, delays in detection of non-compliance amplify the difficulty or blunt the success of recovery processes. A six or nine-month delay in determining whether an employer is fully compliant is simply too great a time period.

⁵ Helen Anderson and Tess Hardy, 'Who Should be the Super Police? Detection and Recovery of Unremitted Superannuation' (2014) 37 UNSW Law Journal 162 – page 168.

This is why the Cbus Trust Deed calls on participating employers of the Fund to pay employee superannuation contributions on a monthly basis.

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.

While some superannuation funds, like Cbus, stand ready to do their part in assisting with more frequent data provision under the proposed amendments, the alignment solution through STP would create far greater transparency and ease of detection in real or much tighter timeframes, improving compliance and recovery.

Chapter 5 – Compliance measures

Cbus has previously advocated for greater compliance measures and tools to improve the operation of the ATO's SG activities.⁶ 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.

We also welcome measures for employers to report salary sacrifice amounts for each individual employee to assist in facilitating the closing of loopholes that allow employers to discount SG obligations. Although we note that legislation amending the Act is yet to pass.

Please do not hesitate to contact James Bennett on (03) 9910 0218 if you have any queries in relation to our submission.

Yours sincerely,



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⁶ Cbus submission to the Senate Standing Committee on Economics Superannuation Guarantee non-payment – March 2017