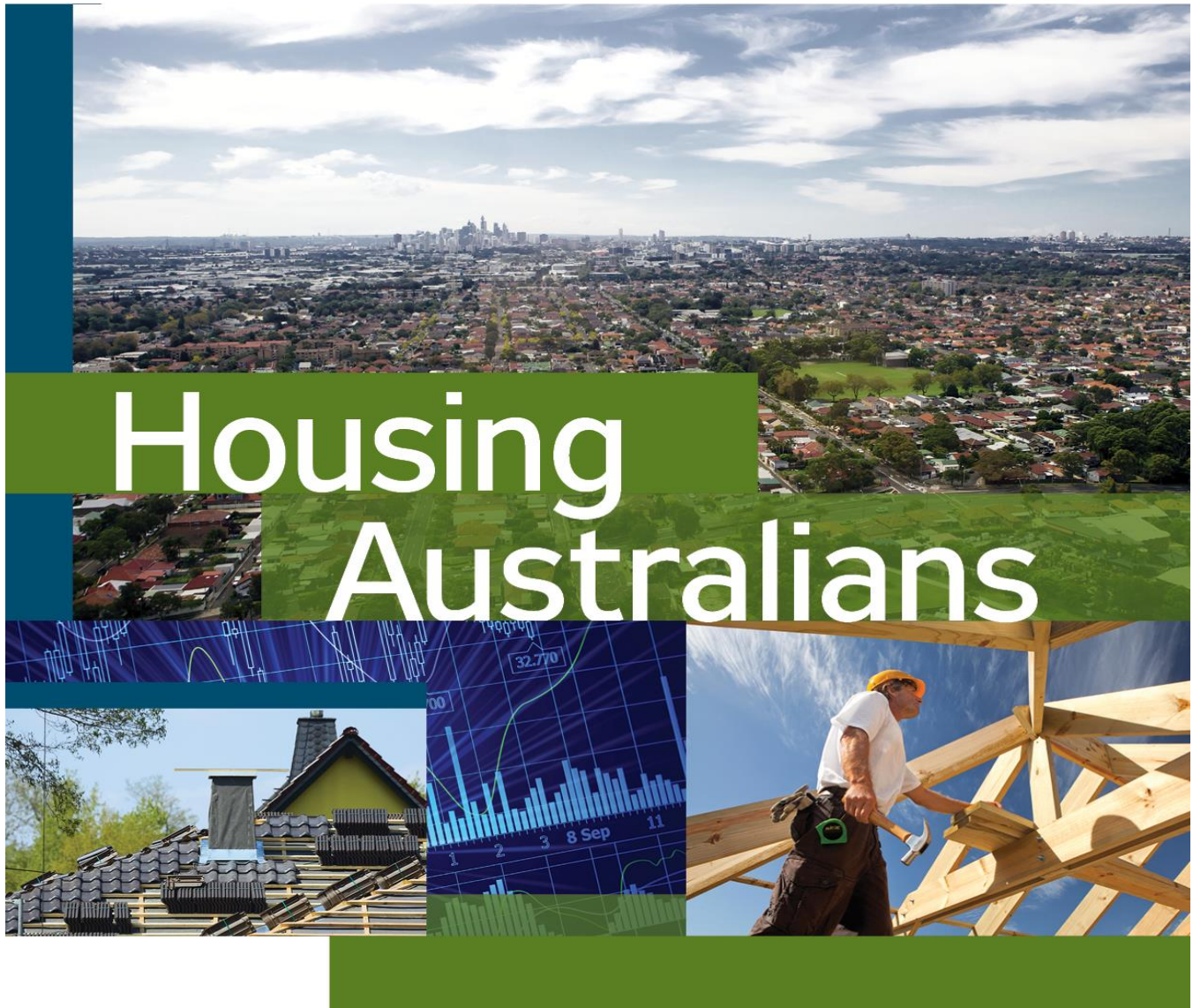




HOUSING INDUSTRY ASSOCIATION



Submission to the Senate Standing Committee on Economics

Treasury Laws Amendment (2018 Measures No. 4) Bill 2018

29 May 2018

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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 40,000 member businesses throughout Australia. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new housing stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

“promote policies and provide services which enhance our members’ business practices, products and profitability, consistent with the highest standards of professional and commercial conduct.”

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over \$150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional member committees before progressing to the Association's National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The Association operates offices in 23 centres around the nation providing a wide range of advocacy and business support services and products.

1. INTRODUCTION

HIA welcomes the opportunity to make a submission in response to the *Treasury Laws Amendment (2018 Measures No.4) Bill 2018* (the Bill) referred to the Senate Standing Committee on Economics on 10 May 2018.

Principally, the Bill proposes a range of changes that seek to enhance the ATO's compliance and enforcement powers to capture circumstances where individuals purposely take actions to avoid compliance with their legal obligations to make required payments for superannuation entitlements.

HIA is concerned that the proposed measures go well beyond that necessary to target those abusing the corporate form and intentionally avoiding their legal obligations and on this basis may not achieve the Governments stated objectives.¹

Specifically, the Superannuation Guarantee Cross-Agency Working Group, which released its final report in March 2017, noted that:

“...while the current penalties provide a strong deterrent, they can also have the effect of harshly penalising ‘honest employers’ who make an inadvertent mistake, thereby discouraging reporting and rectification of underpayment.... Therefore the Working Group recommends that the regime should be more flexible so that penalties can be tailored to reflect different levels of employer behaviour and culpability.”²

Similarly, the Australian National Audit Office (ANAO) reports that the superannuation guarantee scheme operates *“largely without intervention from the ATO, with employers making SG contributions to the superannuation fund of the employee’s choice.”³*

The Bill appears to take an opposite approach.

If passed the Bill would also see the extension of Single Touch Payroll to small employers with less than 20 employees. While HIA acknowledges that simplifying and streaming payroll and reporting systems can have some advantages for employers it is of note 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.

¹ [Consultation on protecting your superannuation entitlements](#)

² *Superannuation Guarantee Non-compliance: A report to the Minister for Revenue and Financial Services* (31 March 2017) at pg. 6

³ *Promoting Compliance with Superannuation Guarantee obligations* (June 2015) at paragraph 4



Other measures proposed by the Bill that would affect the residential building industry include:

- New powers to disclose information about non-compliance with superannuation obligations to current and former employees of a non-complaint employer (Schedule 2).
- Allowing the ATO to pre-fill an individual tax file number declaration and superannuation standard choice form in certain circumstances (Schedule 6).

These matters are elaborated on below.

2. GENERAL COMMENTS

2.1 SUPERANNUATION IN THE RESIDENTIAL BUILDING INDUSTRY

The residential building industry is principally comprised of small businesses and self-employed independent contractors. Some of these businesses may have obligations as employers to pay superannuation and in other cases these businesses may have entitlements to receive superannuation as a result of complex laws that 'deem' independent contractors to be treated as employees.

Introduced in 1992, the Superannuation Guarantee Scheme (SG Scheme) requires employers to contribute a minimum level of superannuation support for employees to fund their retirements.

HIA supports the broad policy intent of a compulsory superannuation scheme to provide an adequate level of retirement income, relieve pressure on the aged pension and increase national savings.

HIA does not support employers or businesses deliberately avoiding their superannuation obligations and failing to pay their superannuation entitlements.

The SG Scheme has placed additional regulatory obligations upon employers to ensure that the correct amount is paid to their 'employees' at the right time, to the chosen fund and in the right manner.

In HIA's experience, the majority of employers in the residential building industry do their best to meet these obligation whilst managing the additional red tape costs and monetary costs that the SG Scheme imposes on a business. This Bill does very little to relieve that red tape burden and fails to recognise that cash flow problems and trading difficulties are the foremost factors for unintentional non-compliance or non-payment of superannuation rather than intentional attempts to flout the law. As such, the imposition of draconian penalties, including imprisonment, is unlikely to address those circumstances.

The approach proposed in the Bill will unfairly penalise small businesses and will also act as a further disincentive to start and stay in a small business.

The liability to be borne by individual directors goes well beyond that notionally accepted as the responsibility of a 'company director'. This punitive approach will have a negative effect on many businesses in the residential building industry.



3. RESPONSE TO THE BILL

3.1 SCHEDULE 1 – DIRECTION AND PENALTIES IN RELATION TO THE SG CHARGE

Education Direction

While HIA supports measures that would see those in the residential building industry better understand their legal obligation, it is unclear how taking a mandatory course will facilitate a better outcome. There are a number of concerns with proposed new power.

Firstly, there is limited evidence that mandatory education enhances regulatory administrative outcomes.

For example, some states require that in order to maintain a residential builder's license, continuing professional development be undertaken. In recommending the removal of mandatory CPD in NSW the Independent Pricing and Regulatory Tribunal (IPART) in its report *Reforming licensing in NSW* noted that:

“Mandatory CPD is seen as a strategy to improve the standard of construction. However, it should be noted that:

- CPD is not a guarantee that learning takes place, or if it does, that it will be translated into changes that improve practice.*
- When CPD is mandatory, standardisation and uniformity is encouraged. However, the focus can become course attendance rather than responding to individuals' learning needs.”⁴*

Secondly, the ATO has already committed to re-focusing on their education activity. Of note, in the final report of the Superannuation Guarantee Cross Agency Working Group⁵ the ATO committed to the following action to enhance and review their education functions:

“AGENCY ACTION 6

To assist employers the ATO will actively promote and make more visible its education and assistance services, tools and calculators, including the recently updated Employee Contractor Decision Tool.

AGENCY ACTION 7

To provide more clarity and administrative ease for employers the ATO will review the useability of the superannuation guarantee charge form, instructions and lodgement processes.”⁶

⁴ Pg.121

⁵ *Superannuation Guarantee Non-compliance*: A report to the Minister for Revenue and Financial Services (31 March 2017)

⁶ *Superannuation Guarantee Non-compliance*: A report to the Minister for Revenue and Financial Services (31 March 2017) at pg. 49



These recommendations clearly recognise that the current administrative processes, the red tape, are a barrier in themselves to achieving the appropriate outcome. Therefore the focus in the Bill on actions solely directed to the business conduct could be seen as either pre-emptive or excessive at this time.

Thirdly, the Bill allows for the setting of fees associated with undertaking the courses required in order to comply with an education direction. It is unclear how the market will respond to the development of an approved course and the type of costs that will be involved in delivering or undertaking this type of training. More detail of how mandatory training is to be implemented should be disclosed to provide industry with a clear understanding of the potential training expectation.

Finally, it is unclear if this education direction is in lieu of, or as well as, issuing a direction to pay or the imposition of other penalties. To deploy multiple compliance methods simultaneously would seem unduly harsh. A hierarchical approach should be taken in respect of any new enforcement powers such that an education direction is a first step unaccompanied by any other enforcement measures or penalties.

Direction to pay

Under the Bill the ATO would be given power to issue a direction to pay. Failure to comply with a direction to pay could result in significant penalties and/or 12 months imprisonment.

The ATO already possess sufficient powers to address non-payment of superannuation, as such HIA is opposed to the introduction of any further compliance and enforcement powers of this nature.

If an employer does not meet their obligations – that is if they do not pay on time, if they underpay, or pay into the wrong fund – they must declare and pay a Superannuation Guarantee Charge (SG charge) to the ATO. The SG charge comprises 9.5 per cent of the amount outstanding, an administrative fee and 'nominal interest' (about 10 per cent), which accrue from the beginning of the quarter the shortfall is associated with, until either the last date for timely payment or when the shortfall is actually paid. The SG charge can be a significant amount in its own right and should be seen as such.

Additionally, an employer who fails to lodge the superannuation guarantee statement on time is liable to pay an additional SG charge which can be up to 200 percent of the amount of the underlying SG charge.

These measures already amount to a significant incentive to comply with the superannuation requirements and represent a severe penalty for non-complying.



Further, the circumstances in which the discretion to issue a direction to pay are unclear. The Explanatory Memorandum states:

“It is intended that the Commissioner only issue direction in relation to serious contraventions to the obligations to pay superannuation guarantee related liabilities by employers whose actions are consistent with an ongoing and intentional disregard of those obligations.”⁷

Yet this approach is not reflected in the Bill.

HIA is also concerned with proposed section 265-105(3) that empowers the ATO to convict for an offence in relation to a direction to pay even if the liability is discharged/ceases to exist. This seems a particularly draconian approach, particularly when the stated aim of these new measures is to encourage compliance with, and payment of, superannuation contributions. Once the underlying cause of the offence is rectified no further penalty should be justified.

3.2 SCHEDULE 2 - DISCLOSURE OF INFORMATION

Schedule 2 of the Bill empowers the ATO to disclose information to an employee about a failure, or suspected failure, by an employer to comply with their Superannuation Guarantee obligations.

Whilst HIA does not oppose measures to assist an employee receiving superannuation when they are entitled to it, a cautious approach needs to be adopted in exercising this proposed new discretionary power by the ATO.

This approach may mislead those who are legitimate independent contractors to unnecessarily question their status to the point of believing a superannuation guarantee obligation arises, or has arisen, when in fact it has not. This would be an unfortunate outcome if it was to arise.

It is also unclear whether the employer will be advised of the proposed information disclosures, before or after, they occur. HIA's preference would be for the employer to be advised of any intention by the ATO to disclose this type of information to a current or former employee prior to this notification being made.

3.3 SCHEDULE 3 - SINGLE TOUCH PAYROLL

Under the Bill, Single Touch Payroll reporting would be required for small employers from 1 July 2019.

On previous occasions HIA has expressed concern with the introduction and mandating of Single Touch Payroll. These moves appear to be motivated by the government's desire to *“level the playing field for*

⁷ Pg.13, paragraph 1.39



*business by reducing non-lodgment and phoenix opportunities, as the ATO would be alert to non-payers sooner.*⁸

Yet this mandatory approach will have a negative effect on small businesses in the residential building industry. Of principal concern is the following observation:

“Although only limited direct benefits are expected for small employers overall, the change will bring major improvements to system integrity and transparency ...”⁹

While reducing the number of reports that have to be manually produced will conceivably reduce the time many small business owners will spend completing ATO paperwork, small businesses that currently do not use accounting or payroll software will face increased costs in terms of acquiring the necessary accounting software (at \$70-\$100 per month), making upgrades to existing IT systems and platforms to manage and accommodate the new software (data migration), potentially upgrade internet connections and cover the costs of training staff to use the new software. While such costs are noted in the regulatory impact assessment, they should not be underestimated when considered in the context of small businesses.

HIA is supportive of the proposed implementation approach. A 2-year transitional period including a 12 month grace period from ‘failure to lodge penalties’ is important. It is presumed that the ATO will undertake specific education campaigns targeted at small business during the transition period, along with also undertaking consultation with businesses and industry groups during this time to ensure any implementation issues are addressed.

HIA is also supportive of the adoption of an approach that does not mandate real time payments through single touch payroll. To force businesses, particularly small business in the residential construction industry to distort payment arrangements such that the ATO is paid in preference of other creditors such as suppliers, manufacturers and subcontractors, could have potentially damaging effects for small business many of whom already operate under a negative cash flow model.

3.4 SCHEDULE 5 – COMPLIANCE MEASURES

The Bill proposes to introduce measures aimed at improving superannuation guarantee and PAYG withholding compliance.

The first measure, seeks to give the ATO the power to use the estimate of a company’s unreported liability to estimate the director’s penalty to enable recovery of the employees’ superannuation guarantee entitlements and PAYG liability.

⁸ The Honourable Bruce Billson MP, Minister for Small Business “Address to the G20 Agenda for Growth: Opportunities for small and medium enterprises conference, Melbourne”, 20 June 2014 accessed at <http://bfb.ministers.treasury.gov.au/speech/015-2014/>

⁹ Explanatory Memorandum pg. 54 paragraph 3.87



The second seeks to prevent company directors extinguishing a Director Penalty Notice for unpaid superannuation contributions by placing the company into administration or liquidation within 3 months of the issuing of the Director Penalty Notice. This proposal would 'lock down' Director Penalties related to a SG charge as soon as they are incurred; not 3 months later.

The intentional avoidance of compliance with superannuation obligations is not supported, however HIA is concerned that the changes shift the focus to penalising individual company directors in preference to the recovery of the employees entitlements.

In 2012 the *Tax Laws Amendment (2012 Measures No. 2) Bill 2012* extended the director penalty regime to make directors personally liable for their company's unpaid superannuation guarantee amounts.

At that time the Explanatory Memorandum stated:

*"The policy objective of the director penalty regime is to ensure that directors cause their company to meet certain tax obligations or promptly put the company into liquidation or voluntary administration."*¹⁰

The current Director Penalty Regime can have a harsh application as the time allowed to arrive at an agreement with the Commissioner, appoint an administrator, or commence the winding up of the company is already very short.

The proposed changes provide no opportunity for company directors to investigate options for compliance without incurring an immediate penalty and may unduly impact those with every intention to comply.

The current proposals appear to take a punitive approach that is at odds with the policy objectives of the director penalty regime.

Further there are broader measures under consideration by the Phoenixing Taskforce that have the potential to improve collection of unpaid superannuation guarantee including:

- Director Identification Numbers;
- Improved director disqualification/qualification rules; and
- Grouping rules to apply to debts (to protect superannuation guarantee and wider employee entitlements) by enabling collection from other arms of a business where the labour hire arm is continually liquidated.

¹⁰ Paragraph 1.5



The consultation paper '*Combatting Illegal Phoenixing*' also proposes a number of measures targeted at avoiding non-compliance with legal obligations through illegal phoenixing.

It may be appropriate to await the implementation of other changes to address phoenixing before introducing these changes.

3.5 SCHEDULE 6 - EMPLOYEE COMMENCEMENT PROCEDURE

HIA does not oppose the measures outlined within Schedule 6 of the Bill.

