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Committee Secretary
Senate Education and Employment Committees
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Dear Committee Secretary

Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023

Industry Super Australia (ISA) is a collective body for funds that carry the Industry SuperFund symbol. ISA manages research, advocacy and collective projects on behalf of those funds and their five million members. Our aim is to maximise the retirement savings of all our members.

ISA welcomes the opportunity to make a submission to this inquiry into the Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023.

Summary of our position

- ▶ ISA strongly supports enshrining super in the National Employment Standards (NES) to provide a further avenue for recovery of unpaid super. However, this reform will not address the problem of unpaid super at its source. The most effective solution is to amend the law so that employers are required to pay the super guarantee (SG) at the same time they pay salary.
- ▶ The Bill should be amended to provide the court with some discretion to allow civil actions to proceed and make orders where, given the circumstances, it is appropriate to do so.
- ▶ The Explanatory Memorandum should be amended to make it clear that an order for compensation can include both unpaid SG and loss of returns on the unpaid SG.

Background

Currently, a quarter of the workforce are being short-changed on their super entitlements. ISA analysis of the latest tax office data shows 2.4 million Australians were underpaid \$4.3 billion in 2019-20, or an average \$1,740 per affected worker. Over seven years Australians have been underpaid \$33 billion in superannuation entitlements. Young workers, and those on low wages or working in construction, transport, trades, hospitality and accommodation, are most likely to be underpaid super.¹

¹ [Industry Super Australia, 'Super Scandalous: How to fix the \\$5 billion scourge of unpaid super', October 2021.](#)

As shown in our recent report, the impact of unpaid super is significant on women, who typically retire with a third less super than men. ISA analysis shows that in 2019-20, 1 million women were underpaid \$1.3 billion, with a total of \$10.8 billion lost over seven years.²

Paying super on payday

While enshrining the right to be paid superannuation in the NES will assist to reduce the significant problem of unpaid or underpaid super by employers by making it an enforceable entitlement for all workers, it will not address the problem of unpaid super at its source.

The most effective solution to address unpaid super is to amend the law so that employers are required to deposit SG contributions into employee accounts at the same time as they pay the employee's salary. Research shows that over the last twelve months, 40 per cent of Australian workers have neither logged into their super account online to check payments or looked at their annual statement.³

Paying super on payday is a simple and cost-effective reform that will make it easier for employees to track their super and reduce the instance of employers using super to manage cashflow while accumulating large unpaid super liabilities. Many employees will also be better off in retirement, as investment earnings on their contributions will begin to accrue sooner.

Paying super on payday:

- ▶ will assist those employers with poor business practices by streamlining, and therefore simplifying, the administration process for payment as both activities will occur at the same time,
- ▶ will reduce the temptation for employers to use the cash for other purposes, a practice that creates the real possibility of under- or non-payment of SG when the time comes for payment because the money is not available,
- ▶ will allow payments to be more closely tracked by both the employee and the ATO. ISA research suggests about half of workers believe that when super entitlements are recorded on their pay slip it means they have actually been paid. In addition to making it difficult to monitor SG compliance, quarterly payments also have the disadvantage of delaying the compounding impact of returns and interest on the growth of account balances,
- ▶ should assist the ATO with proactive monitoring and compliance activities, enabling it to act sooner when it identifies non-payment.

Further, ISA analysis shows that mandating the payment of super with wages is cost neutral to the Federal budget in the short-term and delivers a long-term saving, meaning the proposal could be quickly enacted without having to find other budget savings.

² <https://www.industrysuper.com/assets/FileDownloadCTA/How-payday-super-will-benefit-women-in-retirement.pdf>

³ UMR research, January 2023

ISA position: ISA strongly supports enshrining super in the National Employment Standards (NES) to provide a further avenue for recovery of unpaid super. However, this reform will not address the problem of unpaid super at its source. The most effective solution is to amend the law so that employers are required to pay the super guarantee (SG) at the same time they pay salary.

Court discretion

ISA welcomes the insertion of a new Division 10A to Part 2-2 of the Fair Work Act 2009 which includes superannuation contributions as a minimum entitlement within the NES.

The proposed section 116B provides employees with a means through which they, their representative or the Fair Work Ombudsman can commence actions for recovery of unpaid SG. The proposed amendment correctly works alongside the existing powers of the Commissioner of Taxation to take action where a payment may be due in accordance with the Superannuation Guarantee Charge Act 1992 following non or late payment of superannuation.

ISA is concerned that the proposed section 116D lacks flexibility and may result in employee harm. Whilst the principle of protecting an employer from multiple actions for the same unpaid super is desirable, the proposed prohibition is broad and should be amended to enable the court a level of discretion to enable civil actions to proceed and make orders in circumstances where the court is satisfied that on balance it would be appropriate to do so.

It is not uncommon for the Commissioner of Taxation to formally commence proceedings for non-payment of superannuation relating to one or more employees and for those proceedings to not be actively pursued for years. This can often be the case in insolvency matters. It would be grossly unfair if an employee or group of employees were unable to pursue a claim against an employer merely because another claim against the employer has not been formerly discontinued by the Commissioner of Taxation.

It is also unclear if an action by or on behalf of an individual employee is barred if the Commissioner of Taxation is pursuing a claim against the employee's employer which relates to the non-payment of superannuation contributions to one or more other individual employees. This should be clarified.

ISA position: The Bill should be amended to provide the court with some discretion to allow civil actions to proceed and make orders where, given the circumstances, it is appropriate to do so.

Compensation orders

The discussion within the Explanatory Memorandum regarding orders for compensation under Section 116E correctly notes that the court could make an order to compensate an employee for the loss they have suffered because of a contravention and that ordinarily this compensation would be paid to the employee's relevant superannuation account.

The loss suffered by an employee extends beyond the non-payment of SG amounts and includes the benefit of employer contributions and the returns on those benefits forgone as a direct result of the non-payment of superannuation. The relevant section within the Explanatory Memorandum discussing compensation should be clarified to recognise that it is within the court's power, if it deems it appropriate, to order compensation for loss which includes any loss on returns that would have otherwise been attributed to the

employee's superannuation. It could potentially also include any appropriate compensatory orders involving loss in circumstances where a beneficiaries insurance entitlement to claim has lapsed due to non-payment of superannuation.

ISA position: The Explanatory Memorandum should be amended to make it clear that an order for compensation can include both unpaid SG and loss of returns on the unpaid SG.

If you have any questions in relation to this submission, please contact Ella Cebon at
or Richard Watts at

Yours sincerely

Ella Cebon
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