

The Senate

Economics
Legislation Committee

Tax Laws Amendment (2010 Measures No 1)
Bill 2010 [Provisions]

March 2010

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Senate Economics Legislation Committee

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Chapter 1

Tax Laws Amendment (2010 Measures No. 1) Bill 2010 Schedule 1

About the inquiry

1.1 On 24 February 2010 the Senate referred Schedule 1 of Tax Laws Amendment (2010 Measures No. 1) Bill 2010 to the Senate Economics Legislation Committee for inquiry.¹ The bill also contains schedules related to forestry investment schemes, managed investment trusts, the entrepreneurs' tax offset, consolidation and other miscellaneous matters but they are outside the scope of this inquiry.

1.2 The Senate identified the following matters as requiring consideration and report by 15 March 2010:

- whether the legislation will have unintended consequences for the superannuation market;
- whether the legislation is anti-competitive in relation to privately operating Clearing Houses; and
- whether Medicare is an appropriate agency to operate the Clearing House under the legislation.²

1.3 The committee advertised the inquiry on the parliamentary website and identified a number of stakeholders who were invited to make written submissions by Friday 5 March 2010. The committee received nine submissions. A list of the entities that made submissions to the inquiry is set out in Appendix 1.

1.4 A public hearing was held on Wednesday 3 March 2010 in Sydney. A list of the witnesses who gave evidence at the public hearing is provided in Appendix 2.

1.5 All evidence provided to the inquiry is available on the committee's website at http://www.aph.gov.au/Senate/committee/economics_ctte/tlab_1_2010/index.htm.

1.6 The committee acknowledges the time and effort of all those who participated in the inquiry, particularly given the short reporting time frame. Their contributions have assisted the committee considerably and the committee wishes to express its appreciation and thanks.

1 Senate Selection of Bills Committee, Report No. 2 of 2010, 24 February, Appendix 5.

2 Senate Selection of Bills Committee, Report No. 2 of 2010, 24 February, Appendix 5.

Background

About the bill

1.7 Tax Laws Amendment (2010 Measures No. 1) Bill 2010 was introduced into the House of Representatives on 10 February 2010.³ The bill contains six schedules. Only Schedule 1 of the bill was referred to the Economics Legislation Committee for inquiry and report.

1.8 Schedule 1 will amend various superannuation laws to deliver the Government's 2007 election commitment to introduce an optional and free superannuation clearing house service for small businesses with less than 20 employees.⁴ The measure is designed to reduce the cost to small business of complying with their superannuation obligations by enabling these employers to extinguish their superannuation obligations with a single payment to the approved clearing house.⁵

1.9 In the 2008-09 federal budget, the Government committed \$16.1 million of funding over three years (from 2009-10) to ensure implementation of the measure; its success will be reviewed at the end of the initial three year period.⁶

1.10 If the legislation is passed the service will commence from 1 July 2010.

1.11 On 6 November 2009 Medicare Australia was named as the agency that would provide this service.⁷

3 The Hon Chris Bowen MP, Minister for Financial Services, Superannuation and Corporate Law and Minister for Human Services, Second Reading Speech, *House of Representatives Hansard*, 10 February 2010, p. 12.

4 The Hon Chris Bowen MP, Second Reading Speech, p. 12.

5 The Hon Chris Bowen MP, Minister for Financial Services, Superannuation and Corporate Law and Minister for Human Services, Superannuation Clearing House – Release of Draft Legislation, Media Release No. 040 26 November 2009.

6 Budget Measures 2008-09, Budget Paper No. 2 – Part 2: Expense Measures – Treasury, <http://www.budget.gov.au/2008-09/content/bp2/html/revenue-07.htm> (viewed 27 February 2010).

7 The Hon Chris Bowen MP, Minister for Financial Services, Superannuation and Corporate Law and Minister for Human Services and Dr Craig Emerson MP, Minister for Small Business, Independent Contractors and the Service Economy, Cutting Red Tape for Small Business – Superannuation Clearing House Service, Joint Media Release No 035, 6 November 2009.

Superannuation in Australia

An overview

1.12 As superannuation is one of the three pillars⁸ of Australia's retirement system it will continue to be an area of considerable focus given the future challenges of an ageing population.

1.13 Commencing from 1 July 1992 the Government introduced legislation requiring employers to provide minimum superannuation contributions for most employees.⁹ From 1 July 2005 legislation was introduced requiring employers to provide their employees with a choice as to what fund their employer contributions were paid; failure to offer the 'choice of fund' option or honour an employee's choice resulting in an increase in an employer's SGC liability. The introduction of superannuation choice increased complexity and administration for employers and lead to an increase in the use of clearing houses.

1.14 Compulsory superannuation employer contributions (currently set at 9 per cent of ordinary time earnings) are in addition to salary and wages and are required to be paid to each of employees' chosen fund by the prescribed quarterly cut-off dates, the 28th day after the end of a quarter.¹⁰ Where an employer does not make payment to the fund(s) by this date a superannuation guarantee charge (SGC) will arise. The SGC is comprised of an amount equal to the unpaid contribution plus the added components of nominal interest and an administration charge.

1.15 In these circumstances the employer is required to lodge an SGC statement and pay the amount for which they are liable to the Australian Taxation Office by the 28th day of the second month after the end of the quarter.¹¹ (An SGC assessment is deemed to be made on receipt of the SGC statement by the Tax Office.)¹² The employer is then required to pay the SGC liability to the Tax Office who will forward the amounts to the employees' funds of choice.¹³ In instances where the SGC remains unpaid (to the Tax Office) general interest charge will accrue until the employer has paid the outstanding amount.

8 The other two pillars are the government funded aged pension and personal savings.

9 Section 2, *Superannuation Guarantee (Administration) Act 1992* (SGAA).

10 Tax Laws Amendment (2010 Measures No. 1) Bill 2010, Explanatory Memorandum, p. 13.

11 The dates of 28th day of the second month after the end of the quarter are the 28 November, 28 February, 28 May and 28 August – section 46 of the SGAA 1992.

12 Section 35 of the SGAA 1992. The date that the deemed assessment is taken to have been made will differ depending on when the statement is received by the Commissioner. This impacts the calculation of nominal interest and GIC if the payment remains outstanding after it is deemed to have been made.

13 The administration charge is retained by the Tax Office. All other components of the SGC, as well as any interest that accrues, are remitted to the employee's fund after it has been paid.

Recent developments

1.16 Since its introduction in 1992 Australia's superannuation regime has undergone much legislative amendment, major developments including the introduction of the superannuation co-contribution,¹⁴ choice of fund legislation,¹⁵ abolition of superannuation surcharge and amendments to the tax treatment of benefits on exiting the fund. These changes have also increased the administrative tasks for employers when discharging their superannuation obligations.

1.17 Given the administrative requirements involved with superannuation some employers engage superannuation clearing houses and/or payroll providers to assist them in discharging their obligations. In these circumstances the employer provides the relevant and required information and payment to the clearing house/payroll provider who, for a fee, remits the information and payment to each of the employees' funds. In these circumstances the employer's superannuation obligation remains unmet until the fund has received the required information and payment.

The Government initiative

1.18 In recognition of the increasing administrative burden on small business that legislative development in this area is having, the Government will, through this initiative, introduce a free clearing house service.

1.19 Small businesses that choose to engage the clearing house service will have their legal obligation to make superannuation contributions discharged when payment of the correct amount is made to the clearing house.¹⁶ The clearing house will also manage the employer's choice of fund obligations.¹⁷

Structure of the report

1.20 The report is comprised of three chapters:

14 The co-contribution is designed to encourage low income earners to save for their retirement through the introduction of a scheme which provides for the government to match voluntary additional payments up to a maximum amount of \$1500. There are strict eligibility requirements that must be met to access the co-contribution.

15 Choice of fund legislation was introduced from 1 July 2005 to ensure employees are given the right to choose the fund into which their compulsory employer contributions are paid. Failure by an employer to offer choice of fund results in an additional superannuation guarantee liability – the SGC will be increased by a prescribed amount.

16 The Hon Chris Bowen MP, Minister for Financial Services, Superannuation and Corporate Law and Minister for Human Services and Dr Craig Emerson MP, Minister for Small Business, Independent Contractors and the Service Economy, Cutting Red Tape for Small Business – Superannuation Clearing House Service, Joint Media Release No 035, 6 November 2009.

17 The Hon Chris Bowen MP, Minister for Financial Services, Superannuation and Corporate Law and Minister for Human Services and Dr Craig Emerson MP, Minister for Small Business, Independent Contractors and the Service Economy, Cutting Red Tape for Small Business – Superannuation Clearing House Service, Joint Media Release No 035, 6 November 2009.

- Chapter 2 details the changes that will be introduced through Schedule 1 of the bill explaining how they will operate; and
- Chapter 3 identifies and discusses concerns that have been raised with the proposed amendments before providing the committee's views and recommendations in respect of the areas identified by the Senate as requiring investigation.

Chapter 2

Schedule 1 – the proposed measure

Introduction

2.1 The bill will amend various parts of the superannuation legislation to introduce a free clearing house service for small businesses.¹ This service will reduce the red tape associated with meeting superannuation obligations by removing the need for small businesses to deal with numerous superannuation funds where employees have exercised choice.² The Government has also attempted to limit the impact of the measure on existing clearing houses by limiting its availability to small businesses with less than 20 employees.³

2.2 The Government consulted widely during both the policy design and draft legislation stages of this measure's development: a consultation paper discussing the initiative and seeking the views of both the industry and public was released on 14 November 2008; the draft legislation was later exposed for public comment on 26 November 2009.⁴

2.3 Although the submissions received during both periods of consultation have not been publicly released a summary of the issues raised and how those issues have been addressed is available from the Treasury website - <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1675>.

The provisions

Superannuation contributions

2.4 Under the existing provisions of the *Superannuation Guarantee (Administration) Act 1992* (SGAA) an employer can discharge their superannuation guarantee obligations for a quarter by paying the contributions it owes in respect of each employee to a complying superannuation fund or retirement savings account (RSA) by the 28th day after the end of a quarter.⁵

1 The Hon Chris Bowen, Minister for Financial Services, Superannuation and Corporate Law and Minister for Human Services, Second Reading Speech, *House of Representatives Hansard*, 10 February 2010, p. 11.

2 Second Reading Speech, 10 February 2010, p. 11.

3 Second Reading Speech, 10 February 2010, p. 11.

4 The Hon. Chris Bowen MP, Minister for Financial Services, Superannuation and Corporate Law, Superannuation Clearing House – Release of draft legislation, Media release No. 40, 26 November 2009.

5 Tax Laws Amendment (2010 Measures No. 1) Bill 2010, Explanatory Memorandum, pp 13 – 14.

2.5 The introduction of section 23B in the SGAA will enable employers to meet their obligations in respect of paying superannuation contributions by a single payment as section 23B will operate to deem that where an employer pays an amount to an approved clearing house for the benefit of an employee, the payment will be treated as having been made to a complying superannuation fund or retirement savings account at that point in time.⁶

2.6 In effect, the superannuation guarantee liability is 'turned off' on receipt of the payment by the approved clearing house, providing an incentive for eligible small businesses to take up this free service.⁷ This is in contrast with the effect of paying these contributions through a payroll provider or a superannuation clearing house where the employer's obligations are only considered to have been satisfied when the money they have paid to the payroll provider or clearing house has finally reached the fund or RSA.⁸

Choice of fund requirements

2.7 Introduction of the choice of fund rules from 1 July 2005 now requires employers to provide employees with a standard choice of fund form to enable employees to choose the fund into which their compulsory employer contributions are paid.

2.8 Choice of fund was introduced to provide employees with greater freedom to decide who manages their superannuation. The measure was also expected to increase competition and efficiency in the superannuation industry 'leading to improved returns and placing downward pressure on fund administration charges.'⁹ At the time the changes were introduced it was noted that the nature of the choice of fund requirements would increase costs for some employers, particularly small businesses less able to absorb any such impacts,¹⁰ but that the benefits to employees and the community outweighed those costs.¹¹

2.9 The Government has sought to rectify this situation through the proposed bill and a subsequent amendment that it will make to the choice of fund provisions in section 32C. The amendment will operate to ensure that payment of an employer's

6 Explanatory Memorandum, pp 13 – 14.

7 Treasury, Additional Information, 3 March 2010, p. 1.

8 Explanatory Memorandum, pp 13 – 14.

9 *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004*, Explanatory Memorandum, p. 5.

10 Explanatory Memorandum, p. 14.

11 *Superannuation Legislation Amendment (Choice of Superannuation Funds) Act 2004*, Explanatory Memorandum, p. 34.

superannuation contributions for employees to the approved clearing house also discharges the employer's choice of fund obligations.¹²

The approved clearing house

2.10 The final substantive change involves the introduction of a definition of the term 'approved clearing house'.

2.11 When the measure was first announced the Government advised that the approved clearing house would be contracted to the private sector, the successful entity being appointed by tender.¹³ Following further development of the measure this was changed; the Government taking the view that as risk would be transferred back to the employee in the event of default (given the employer's liability on payment to the clearing house is extinguished) a private clearing house provider should not be engaged.¹⁴

2.12 As a result, Schedule 1 of the bill now provides that the definition of 'approved clearing house' will be determined by the making of regulations; the government announcing that following passage of the bill, regulations identifying Medicare Australia as the approved clearing house for the purposes of the measure will be made.¹⁵

Additional minor amendments

2.13 In addition to these main changes, additional minor amendments to facilitate the measure will be made.¹⁶ These include changes to proposed Division 355 (confidentiality of taxpayer information) of Schedule 1 to the TAA 1953 to allow the Tax Office to disclose information to Medicare for the purposes of administering the clearing house service. Division 355 has not yet been enacted; it is currently contained in the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 which is before the Parliament for consideration.¹⁷

12 Provided the employer has given details of the employee's chosen fund to the approved clearing house; the bill requires that notification of the employee's choice of fund details be given to the approved clearing house either within 21 days after the employer has received the information from the employee or before the contribution to the approved clearing house is made.

13 Treasury, Additional Information, 3 March 2010, p. 1.

14 Treasury, Additional Information, 3 March 2010, p. 1.

15 Tax Laws Amendment (2010 Measures No. 1) Bill 2010, lines 14 – 17 p. 5 and lines 4 – 5 p. 7.

16 Explanatory Memorandum, p. 18.

17 Senate Economics Legislation Committee, *Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 [provisions]*, March 2010.

Commencement date

2.14 Provided the bill is passed, Schedule 1 will commence on 1 July 2010.¹⁸ Medicare will have facilities available to those employers who intend to use the service to register from May 2010.¹⁹

18 Explanatory Memorandum, p. 18.

19 The Hon Chris Bowen MP, Minister for Financial Services, Superannuation and Corporate Law and Minister for Human Services and Dr Craig Emerson MP, Minister for Small Business, Independent Contractors and the Service Economy, Cutting Red Tape for Small Business – Superannuation Clearing House Service, Joint Media Release No 035, 6 November 2009.

Chapter 3

Views on the measure

3.1 This chapter examines the views and issues raised by various stakeholders during the committee's inquiry into the proposed superannuation clearing house for small business and examines those issues in light of the areas which the Senate requested the committee investigate.

General support for a clearing house service

3.2 As detailed in Chapter 2, the free service to be introduced by this legislative amendment will relieve employers of the administrative burdens associated with their superannuation guarantee obligations.¹ Submitters to this inquiry have been in favour of the benefits that will result from its implementation and the measure has therefore enjoyed general support.

[The Association of Superannuation Funds of Australia]...is supportive of the government proposal to deliver the superannuation clearing house for small employers...²

The Council of Small Business Organisations of Australia welcomes the Federal Government initiative to provide free superannuation clearing house services to small businesses in Australia, and acknowledges this fulfilment of an election commitment.³

[Investment and Financial Services Association Limited] welcomes the Government's initiative to deliver its election promise by legislating for a free clearing house service for small business. We support the creation of approved clearing houses for the management of superannuation contributions on behalf of small business.⁴

We are supportive of the idea behind the notion of an approved clearing house...we can certainly see advantages for many employers in a system which assists them to minimise the administrative problems of superannuation.⁵

3.3 In giving their support however, submitters to the inquiry have identified particular aspects of the proposal that they consider require further consideration and

1 Treasury, Additional Information, 3 March 2010, p. 1.

2 ASFA, *Submission 2*, March 2010, p. 1.

3 COSBOA, *Submission 7*, March 2010, p. 1.

4 IFSA, *Submission 1*, March 2010, p. 2.

5 Mr Dick Grozier, NSW Business Chamber, Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 3 March 2010, pp 3 and 5.

development prior to implementation. It is these matters that will be examined in this chapter.

The use of a single approved clearing house

3.4 In 2009 the Government announced that Medicare Australia would perform the role of the 'approved clearing house' departing from its election commitment to outsource the clearing house service through a tender process.⁶ The Government noted that Medicare was 'well placed as one of the Commonwealth Government's key service delivery agencies – with significant electronic and payment processing capacity whilst ensuring the privacy of information and the security of funds'.⁷ During the inquiry this shift in Government policy was the subject of criticism, submitters expressing concern that it would adversely affect competition in the market:

IFSA are concerned about equity in competition...competition is key to an efficient and cost-effective superannuation system and that competition must be in an environment that is equitable...our concern is that there is not a level playing field...it is good that Medicare is coming in to fill a role that is an issue in the marketplace, but it should not limit others from competing equally with Medicare.⁸

...the capacity to become an approved clearing house should be open to clearing houses in general.⁹

...the introduction of Medicare is anticompetitive as it will progressively distort the commercial underpinnings of the clearing house market and offer a competitor an unfair advantage...if the government still wishes to proceed with the initiative, the legislation [should be] amended to appoint the government clearing house provider by tender or, alternatively, level the playing field by enabling private sector providers to become approved and reimburse them for offering the service...¹⁰

3.5 When questioned as to why the Government decided against a tender process to identify and appoint a suitable clearing house provider Treasury gave the following explanation:

The turning off of the SG liability concentrates the financial risk associated with non-payment of superannuation entitlement in one place – namely a clearing house. A failure at the clearing house level would potentially affect the employee entitlements of all employers using the clearing house.

6 Treasury, Additional Information, March 2010, p. 1.

7 Hon. Chris Bowen, Press Release, 6 November 2009.

8 Mr John O'Shaughnessy, IFSA, *Proof Committee Hansard*, Wednesday 3 March 2010, pp 45-7.

9 Mr Dick Grozier, NSW Business Chamber and Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 3 March 2010, p. 2

10 Mr Stuart Korchinski, Director, SuperChoice, *Proof Committee Hansard*, Wednesday 3 March 2010, p. 37.

Currently, a failure to pay employee entitlements only affects the employees of the employer who fails to discharge their SG obligations.¹¹

...[this] is one of the key reasons that the Government ultimately chose to do the clearing house within the public sector and through Medicare.¹²

3.6 Treasury's explanation as to why the Government ultimately decided to preserve the element of extinguishing an employer's SG obligation as soon as payment is made to the approved clearing house rather than the commitment to implement the measure through a private sector provider demonstrates the critical policy considerations and trade-offs that were taken into account.¹³

3.7 Submitters have however continued to express the view that this element of the measure could be extended to private sector clearing houses provided those entities are appropriately licensed and regulated.¹⁴ The NSW Business Chamber and Australian Chamber of Commerce and Industry suggested that greater benefits would be available to employers if the capacity to become an approved clearing house were open to private providers.¹⁵ They called for the definition of 'the' approved clearing house to be changed to 'an' approved clearing house to enable their participation in this new market.¹⁶

3.8 Treasury noted that the costs associated with going down the private sector route would have included both the private sector bid as well as the internal regulatory costs of government which they noted 'may have been substantial'.¹⁷

3.9 Australian Super also did not agree that allowing existing clearance houses to participate would be a more efficient way of processing superannuation for small business:

If the government were to offer subsidies to existing clearing house providers to focus a service on this segment of the market, they probably could have done it, but it would have to have been in conjunction with legislation introduced as we have seen Medicare looking at—mandatory electronic data, mandatory data standards, licensing, a guarantee on floats, and service standards on how long a clearing house can hold onto the money and send it to the funds. If your question is, 'Could private clearing

11 Treasury, Additional Information, March 2010, p. 1.

12 Mr David Parker, Treasury, *Proof Committee Hansard*, Wednesday 3 March 2010, p. 26.

13 Treasury, Additional Information, March 2010, p. 1.

14 Mr John O'Shaughnessy and Mr Andrew Bragg, IFSA, *Proof Committee Hansard*, 3 March 2010, pp 46 – 47.

15 Mr Dick Grozier, NSW Business Chamber and Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 3 March 2010, p. 2.

16 Mr Dick Grozier, *Proof Committee Hansard*, 3 March 2010, p. 2.

17 Mr David Parker, Executive Director, Treasury, *Proof Committee Hansard*, 3 March 2010, p. 32.

houses provide this service with the subsidy going to them?’ the answer is: yes, they could have, but it would not have been as effective as the model that we are looking at now, unless it were in conjunction with a whole list of additional criteria.¹⁸

Committee comment

3.10 The committee acknowledges the complex policy considerations that were balanced by the Treasury in giving effect to this measure, particularly the degree of risk that would be involved if ‘turning off’ the SG liability were extended to payments of superannuation contributions to private clearing houses.

3.11 Although the committee acknowledges industry concerns that this gives the Medicare clearing house facility a competitive advantage, potentially eroding their client base, the committee takes the view that this is one particular instance where it is both suitable and beneficial that the Government provide a free service to this specifically targeted sector of the community and although government involvement in these circumstances may lead to some minor distortion, the benefits that will be delivered to small business justify that impact.¹⁹ The committee is also satisfied, based on evidence it heard, that although there are some private providers of clearing house services currently operating in the small business market, their market penetration is small and there is room for a government provider to operate.²⁰ In fact, drawing on the information provided to the committee, of the two million small businesses in Australia only around two per cent are currently being provided with a clearing house service by SuperChoice.²¹ The committee considers that this further confirms the appropriateness that the free service is only made available to employers with less than 20 employees.

3.12 On the issue of enabling private clearing houses to operate as approved clearing houses for the purposes of this measure on the proviso that they be appropriately licensed and regulated the committee contends that the costs of implementing a framework and body to regulate those entities would be prohibitive, would not guarantee against systemic failure and could result in the creation of an implicit contingent liability for the government.

18 Mr Shawn Blackmore, Head of Operations, AustralianSuper, *Proof Committee Hansard*, 3 March 2010, p. 55.

19 *Proof Committee Hansard*, 3 March 2010, pp 32 – 33.

20 Mr David Parker, Executive Director, Revenue Group, Treasury, *Proof Committee Hansard*, 3 March 2010, p. 34; Mr Shawn Blackmore, Head of Operations, AustralianSuper, *Proof Committee Hansard*, 3 March 2010, p. 52.

21 Mr Stuart Korchinski, Director, SuperChoice, *Proof Committee Hansard*, 3 March 2010, p. 36.

The definition of a 'small business'

3.13 Treasury note this targeting of government assistance; once an employer gets 20 employees or more it will not be possible for that employer to continue to access the free service, even if they were willing to pay.²² The committee also draws attention to the Government's announcement that limiting access to the free clearing house service to employers with fewer than 20 employees also minimises the impact of the measure on competition in the existing clearing house market.²³

3.14 While the Government has stated publicly that the facility will only be available to small businesses that have fewer than 20 employees, this eligibility criteria has not been explicitly stated in the bill.²⁴

3.15 Throughout consultation, on both the exposure draft and the current bill, specifying these size limits by instruction has been criticised and submitters have called for the Government to define 'small business' for the purposes of the measure.²⁵ The Government has however taken the view that 'restricting eligibility for the service through the legislation is...not necessary [as it] would create additional complexity.'²⁶

3.16 Rather, the approach that has been taken to ensure that only small businesses with fewer than 20 employees access the service is the inclusion in the bill of a provision that requires the approved clearing house to accept a payment that is made in satisfaction of the employer's superannuation obligations.²⁷

3.17 Although it is clearly the intent of the Government to restrict access to the clearing house service to small businesses with fewer than 20 employees, the committee heard that the lack of legislative guidance may result in administrative difficulties:

...this requirement to refuse seems to suggest that, if a small employer increases in size to 20 or more employees, payments will be refused...Apart from the complexity of administering this gate and the technical administrative burden imposed on an employer which is growing his or her

22 Mr Michael Willcock, General Manager, Personal and Retirement Income Division, Treasury, *Proof Committee Hansard*, 3 March 2010, p. 33.

23 The Hon Chris Bowen MP, Minister for Financial Services, Superannuation and Corporate Law and Minister for Human Services and Dr Craig Emerson MP, Minister for Small Business, Independent Contractors and the Service Economy, *Cutting Red Tape for Small Business – Superannuation Clearing House Service*, Joint Media Release No 035, 6 November 2009.

24 The Hon. Chris Bowen MP, *Second Reading Speech*, Wednesday 10 February 2010, p. 11.

25 Australian Government, Treasury, *Superannuation Clearing House, Summary of Consultation Process*, February 2010, p. 2; SuperChoice, *Submission 8*, p. 4.

26 Australian Government, Treasury, *Superannuation Clearing House, Summary of Consultation Process*, February 2010, p. 2.

27 Tax Laws Amendment (2010 Measures No. 1) Bill 2010, Schedule 1, item 1 line 12, item 3 line 26 – 27, item 6 line 14.

workforce, or even one who is contemplating a request for a job-share arrangement, it seems to directly and negatively impact employers who might best benefit from the facility. Employers who have seasonal workforces, which means that their workforce fluctuates from its usual small number to 20 or more for a seasonal period, would, depending on how the requirement to refuse is given effect, seem well advised either to not register in the first place or to not use the facility at seasonal peak times...These seasonal employees are the ones who would impose the greatest superannuation guarantee administrative burden on the employer and where the greatest benefit of the approved clearing house facility would seem to fall.²⁸

3.18 These concerns were not shared by all submitters. COSBOA is of the opinion that the definition of fewer than 20 employees on a head count basis rather than a full-time equivalent basis was appropriate:

We understand that 84 per cent of small businesses are micro-businesses, which have five staff or fewer. On balance, we considered that the issues of the thresholds are issues that deal with small businesses at the margins. The definition that was offered by Medicare, which was a definition of fewer than 20 employees on a headcount basis rather than a full-time equivalent basis, was appropriate given the issues and the challenges in implementing such a threshold.²⁹

Committee comment

3.19 The committee considers that the absence of a definition within the legislation may result in ambiguity, particularly for small business employers who employ a predominantly casual workforce and/or seasonal employees.

Recommendation 1

3.20 The committee recommends that the threshold value be monitored over the initial three year period to assess whether the threshold is appropriate.

Medicare as the approved clearing house provider

3.21 The Senate also requested that the committee consider Medicare Australia's suitability for the role of provider of the Government's clearing house service.

3.22 In making its announcement that Medicare would take on this role the Government explained that it had chosen the agency given that in its current roles it had developed significant capacity in payment processing and would be able to use its

28 Mr Dick Grozier, NSW Business Chamber and Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 3 March 2010, p. 3.

29 Mr Michael Pruscino, Director, COSBOA, *Proof Committee Hansard*, 3 March 2010, p. 11.

existing infrastructure capabilities while ensuring information privacy and fund security.³⁰ Medicare themselves commented that:

We have well-established systems that have been in operation and tried and tested over a long period of time; appropriate audit controls and the like; and a skilled workforce who are very comfortable with and used to doing this kind of work. We have no concerns about our capacity to deliver on this program...it is obviously a very important program and we are determined to get it right.³¹

3.23 Although Medicare has also established working groups with industry to ensure their needs are met and the service is a success, there remains concern that the service to be delivered will not be efficient. This concern has arisen as no processing, transfer or missed payment response time requirements have been cited for introduction.³²

3.24 A number of submitters³³ have suggested that as the payments to be made to Medicare will be deemed to be payments to the relevant superannuation funds there is an argument for introducing transaction time and other processing requirements.

...our intention once the information is matched is for the money to be distributed to the super funds immediately, so we would be looking at doing that within 24 hours. The only one where we could not commit to that would be those where there were issues with matching and some requirement for us to do some follow-up work.³⁴

Committee comments

3.25 The committee is of the view that Medicare will be an efficient and effective provider of the optional superannuation clearing house service for small business although it recognises that the benefits associated with introduction of the service may not be realised as early as hoped if take-up amongst small business is slow.

30 The Hon Chris Bowen MP, Minister for Financial Services, Superannuation and Corporate Law and Minister for Human Services and Dr Craig Emerson MP, Minister for Small Business, Independent Contractors and the Service Economy, Cutting Red Tape for Small Business – Superannuation Clearing House Service, Joint Media Release No 035, 6 November 2009.

31 Mr Mark Jackson, General Manager, Business Framework, Medicare Australia, *Proof Committee Hansard*, 3 March 2010, p. 25.

32 Mr Dick Grozier, *Proof Committee Hansard*, 3 March 2010, p. 2.

33 The NSW Business Chamber, Australian Chamber of Commerce and Industry, AustralianSuper, ASFA, SuperChoice all mentioned a need to introduce data and processing standards in their submissions.

34 Ms Jacqueline Hughes, Medicare Australia, 3 March 2010, pp 23-24.

3.26 The committee is satisfied that as Medicare has been fully funded to deliver this measure its implementation will not adversely affect delivery of its other services.³⁵

3.27 The committee is satisfied that Medicare will set adequate service standards in terms of payment and other processing times as part of their normal departmental performance indicators.

Recommendation 2

3.28 The committee recommends that the Senate pass the bill.

Senator Annette Hurley
Chair

35 Mr Mark Jackson, Medicare Australia, *Proof Committee Hansard*, 3 March 2010, p. 20.

Minority Report by Coalition Senators

Introduction

The Coalition is broadly supportive of the Government's broad policy. The Coalition recognises red-tape is a concern for small business and supports Government measures to implement a superannuation clearing house for small business.

However, the Government has not explained why it broke its commitments to tender the service to the private sector that Medicare has not publicly made a business case for establishing the clearing house, and that many operators in the superannuation sector have expressed concerns about the anti-competitive. The Coalition is particularly concerned about this and will discuss a number of issues associated with this.

Unintended Consequences for the Superannuation Market

The intentions of this legislation are welcomed by the superannuation industry and small business. The Australian Chamber of Commerce and Industry (ACCI) told the Hearing that:

We welcome the Government's decision to establish a clearing house facility to assist employers to manage their superannuation contribution obligations under choice and which would provide a free service for small employers...We are very supportive of reforms to simplify compliance and to expedite contributions processing.¹

The Investment and Financial Services Association (IFSA) said:

We welcome the Government's initiative...this is a key area where the superannuation payment obligations have been a major problem for a number of small businesses, particularly with regard to their payroll responsibility.²

The support given by those in the industry is cautious and the legislation requires further consideration and development prior to implementation. The recommendation that the legislation be passed unamended is inappropriate and is indicative of the Government's refusal to consider outside industry concerns about the legislation. When Medicare was asked about responses to the discussion paper on this issue and what they had done to deal with those responses:

¹ Mr Dick Grozier, Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 3 March 2010, page 2

² Mr John O'Shaughnessy, Investment and Financial Services Association, *Proof Committee Hansard*, 3 March 2010, page 45

We have not asked for any of those documents.³

What we have done is set up two working groups so we are working directly with industry and employers so that any issues that they have can be raised...⁴

The Coalition believes that the inclusion of industry representatives on working groups and Medicare's refusal to consider Treasury submissions is not a justification for disregarding their concerns. For example, the Association of Superannuation Funds Australia (ASFA) and IFSA were both included on Medicare's working group, but made submissions to this inquiry detailing how the legislation can be improved.

Similarly Coalition Senators agree with the Chair Report's comments on the 20 employee threshold. ACCI told the Inquiry hearing:

...this requirement to refuse seems to suggest that, if a small employer increases in size to 20 or more employees, payments will be refused... Apart from the complexity of administering this gate and the technical administrative burden imposed on an employer which is growing his or her workforce, or even one who is contemplating a request for a job-share arrangement, it seems to directly and negatively impact employers who might best benefit from the facility. Employers who have seasonal workforces, which means that their workforce fluctuates from its usual small number to 20 or more for a seasonal period, would, depending on how the requirement to refuse is given effect, seem well advised either to not register in the first place or to not use the facility at seasonal peak times.⁵

The Coalition supports recommendation 1 in the committee report but would add the following.

Recommendation 1

The committee recommends that the threshold value be monitored over the initial three year period to assess whether the threshold is appropriate.

Anti-Competitive Provisions in the Legislation

The principal concern of the superannuation sector and clearing houses that are currently operating in the private sector is the anti-competitive nature of the legislation.

Private sector superannuation clearing houses have been operating in the sector for some time. The sector's largest clearing house, SuperChoice, told the inquiry that it is:

³ Ms Jacqueline Hughes, Medicare Australia, *Proof Committee Hansard*, 3 March 2010, page 19

⁴ Ms Jacqueline Hughes, Medicare Australia, *Proof Committee Hansard*, 3 March 2010, page 19

⁵ Mr Dick Grozier, Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, 3 March 2010, page 3

Processing this year around 20 million contributions on behalf of 50,000 employers, 40,000 of whom are employers with fewer than 20 employees. They account for two million-odd employees. Overall, we project about \$7.2 billion will be cleared through our service. We estimate that that is around 20 per cent of the entire clearing market.⁶

The superannuation fund contracts the clearing house transactions to companies like SuperChoice, who provide their services to employers free of charge through their chosen superannuation fund.

If the Government were to introduce its own clearing house operator and enforce preferential regulations on that operator when compared to currently operating clearing houses, the legislation has the potential to seriously impact upon the business of those privately operating clearing houses. One submission related the primary concerns of private clearing houses in their submission:

Under the proposed legislation, private sector clearing houses are subject to SG deadlines that are applied quarterly. They require employers to make payments well prior to the 28th of the month after the corresponding SG quarter, to ensure they get the money to the superannuation fund by the 28th. The Medicare solution means employers only need to pay Medicare by the 28th to meet their SG obligation and Medicare can hold onto that money for a month.⁷

Westpac made the following comment on its submission focusing on the different SG requirements:

This important difference means that private sector clearing houses, such as Westpac's QuickSuper, will be forced to compete in a market distorted by the change and no longer uniform or equitable from public and private sector participants. This will have negative consequences for small businesses who choose to continue to use private sector clearing houses...We recommend the legislation is amended to ensure clearing house standards are the same across both private and public sectors.⁸

Whilst the intentions of Medicare may be to provide a superannuation clearing house to those employers who currently cannot access a free service, the legislation and regulations will allow absolutely any business with fewer than 20 employees access to the service. For instance, the 40,000 employees who use the SuperChoice clearing house will have overwhelming incentive to switch to the Medicare clearing house due to the far less stringent requirements for the discharge of SG payments.

⁶ Mr Stuart Korchinski, SuperChoice Services Pty Ltd, *Proof Committee Hansard*, 3 March 2010, page 36

⁷ Craig Osborne, Sage MicrOpay, *Submission 4*, page 2

⁸ The Westpac Group, *Submission 9*, page 1

The Government recently said that the way superannuation can be strengthened is to 'drive efficiencies, reduce administrative costs and thus increase returns'.⁹ This is the exact opposite of what the superannuation sector will achieve by this Bill in its current form. As IFSA states in its submission:

If the Item 3 amendment is passed as drafted, we would be concerned about the erosion of the "level playing field" in the provision of clearing house services. IFSA has long maintained that competition is the key to an efficient and cost effective superannuation system, and that competition is the key to an efficient and cost effective superannuation system, and that competition occur on a level playing field.¹⁰

AFSA made similar comments in their submission. To improve the legislation, ASFA recommends the following:

That the legislation be amended so as to provide a path forward whereby private sector organisations could achieve approved clearing house status. This would achieve a level playing field. The path forward could include the establishment of operating standards combined with regulatory oversight, as envisioned by the government's original statement. Importantly, this would ensure clearing houses meet certain minimum requirements and provide a wider range of employers with the opportunity to meet their SG obligations by contributing through a clearing house.¹¹

Such a recommendation will encourage the use of clearing houses, and provide each clearing house with competitive incentives to create efficiencies and implement best practice.

The majority of submissions from the superannuation and business sectors made similar recommendations. IFSA submitted:

All references to 'the approved clearing house' be changed to 'an approved clearing house'. Further, IFSA recommend that the definition of 'an approved clearing house', which will be finalised in the forthcoming regulations, be expanded to include a range of licensed clearing houses.¹²

ACCI made the following statement with relation to how business would like the legislation improved:

We believe the capacity to become an approved clearing house should be open to clearing houses in general. This would mean that the full benefits of

⁹ The Hon Chris Bowen, Address to Self-Managed Super Fund Professional Association of Australia, Melbourne, 18 February 2010, <http://mfsscl.treasurer.gov.au/DisplayDocs.aspx?doc=speeches/2010/003.htm&pageID=005&min=ceba&Year=&DocType=>, accessed 11 March 2010

¹⁰ Investment and Financial Services Association, *Submission 1*, page 4

¹¹ The Association of Superannuation Funds of Australia Limited, *Submission 2*, page 3

¹² Investment and Financial Services Association, *Submission 1*, page 4

an efficient clearing house system would be available to employers. Such a clearing house system could help drive reform of the superannuation system overall in such areas as how payments are made to funds, what sort of information is required by the fund and interfund transactions.¹³

Coalition Senators agree with these sentiments of the industry and recommend that similar amendments are made to the Bill to protect competition, encourage innovation, and improve the access and services available to all businesses.

Recommendation 2

The legislation be amended to allow the definition of an ‘approved clearing house’ to include privately operating clearing houses, subject to licensing and minimum standards stipulated in the regulations.

Is Medicare an Appropriate Clearing House Operator?

The Government has allocated \$16.1 million to this project over four years and must provide genuine reasons to taxpayers concerning why the Prime Minister failed to meet his election promise to implement the plan through a competitive tender process. Medicare must also demonstrate that it is the most efficient option and whether it can provide services comparable to what the private sector can provide.

Treasury gave evidence in the hearing to the effect that tender documents were not produced.¹⁴

This contradicts evidence given on notice by Treasury to Senate Estimates in February 2010, where Treasury responded that ‘no draft tender document suitable for public release was prepared.’¹⁵ This indicates that tender documents were prepared but not released.

Medicare’s evidence to the Inquiry hearing demonstrates that the agency has not completed a business plan to a level that would have been required in a competitive tender process. Medicare made the following comments to the hearing:

We do not have any targets at this point in terms of the number of businesses which are going to use the system.¹⁶

We did not go and cost an alternative provider.¹⁷

¹³ Mr Dick Grozier, Australian Chamber of Commerce and Industry, *Proof Committee Hansard*, page 2

¹⁴ Mr Michael Willcock, The Treasury, *Proof Committee Hansard*, 3 March 2010, page 31

¹⁵ Treasury, Answers to Question on Notice AET39, *Senate Economics Committee*, 11 February 2010

¹⁶ Mr Mark Jackson, Medicare Australia, *Proof Committee Hansard*, 3 March 2010, page 17

¹⁷ Mr Mark Jackson, Medicare Australia, *Proof Committee Hansard*, 3 March 2010, page 21

We are considering options (to accept employer payments)... We have looked at the alternatives... We have not reached any firm decision on that and we are still talking with industry about that.¹⁸

We have a wide range of KPIs right across (Medicare). I cannot imagine we would deviate from the normal Medicare ones. We have payment cycles of 14 days for some things as well as other time frames. They would be quite different, and we would need to look at the system and at what appropriate KPIs are.¹⁹

Upfront validation? We do not check with the fund at that point to ensure the member details match up when the employer sends us the payment. At this stage we are not planning to do that sort of validation.²⁰

Our intention once the information is matched is for the money to be distributed to the super funds immediately. The only one where we could not commit to that would be those where there were issues with matching and some requirement for us to do some follow up work.²¹

Private clearing houses have raised expert concern on Medicare being awarded the contract. As SuperChoice noted:

...a significant underestimation of the costs to build and operate an effective clearing house, particularly in the time frame that Medicare has been given; likely poor employer experiences as a result of rushing into operation of a functionality based service offering, which will lead to growing employer complaints and an increase in red tape for employers; relatively low benefits for super funds, which will be off-set by the cost to access the clearing house; an inequitable landscape, where 85,000 employers who employ 7.7 million employees are not offered the same level of benefits that SME employers will access through Medicare; and ultimately a missed opportunity to support the industry to advance its e-commerce aspirations.²²

The Superannuation Information Centre submitted that the decision to send the clearing house to Medicare means that 'there is the serious potential for large scale economic waste'.²³ It was additionally submitted:

Do (Medicare) really understand the complexity and nature of what they are trying to achieve? And the answer has to be 'no'.²⁴

¹⁸ Mr Mark Jackson, Medicare Australia, *Proof Committee Hansard*, 3 March 2010, page 23

¹⁹ Mr Mark Jackson, Medicare Australia, *Proof Committee Hansard*, 3 March 2010, page 24

²⁰ Mr Mark Jackson, Medicare Australia, *Proof Committee Hansard*, 3 March 2010, page 24

²¹ Ms Jacqueline Hughes, Medicare Australia, *Proof Committee Hansard*, 3 March 2010, page 23

²² Mr Ian Campbell, SuperChoice Services Pty Ltd, *Proof Committee Hansard*, 3 March 2010, page 36

²³ Superannuation Information Centre Pty Limited, *Submission 3*, page 2

²⁴ Mark Fenton-Jones, 'Clearing house plan slammed', *Australian Financial Review*, 9 March 2010, page 50

It has taken years for fund clearing service providers in the private sector to achieve and deliver service offerings that are viable and efficient. You cannot assemble a system like this in six months.²⁵

It is also not clear if Medicare will be subject to the same professional indemnity insurance that private clearing houses are required to hold. SuperChoice told the hearing:

We believe that the risks of private sector failure or fraud are not well understood by Treasury, in part because existing clearing house providers such as us, Westpac and ADP are reputable, well capitalised and have extensive professional indemnity cover. They segregate duties by outsourcing payment distribution to banks, which is a key fraud control. They house employer funds in bank-controlled custody accounts and have not suffered any loss to date that we are aware of.²⁶

Small Businesses are ambivalent on who operates the subsidised clearing house. The Council of Small Business Organisation was asked if they would have been concerned if the private tender process had been completed and commented that it would not have been a concern to them.²⁷

Given the evidence available, Medicare and Treasury have not been able to prove that Medicare can handle the scheme at the budget provided and without risk to employee superannuation payments. Many in the industry have legitimate concerns about how Medicare will operate the scheme.

The Coalition has no issue with Medicare operating the system if it is the best option and if it does not disadvantage private industry. Medicare must be required to publicly release its business plan addressing these concerns and demonstrating that they can deliver the service more efficiently than the private sector. Furthermore, the Government must be held accountable for breaking its promises.

Recommendation 3

That Medicare be required to compete for the taxpayer-subsidised clearing house by publicly releasing its full costings and business model.

Conclusion

As already discussed, the Coalition is broadly supportive of the legislation, but is concerned about the lack of public tendering and the effectiveness of Medicare as a provider. The Coalition will be seeking to ensure that the private sector has the opportunity to compete for the superannuation clearing house contract.

²⁵ Mark Fenton-Jones, 'Clearing house plan slammed', *Australian Financial Review*, 9 March 2010, page 50

²⁶ Mr Stuart Korchinski, SuperChoice Services Pty Ltd, *Proof Committee Hansard*, 3 March 2010, page 37

²⁷ Ms Jaye Radisich, Council of Small Business Organisations of Australia, *Proof Committee Hansard*, 3 March 2010, page 14

Senator Alan Eggleston

Deputy Chair

Senator David Bushby

APPENDIX 1

Submissions Received

Submission

Number

Submitter

- 1 Investment and Financial Services Association
- 2 Association of Superannuation Funds of Australia Limited
- 3 Superannuation Information Centre Pty Limited
 - Supplementary Submission
- 4 Name Withheld
- 5 Confidential
- 6 Mercer (Australia) Pty Ltd
- 7 Council of Small Business of Australia
- 8 SuperChoice Services Pty Ltd
 - Supplementary Submission
- 9 Westpac

Additional Information Received

TABLED DOCUMENT

Sydney, Wednesday 3 March 2010

- Document tabled by Treasury: "Superannuation Clearing House - Points for Opening Statement to Senate Committee"

APPENDIX 2

Public Hearing and Witnesses

SYDNEY, WEDNESDAY 3 MARCH 2010

BLACKMORE, Mr Shawn, Head of Operations,
AustralianSuper

BRAGG, Mr Andrew James, Policy Manager,
Investment and Financial Services Association

CAMPBELL, Mr Ian Lindsay, Chairman,
SuperChoice Services Pty Ltd

DALTON, Mr Michael, Personal and Retirement Income Division,
The Treasury

FIELDING, Mr Mike, General Manager,
SuperChoice Services Pty Ltd

GROZIER, Mr Dick, New South Wales Business Chamber;
Australian Chamber of Commerce and Industry

HUGHES, Ms Jacqueline Therese, Manager, Government Business Delivery Branch,
Medicare Australia

JACKSON, Mr Mark John, General Manager, Business Framework,
Medicare Australia

KORCHINSKI, Mr Stuart, Director,
SuperChoice Services Pty Ltd

O'SHAUGHNESSY, Mr John Anthony, Deputy Chief Executive Officer,
Investment and Financial Services Association

PARKER, Mr David John, Executive Director, Revenue Group,
The Treasury

PRUSCINO, Mr Michael Robert Anwyl, Director,
Council of Small Business Organisations of Australia

RADISICH, Ms Jaye Amber, Chief Executive Officer,
Council of Small Business Organisations of Australia

VAN DAATSELAAR, Mr Hans, Manager, Strategy and Policy,
Superpartners

WILLCOCK, Mr Michael, General Manager, Personal and Retirement Income
Division, The Treasury

