

Stolen future: an amnesty for super theft

Submission by the Australian Council of Trade Unions to the
Senate Economics Legislation Inquiry into Treasury Laws
Amendment (Recovering Unpaid Superannuation) Bill 2019

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Introduction

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. There is no other national confederation representing unions. For 90 years, the ACTU has played the leading role in advocating in the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions of employees. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation over that period.

The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates. They have approximately 2 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

The ACTU and its affiliated unions founded industry superannuation and won the right for all workers to be entitled to super. The ACTU continues to be a leader in the superannuation sector, advocating to ensure workers retain rights over their deferred wages, and that superannuation delivers adequate retirement outcomes for workers.

This Bill allows employers who have been underpaying their workers for 26 years to not only escape penalties, but to gain a tax advantage. Rather than taking steps to rectifying the ongoing injustice, the Government, once again, takes the side of unscrupulous bosses who have been ripping off their workforce. The Superannuation Guarantee Charge has been in place for a generation, despite this the Government is claiming that ignorance is a justifiable defence for breaking the law. Workers suffer real hardship due to unpaid superannuation and this is particularly acute for those immediately facing retirement or recently retired.

The amnesty does nothing for workers and should be scrapped in favour of new measures allowing workers, their unions, their superannuation funds and the Australian Taxation Office (ATO) to proactively enforce and recover superannuation entitlements.

Superannuation guarantee amnesty

The Superannuation Guarantee (SG) amnesty is an insult to workers who have had their superannuation stolen by unscrupulous employers. The Government proposes to allow business to claim a tax deduction for superannuation theft from the introduction of superannuation until 2018. This amnesty is based upon the assumption that once offered, it will be taken up. But the very fact that a historic amnesty for SG non-payment is offered is due to rampant non-compliance by employers who face only a minor risk of being caught. The retrospective amnesty will be coupled with no attempts from Government for proactive compliance. Instead, the efforts of the Government focusing on the introduction of new technology it hopes will auto-correct future SG non-payment.

The amnesty will not address historic non-compliance from companies nor those who have historically stolen workers' wages. It will do nothing to address non-payment from more than five years ago, where employers are able to destroy records of superannuation contributions. The bill allows those who have avoided their obligations and take up the amnesty the ability to claim a tax deduction on payment which is a gift to those who have ripped off their workers.

Ignorance is not a defence for any other aspect of the law, and nor should it be for rogue employers who have ripped off their workers.

Impact of stolen superannuation

Industry Super Australia (ISA) modelling shows that 2.85 million workers lose \$5.94 billion per year in unpaid superannuation. Because of this theft, workers will face a poorer retirement due to employers shirking their obligations. Young and vulnerable workers are more likely to have their superannuation and wages stolen from their employers. With little understanding of their rights at work, or the obligations of their employer, workers in industries like cleaning, hospitality, construction, agriculture and more are likely to be ripped off by unscrupulous bosses. These workers are least able to afford being ripped off and most likely to be ripped off.

Amnesty hurts most for those who are facing retirement

Workers who have their superannuation entitlements stolen by their employers are left facing an insecure retirement without their superannuation payments. In the 26 years the amnesty covers, many workers have retired, or are nearing retirement with a superannuation balance which leaves them struggling on the meagre Age Pension. These workers should have been able to draw upon their superannuation entitlements as they entered retirement, with the ability improve their standard of living relative to solely relying upon the age pension.

In their submission to the Senate Economics References Committee inquiry into wage theft and non-compliance of the superannuation guarantee, the then Construction, Mining, Forestry and Energy Union (CFMEU) highlighted the example of a steel fixer Bill¹, 46, who worked for 10 years. Despite earning around \$100,000 per year over the last ten years, Bill discovered he had a superannuation balance of around \$12,000. Bill worked his entire career with the promise that his deferred wages through superannuation would afford him a dignified retirement. Many of his previous employers are now out of business, and at the time of writing the Union deemed it unlikely he would be able to recoup all of his entitlements. The Bill does nothing for Bill.

Amnesty useless for workers ripped off by insolvent companies

Cleaners, textiles workers, hospitality workers, construction workers, and those in labour hire lose their entitlements because companies regularly claim insolvency to avoid paying workers properly. The amnesty will do nothing for workers whose employer folded and did not pay their superannuation entitlements. In August 2010, Reflections Group collapsed owing more than \$3 million of dollars in unpaid superannuation to its 3,500 workers. Reflections Group provided cleaning services to shopping centres and had deceived its staff by showing superannuation payments on payslips but hadn't deposited the money. The impact of the cleaners was devastating, and despite work from the union to recover much of the unpaid superannuation and wages, there is still money outstanding.

Case Study Blossom Road

Blossom Road was a women's clothing manufacturer company located in Melbourne. The company was placed into administration in 2011. At the time of insolvency, the company employed approximately 12 workers, predominantly women from CALD backgrounds, with limited written and spoken English and computer literacy. All were award dependent and low paid.

At the time of the insolvency event, the employer had not made any superannuation payments at all on behalf of any of the production workers. One worker who had been employed for over 10 years and retired at age 65 (prior to the company's insolvency) discovered that the employer had never paid any superannuation for her.

¹ Name changed for privacy

In addition, the employer had not remitted any of the voluntary superannuation contributions made by approximately 5 of the employees who had authorised deductions from their wages. These women were between 5 -10 years from retirement age.

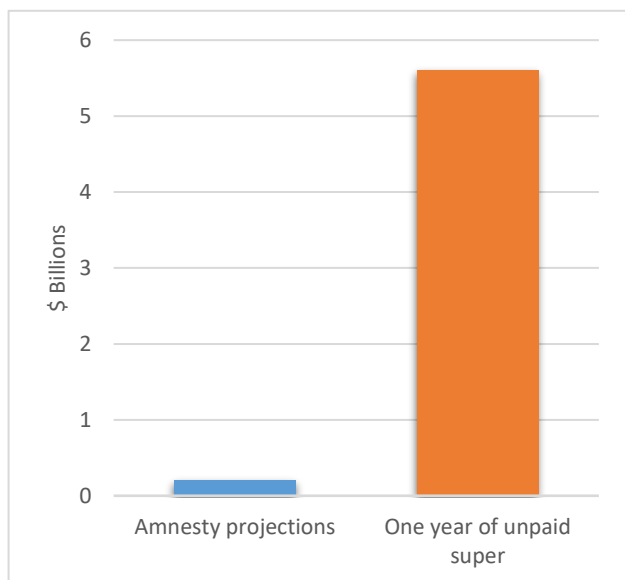
The affected workers received no compensation through the insolvency process for the unpaid superannuation amounts.

Virtually a day after entering into administration, the company phoenixed and commenced operations from the same premises, with a number of family members substituted for the directors and employing a number of the same workers.

As companies have been wound up, directors are under no obligation to pay SG owed, and they get away with having ripped off their workers.

The projected amount of superannuation that would be recovered is miniscule

The Government has already claimed the superannuation amnesty is responsible for \$160 million in repaid superannuation, despite not being law. It has claimed in the past it would change employers' behaviour and generate up to \$200 million in paid debts. This is less than a drop in the ocean. \$200 million in recovered superannuation is less than 3% of just one year's unpaid superannuation - despite covering 26 years of non-compliance.



Ignorance is not a defence

The amnesty is based upon the proviso that businesses may have been ignorant of their obligations, or inadvertently missed payments due to an administrative error. In every other circumstance, ignorance of the law is not a defence. The Superannuation Guarantee Charge (SGC) has been law since 1 July 1992. Businesses cannot believably claim ignorance of the SGC when and where it applies to them. The SGC is not a unique obligation upon employers. Wages, workplace entitlements, business tax, licensing are all incumbent upon the business owner to comply with. To claim that non-payment of superannuation is too difficult by comparison and therefore an amnesty is warranted, is absurd.

The ACTU rejects the provision of a 12-month amnesty for employers who have not paid workers their superannuation entitlements, and recommends this Schedule be rejected outright.

Workers should have the right to pursue unpaid super claims

The current process for unpaid superannuation recovery is opaque, slow and does not take workers into account. Workers lodging claims with the ATO may not see action for months, years or at all, with very little information given as to why. The ATO is restricted in the information it can provide workers, so does not share details of payment plans nor does it allow anyone to contest employers' claims should they say they do not have capacity to repay in a reasonable time.

Given workers lose out on \$5.9 billion per year in superannuation payments, the system is obviously not working. Workers and their unions should have the right to pursue unpaid superannuation as an industrial entitlement and should have the ability to inspect records of payment. Superannuation is an industrial right, and it is a historic anachronism that it is treated differently. If the Government were serious about unpaid super it would replicate superannuation provisions in the National Employment Standards to allow workers to enforce their rights at work.

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