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Cbus submission: Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023

About Cbus

Cbus Super was established in 1984, created by workers for workers. We are a proud industry super fund, representing those that help build Australia.

As one of Australia's largest super funds, we provide superannuation and income stream accounts to more than 875,000 members and manage over $73 billion of our members' money (as at December 2022).

Our members work in sectors that perform physical labour, often in hazardous environments. Cbus tailors its products and services to our members' needs.

Re: Schedule 3—Superannuation

Superannuation sits within a framework of rights and obligations in people's working lives, borne out of the struggle of employees, their union representatives, and sympathetic employers to see a material improvement in Australians' retirement outcomes. The regulatory framework around superannuation situates it both within the industrial landscape of Australia and as an important and ever-growing participant in the Australian economy.

Non-compliance with the Superannuation Guarantee (SG) is a steady leak in Australia's retirement system. Across the economy workers lose out on $6 billion a year in super. Unpaid super is unfortunately common in the building, construction, and allied industries, and this has a significant impact on the retirement savings of Cbus members.

It is estimated based on Australian Taxation Office (ATO) data, that around 244,000 employees in the construction industry are underpaid superannuation, averaging an underpayment of $1,722 per year. This equated to an approximate $420.99 million in Superannuation Guarantee entitlements that were not paid to employees in the construction industry during 2018/19 alone.[1] Furthermore, the construction industry is the second highest source of complaints to the ATO about unpaid superannuation[2] and nearly one in five corporate insolvencies that involve unpaid superannuation are in the construction industry.

[1] Research estimates by the McKell Institute using the ATO 2% sample file for 2018-2019 and commissioned by Cbus in 2021.
[2] Australian Taxation Office, answers to questions on notice, W4, September 2020, Senate Economics Reference Committee Inquiry into the unlawful underpayment of employees' remuneration.

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The issue of unpaid super is not just a problem for workers, it penalises the majority of business which do the right thing and also represents significant lost Government revenue and an increased reliance on the Age Pension.

Cbus welcomes the move to include superannuation in the National Employment Standards.

Cbus has long advocated for a legal avenue for *all* workers to recover unpaid super, as already exists for recovery of unpaid or underpaid wages. Parliament should empower workers and their representatives, including their superannuation fund, to take action against employers engaged in this form of wage theft for the under and non-payment of the SG or superannuation contributions.

While we applaud this move by the Government, more can and should be done to tackle the problem of under and nonpayment of superannuation, including:

1. Make clear, as part of this package, that an order for compensation can include both unpaid superannuation and loss of returns on the unpaid superannuation. This would have a significant deterrent effect and would facilitate a just outcome for the wronged worker, restoring their superannuation balance and putting them on a path to the dignified retirement they are entitled to.

2. Compensation under this package should extend to loss of insurance benefit if the failure to pay super leads to a suspension of cover and the member suffers an insurance event.

3. Unwind 'stapling', a measure which leaves workers in building, construction and other occupations that are at the highest risk for unpaid super, worse of. This will allow funds with expertise and a track record of success in compliance to continue to help more workers get the superannuation they're owed. If this is not accepted, workers in hazardous occupations should be excluded from the stapling regime, defaulting instead into the fund named in their EBA or award.

4. Payment of SG contributions should be aligned with payment of wages. This would enable non-payment and underpayment to be identified more quickly and improve member engagement with superannuation more generally. We note that Cbus is a 'monthly fund', requiring active employers to contribute super monthly, which helps the fund to identify and tackle non-compliance early. This rule has produced improved outcomes for members – super on pay day would be a further improvement.

5. Expand the Fair Entitlements Guarantee (FEG) to include superannuation. This would be a consistent application of the FEG. As noted in the Explanatory Memorandum to the Fair Entitlements Guarantee Bill 2012, the scheme "is necessary to fulfil a significant community need to protect the entitlements of Australian employees who would otherwise stand to lose their entitlements if they lose their jobs due to insolvency of their employer."[3] ASIC data on insolvencies for 2018—2019 showed that almost half of insolvencies involve unpaid super.[4] In 2022, construction company insolvencies accounted for close to 30% of all company insolvencies.[5]

[3] https://www.legislation.gov.au/Details/C2012B00188/Explanatory%20Memorandum/Text
[4] ASIC, Insolvency statistics: External administrators' reports July 2018-June 2019, December 2019, p 45
[5] RBA Financial Stability Review – October 2022, Box C: Financial Stress and Contagion Risks in the Residential Construction Industry, https://www.rba.gov.au/publications/fsr/2022/oct/contents.html

6. The ATO, which is responsible for recovering unpaid SG contributions and penalising non-compliance, should take a much stricter and more proactive approach to investigating and recovering unpaid super and ultimately imposing penalties on those who do not meet their SG obligations.

7. Data is a significant pain point for members, and especially for those who lack financial expertise. Government agencies including Centrelink and the ATO collect and hold a significant amount of information directly relevant to members' employment, income and retirement. Government already collects all the information required to identify non-payment and underpayment of super. The Government should, where members consent, share relevant information directly with a member's superannuation fund. This would enable funds to give members better advice, chase unpaid super, pre-populate forms for members, and support members to achieve a better understanding of their financial position before and in retirement.

8. The ATO should regularly publish aggregated and anonymised data on non-payment of superannuation, including by industry, to allow the issue to be continually monitored.

Cbus member verbatims captured in qualitative research conducted by Cbus in 2019:

"Why aren't they fining people if they don't pay?"

"It would be more reassuring if someone policed this."

"They need to tighten things up, it needs to be as important to the government as getting tax."

"The Government should have a mechanism to ensure that it's going in."

Cbus works hard to recover unpaid super on behalf of our members

Cbus has collected $78,979,002.00 in unpaid super from 9,654 employers on behalf of 81,025 members during this financial year to date.

Last financial year Cbus collected $106,604,052.12 from 16,343 employers on behalf of 126,086 members.[6]

Over the past 5 years, Cbus has recovered $471 million in unpaid super for its members.

Cbus uses a suite of tools to identify suspected non-compliance with SG obligations, starting with enabling Cbus members to check that contributions are being made on time via the online member portal and the member app.

In addition, a Compliance Line team at the fund supports union officials, workplace delegates, and Cbus' team of highly experienced Coordinators who regularly attend workplaces to check that employers are meeting their monthly SG obligations (where applicable) through a bespoke Cbus Super Payment Checker app. If the check identifies anomalies with payments, further investigation is carried out with the employer by the delegate. There are nearly 400 active users of this app.

Our Workplace Coordinators educate and inform members of their SG entitlements and guide them on how to approach their employer if they suspect their entitlements are not being paid correctly. Our Coordinators

[6] Compared with one of Australia's largest funds, which reported recovering just $8.3 million on behalf of its members in that same year.

and Compliance team run training sessions for authorised delegates, and Coordinators regularly address delegates meetings on compliance and assist delegates on the job to identify non-payment of super.

Coordinators and delegates are integral to the detection and collection of tens of millions in unpaid superannuation each year.

Cbus outsources its unpaid superannuation collection service to Industry Fund Services' (IFS) Unpaid Super division IFS contacts employers on behalf of Cbus to recover superannuation monies when an employer goes into arrears. IFS also manages legal referrals where nonpayment of super has gone on for longer periods, as well as managing the collection of any unpaid super when businesses become insolvent.

Cbus refers employers to ATO where it is considered appropriate.

"I used to regularly get a letter from Cbus saying 'your employer hasn't made a contribution for six months'. Now he has to do it every month, it hasn't been an issue for a while." – Cbus member

"When I was an apprentice, I was robbed four years from my employer, he didn't pay my super. I contacted the ATO as well. He started a new business; he went bankrupt and he got away with it. I didn't realise, I was only really young, 17." – Cbus member

Impact on those employers who do the right thing

The issue of unpaid super is not just a problem for employees. It has an impact on competition. Many businesses do the right thing. They pay their employees correctly, and on time. However, the proliferation of underpayment of wages and superannuation, and lax enforcement regimes, put these businesses at a disadvantage when their competitors don't pay. For example, where tenders for projects are priced without allowing for the payment of superannuation, a contractor gains a 9.5% wages price advantage over other tenderers.

Fixing the issue of unpaid superannuation would help create a fairer business environment for the majority of employers who are compliant with superannuation requirements.

Insolvency and phoenixing

The building and construction industry is unfortunately plagued with a very high level of corporate insolvency - a situation which has hardly seen any improvement over the past decade despite legislative efforts to tackle it. For some unscrupulous employers, establishing businesses for a limited time before liquidating them is 'business as usual'. The directors of such companies rarely suffer any real consequences, leaving behind workers who are owed wages and superannuation. In many insolvency cases the ATO does not lodge claims to recover unpaid SG on behalf of employees. In these instances, IFCC, engaged by Cbus, will step in and lodge a claim on behalf of a fund member.

The Reserve Bank of Australia noted recently that several large residential construction firms have entered into insolvency over the past year, and that construction company insolvencies have increased sharply - exceeding their pre-pandemic levels and accounting for close to 30 per cent of all company insolvencies. They predict that further increases in insolvencies are likely.[7] Within the past month, one of Australia's largest home builders and a prominent civil construction group collapsed on the same day.[8]

[7] Financial Stability Review – October 2022, https://www.rba.gov.au/publications/fsr/2022/oct/contents.html
[8] https://www.smh.com.au/business/companies/home-builder-porter-davis-in-trouble-20230330-p5cwvn.html

Employees of companies with insufficient assets to pay wages, leave and redundancy entitlements are protected by a government safety net, the Fair Entitlements Guarantee (FEG). However the FEG does not cover any form of superannuation contributions. The predecessor to FEG, the General Employee Entitlements and Redundancy Scheme, also did not cover unpaid SG, but did fund three months of superannuation contributions.[9]

'Stapling' compounds the risk of unpaid super going undetected and unaddressed, leaving workers worse off in retirement.

Cbus – with an almost 40-year heritage in the building and construction industries – is experienced in identifying and addressing late, under and nonpayment of superannuation entitlements, and in recouping funds owed to members.

We advocated strongly on behalf of the sectors we serve - building, construction and adjacent industries that build and maintain Australia - during the Your Future, Your Super debate in 2021 to raise concern about serious unintended consequences which would arise from stapling.

Australia's default superannuation system has served Australians – and especially those in blue-collar professions – well for over three decades, commencing well before the SG was legislated, with most default members landing in high performing funds, with automatic insurance cover that was tailor made to suit their working circumstances and life trajectory, and unpaid super services which pursue workers' entitlements with vigour.

The Australian National Audit Office (ANAO) noted in their 2015 report entitled Promoting Compliance with Superannuation Guarantee Obligations that "Most industry superannuation funds have well established early intervention strategies to pursue and collect arrears and employ debt collection services, such as the IFCC…. Other funds, such as retail funds, typically leave the monitoring of employer compliance to members."[10]

Stapling compounds the problem of unpaid superannuation in the building and construction industries by introducing the risk that more under and nonpayment will go undetected. Employees of a single employer will likely be in different funds it will become increasingly difficult for their union representatives or funds to identify systemic SG non-compliance. Union delegates and Cbus Workplace Coordinators cannot assist workers on site who are stapled to super funds outside of Cbus. Retail funds and industry funds without specialization in the sector do not send representatives to building sites to support workers to check their super and address nonpayment by their employers. Missing out on that service, when the person working next to you gets it by default, is a perverse outcome.

A simple default super system also empowered unions to bargain for contributions above the SG for many blue-collar workers, contributing significantly to higher balances at retirement.

Changes to the default system should only have been made where they met specific, articulated challenges, were in the interests of fund members and led to demonstrably superior outcomes. Instead, stapling reforms will leave workers financially worse off at retirement.

[9] Overdue: Time for Action On Unpaid Super, Cbus/ISA report December 2016, https://www.cbussuper.com.au/content/dam/cbus/files/news/media-releases/Unpaid-Super-Report-Dec-2016.pdf

[10] Australian National Audit Office (2015), Promoting Compliance with Superannuation Guarantee Obligations, Audit Report No. 39, 2014-15, p60.

Interaction with members' insurance

Non-payment of superannuation for an extended period has an additionally damaging impact on workers in hazardous occupations. Following the passage of the Protecting Your Super legislation in 2019, members lose their default TPD and Death cover if no contributions have been made on their behalf for over 16 months. This can leave members uninsured and unaware of that fact, with potentially tragic consequences for them and their families.

Case study – Loss of insurance due to unpaid superannuation

In 2019, a 38-year-old construction worker and Cbus member tragically fell several storeys to his death on a building site in Sydney's west. The story was covered widely by the media. His young widow, a new migrant to Australia who barely spoke a word of English, was left to care for their very young children without familial or any external financial support.

Cbus' Workplace Coordinator – making enquiries as to whether the man had life insurance through his Cbus membership - quickly discovered that despite working continuously, the member hadn't been paid super for some time, and as a result had appeared 'inactive' to the fund – which triggered the switching off of his insurance per the 'Protecting Your Super' legislation.

Cbus brought this unlawful non-payment of super, which could have had terrible ramifications for the widow, to his employer's attention, and quickly recovered all back pay that was owing. Cbus then negotiated successfully with our insurer to retrospectively reinstate cover for this member and pay out the death claim. The member's widow received an insurance payout and the balance of her late husband's account, which was in much better shape thanks to the coordinator's efforts.