

BCA Submission to Securing Australians' Superannuation consultation paper

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1. Overview

The Business Council of Australia (BCA) welcomes the opportunity to make this submission to the consultation paper on Securing Australians' Superannuation.

The BCA supports the intent behind the government's proposal to legislate for employers to pay their employees' Superannuation Guarantee (SG) contributions at the same time that they pay salary and wages from 1 July 2026.

The proposed measures will ensure more timely payment of superannuation benefits, increasing superannuation balances and retirement benefits. This is particularly important given the increases in the compulsory contribution rate under current legislation, rising to 12 per cent by 1 July 2025. The measures will give employees greater visibility over whether contributions have been paid. Most importantly, they will reduce the exposure of employee superannuation benefits to potential insolvencies, particularly on the part of small business.

Large employers are already overwhelmingly compliant with their SG payment obligations and make payments of superannuation entitlements in a manner generally consistent with the proposed payday super models canvassed in the consultation paper. Most medium to larger size businesses pay superannuation monthly and transitioning to fortnightly payment should not be overly burdensome. The move to payday super will be a much bigger challenge for small to medium size businesses that currently take advantage of the flexibility to pay superannuation entitlements quarterly.

The proposed compliance framework will also create incentives to address some of structural issues with the SG system that are partly responsible for unpaid SG contributions. The transition to payday superannuation is an opportunity to capture efficiencies from aligning superannuation payments with the payment of wages and salaries and improve the efficiency of the payment and reporting of SG contributions. Capturing these efficiencies will also require significant government investment in the automation of payment platforms and better linking administrative data. Changes to the existing payment model should avoid introducing risks and costs for employers who are already payday compliant under the existing framework.

It is important that employer obligations under the proposed framework do not leave them exposed to penalties for circumstances beyond their effective control. This requires clear but flexible definitions around how and when an employer's obligations are met that are consistent with other legislation, including employer obligations under the Fair Work Act. It is also important that the chosen model minimises compliance burdens for employers.

The BCA note that the time given for this consultation is inadequate, a point made by numerous stakeholders, particularly given the proposed measures do not commence until 1 July 2026 and implementing legislation will not be finalised until after the 2024 Budget process. Treasury's impact analysis also notes that 'an extensive post-decision consultation would be required should the recommended options be agreed by Government.'¹ The BCA urges the Government to keep this consultation process open for an additional month. The draft legislation expected to go out for consultation in the September quarter 2024 must include a longer than usual consultation period given the critical importance of this legislation in defining and operationalising the policy options canvassed in this consultation.

2. Key recommendations

- Changes to the existing superannuation payment model should avoid introducing risks and costs for employers who are already largely payday compliant under the existing framework.
- It is important that employer obligations under the proposed models do not leave them exposed to penalties for circumstances beyond their effective control or where penalties are not necessary or

¹ Treasury, 'Unpaid Superannuation Guarantee Package: Impact Analysis,' p. 5.

appropriate. Employer obligations and liabilities should end once payment is sent and not further extend to the time taken for payments to then reach employees' superannuation fund accounts.

- Given the increased timeliness and stronger compliance framework expected from the proposed legislation, there should be a grace period of up to 30 days for employers to make post-payday corrections without penalty, together with greater flexibility in SG charge assessment and remission.
- Any penalties should be proportionate to the offence and should be tax deductible so as not to give rise to a double penalty through the tax system. Penalties should be broadly aligned to civil wage underpayment penalties.
- The administration charge component of the SG charge should not be applied on a per employee basis given that the ATO's administrative costs in relation to underpayment are not proportionate to the number of employees and given the efficiencies expected through further investment in ATO systems under payday super reforms.
- The superannuation payments system should be capable of accommodating multiple payments systems and technologies and should aim to be neutral between these different systems.
- Any new digital ATO platform to confirm employee superannuation fund details must be fit for purpose, be compatible with existing systems and not add unnecessary administration and other costs. Use of the ATO platform should be voluntary.

3. Unpaid superannuation

Under existing legislation, employers are required to pay SG entitlements to an employees' superannuation account on at least a quarterly basis. If an employer does not pay the correct SG amount to an employee's nominated fund by the quarterly due date, they may be liable for the SG charge, consisting of the shortfall amount, plus 10 per cent interest and an administration charge. The ATO then forwards the shortfall amount and nominal interest component to the employee's superannuation fund. The 10 per cent interest rate adequately compensates employees for foregone returns relative to average superannuation fund returns over time.

Analysis based on ATO data indicates that the difference between the amount of SG paid and the amount that should be paid in a fully compliant system was around \$3.6 billion in 2020-21 or 5.1 per cent of the estimated theoretical Super Guarantee liability.² This 'SG gap' has narrowed over time, partly as a result of increased ATO compliance activities.³

The overwhelming majority of unpaid SG entitlements are attributable to micro and small enterprises, particularly where these businesses have become insolvent. In 2022, of the SG charge debt raised against employers by the ATO, \$1.4 billion was owed by micro enterprises with annual turnover of less than \$2 million, around \$0.5 billion was owed by small and medium enterprises (SMEs) with turnover between \$2 million and \$250 million. A further \$1.1 billion of SG charge debt was subject to insolvency.⁴ Large employers are overwhelmingly compliant with their SG obligations and already pay superannuation entitlements at a monthly frequency, with only 13 per cent of government and 15 per cent of large-market employers paying SG quarterly. By contrast, around 69 per cent of micro businesses and 46 per cent of SMEs pay SG entitlements quarterly.⁵

Quarterly payment of superannuation entitlements gives flexibility to small business in managing cash flow, but can be problematic in exposing those entitlements to insolvency risk. Under existing arrangements, employers have 28 days after the end of the quarter for funds to be received by employees' superannuation accounts and

² Australian Taxation Office, 'Tax Gaps,' <https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Tax-gap/Superannuation-guarantee-gap/?anchor=Latestestimatesandtrends#Latestestimatesandtrends>

³ Treasury, 'Unpaid Superannuation Guarantee Package: Impact Analysis,' p. 9.

⁴ Treasury, 'Unpaid Superannuation Guarantee Package: Impact Analysis,' p. 10.

⁵ Treasury, 'Unpaid Superannuation Guarantee Package: Impact Analysis,' p. 27.

an additional 28 days to lodge an SG statement with the ATO, during which time an employer may become insolvent before first being contacted by the ATO about outstanding SG obligations.

The proposed requirement to pay the SG alongside wages will provide employers with a stronger incentive to meet their SG obligations, as the SG charge will accrue more quickly. Payday super will also provide for faster recovery of unpaid SG entitlements, reducing their exposure to insolvency. This in turn should contribute to higher superannuation balances and increased compounding of returns net of any increase in compliance costs passed on to fund members.

4. Defining 'payday'

The consultation paper seeks feedback on two models for aligning the payment of SG entitlements with ordinary time earnings: an 'employer payment' model that would require employers to make payment of the SG contributions on the same day that wages and salaries are paid; and a 'due date' model that requires contributions to be received by the superannuation fund within a certain number of days following 'payday'. The proposed 'payday' would capture every time a payment with an ordinary time earnings (OTE) component is made to an employee. OTE is defined in legislation as 'earnings in respect of ordinary hours of work.'

The proposed definition of payday raises issues due to a lack of alignment with the concept of OTE in the Fair Work Act, which is already a source of confusion and cause for late payment under existing legislation. This is partly attributable to the complexity of the modern award system. Incorrect calculation of super benefits based on confusion around the definition of OTE is already a significant source of payment errors within the super system. Payday super should be seen as an opportunity to achieve better alignment of the payment of OTE and SG contributions. Termination and other extraordinary payments that are not part of the regular pay cycle should be outside of the scope of the definition of payday. The late payment penalty regime needs to be sensitive to ambiguity and disputation on whether particular payments are or are not OTE and employers should not be penalised over legitimate differences in interpretation or for seeking a ruling.

Both proposed models are potentially workable. However, the proposed 'due date' model needs to allow a reasonable period for processing and validating data by payments system providers, which may require employers to re-submit data. The proposed 8-13 days after payday for superannuation contributions to reach the fund is based on an assumption that existing payment processes will be streamlined. However, employer obligations and the associated compliance point should not extend beyond the point at which they no longer have control over the payments process under this model. Employer obligations should end once payment is sent, not when it is received by the superannuation fund. Delays attributable to intermediaries or funds should not give rise to liabilities or penalties for employers. Improved information flows between employers and funds would help employers address issues of under-payment in a more timely manner.

Given the increased timeliness and stronger compliance framework expected from the proposed legislation, a longer period of 20 days for SG contributions to reach the fund would still allow the proposed changes to achieve the government's policy intent, without exposing employers to potential penalties for payment issues outside their control attributable to either intermediaries or super funds or increasing risks to superannuation entitlements. This is consistent with the consultation's suggested grace period for the resolution of errors in payment. There would still be an expectation that the overwhelming majority of payments by employers will be made in the 3-4 day period facilitated by new payment platforms and within which most larger employers already meet their obligations.

5. Flexibility in SG penalties, charge assessment and remission

The SG charge penalty regime leaves employers potentially exposed to issues outside their control arising from inadequate messaging and information flows between employers and funds and the rejection of payments. A grace period of up to 30 days for employers to make post pay corrections without penalty is appropriate and would have the advantage of reducing the ATO's enforcement efforts by focusing on repeated carelessness or intentional underpayment rather than unintentional errors. Any penalties should be proportionate to the offence and should be tax deductible so as not to give rise to a double penalty through the tax system. Penalties should be broadly aligned to civil wage underpayment penalties.

It should be possible for an employer to pursue a legitimate superannuation dispute without falling foul of sanctions against late payments. There should be a flexible approach where a superannuation ruling is being sought, where an employer is seeking legal advice on the application of the SG to particular payments, or where there is some disputation or exchange between an employer and the ATO or a fund, and the employer maintains superannuation is not payable.

The administration charge component should not be applied on a per employee basis given that the ATO's administrative costs in relation to underpayments are not proportionate to the number of employees and given the efficiencies envisaged through further investment in ATO systems envisaged under payday super.

The ATO should allow greater flexibility to remit the SG charge where employers do not meet their obligations due to circumstances beyond their control. This can include, but is not limited to, natural disasters that impact normal payroll operations that prevent both wages and superannuation entitlements from being paid or where employees have not supplied fund details or have supplied incorrect fund details to their employer.

Given the shift to a payday super model and a stronger overall compliance framework, greater flexibility in charge remission should be possible without threatening the integrity of the system or employee entitlements.

6. Choice of fund, stapling and onboarding

Under existing arrangements, some employers are seeking to avoid the administrative burdens associated with stapling by requiring employees to actively choose a fund during onboarding. Employers are currently unable to access details of an employee's superannuation account without the ATO first establishing that an employment relationship exists. This in turn can give rise to delays in payment of superannuation entitlements and potential penalties due to factors outside the employer's control. Onboarding platforms will also present employees with information about default offerings, including firm-specific benefits and insurance offers large employers have negotiated with funds.

The superannuation system should be capable of accommodating multiple payments systems and technologies and should aim to be neutral between these different systems. The BCA does not oppose the consultation paper's proposal for a new digital ATO service that employees and employers could use to confirm superannuation fund details, including retrieval of stapled fund details, and to satisfy choice of fund requirements. This could include a requirement for employers to offer stapling as one option for employees during onboarding. This would support the policy intent behind existing stapling arrangements by preventing unnecessary churn in funds and a proliferation of member accounts, while still facilitating member choice. Onboarding platforms should facilitate access to the full range of options under existing choice of fund requirements and should strive to be neutral between these options from the perspective of the employee.

Any new ATO digital platform must be fit for purpose, be compatible with existing systems and not add unnecessary administration and other costs. Use of the platform should be voluntary.

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