

3 November 2023

Ms Wendy Hau, Director
Superannuation Access and Compliance Unit
Retirement, Advice and Investment Division
The Treasury
Langton Crescent
Parkes ACT 2600
Sent via email: paydaysuper@treasury.gov.au

Dear Ms Hau

We are pleased to provide our feedback in response to the consultation paper, "*Securing Australians' Superannuation – Budget 2023-24*".

We have provided brief comments in relation to the questions for consultation. We support the process of reforming the superannuation guarantee contribution timing requirements to provide better outcomes for employees, while noting the objective of maximising clarity for employers and avoiding unintended costs or overly onerous requirements.

We recommend that the introduction of Payday Super legislation is accompanied by a broader review of superannuation guarantee legislation to address complexities and areas of practical concern that are likely to be exacerbated by the requirement to make contributions on a more timely basis.

We look forward to continuing to be involved in the consultation process as these measures progress.

If you have any questions, please contact Tanya Ross Jones on 08 9429 2249 or Marnie Taylor on 02 9248 5671.

Yours sincerely

Ernst & Young

Appendix A

Comments on consultation questions

1. What implementation issues could arise if 'payday' is defined as being each time a payment is made to an employee with an OTE component?

The superannuation guarantee regime has been in place since 1992 on a quarterly basis. Employers are accustomed to having an entire quarter and the 28 days thereafter to reconcile payments. While it is customary for large employers to actually facilitate superannuation contributions simultaneously with other payroll payments, the complexity of the system means it is helpful to have additional time to ensure all considerations are addressed.

The change to payday obligations for superannuation contributions is significant. We suggest that this transition and the ongoing application of an effective system would be best supported if the new regime permits some leeway after payment date for contributions to occur. Therefore, we do not support payday as the default payment date.

2. What implementation issues could arise when more regular SG payments are mandated?

As above, we consider there should be a reasonable allowance of time for to allow employers to deal with the administration associated with payments. The use of clearing houses as is required by legislation inherently slows down the process. The prevalence of changes in superannuation fund details and delays in employees providing these details is also a practical obstacle to timely compliance.

It is not uncommon for payments to be rejected and need to be resubmitted. Furthermore, it is very common in payroll arrangements for there to be adjustments to payments, overpayments and back payments, which are more complex to rectify when superannuation guarantee is associated with each payment. It is therefore important to have sufficient time to allow the administrative arrangements to be made and for reconciliations to occur.

3. Are there any advantages or disadvantages with the requirements of payday super being fulfilled if employers make the payment of SG contributions on payday (the employer payment model)?

As above, we do not consider a payday model allows sufficient time for employers to deal with administrative and payroll operational complexities.

4. Are there any advantages or disadvantages with the requirements of payday super being fulfilled if the employee's superannuation fund has received employer contributions a certain number of days after payday (i.e. the due date model)?

We support the due date model, provided a sufficient number of days is allowed to recognise the potential for payments to be rejected and to allow a reasonable time for reconciliations addressing more complex matters, such as exclusions from OTE and application of the maximum contribution base.

5. Should there be a standardised due date for SG contributions depending on different pay cycles, independent of the frequency to when salary and wages are paid?

A standardised due date across the board e.g. 28 days after month end, based on month of payment irrespective of pay frequency, is preferred to provide the maximum clarity. We are aware of a number of employers who already take this approach.

Multiple or differential deadlines risk creating confusion and uncertainty, acknowledging that payrolls with multiple pay frequency require additional time.

6. Would requiring a new reporting mechanism for employers under an employer payment model to the ATO on payday increase compliance burden?

The compliance burden will increase due to the need to report in-period payments, as opposed to the Single Touch Payroll (STP) regime which reports on a year-to-date basis. While payroll solutions already inherently utilise this data, complexities can arise from payment adjustments arising from timesheet changes, late notifications of changes in employee status or terms, which results in amendments to payments. These are readily encompassed in STP reporting of year-to-date totals and the associated superannuation guarantee implications can be managed via quarterly reconciliations, but a payday reporting system where the data is used within a reasonably short time by the ATO to prompt enquiries increases the onus to minimise adjustments.

We consider this additional reporting to be quite a significant change and recommend that plenty of time is allowed in transition. Employers have made significant investments in payroll in the course of the introduction of STP across both phases. Payroll departments of large employers in particular are often under-resourced and dealing with multiple regulatory challenges. For small employers the burden of real-time reporting is also significant.

7. How would intermediaries continue to be incentivized to expedite the processing of employer contributions under an employment payment model?

In practice it is very difficult to govern the processing by intermediaries. It would be preferred to allow leeway in the system rather than seeking to either incentivize or penalise the intermediary or employer, noting that the matters which create delays are often outside the control of either party. Employee changes to superannuation accounts are a common example of a factor that creates processing issues at no fault of the employer or intermediary.

8. Given reduced payment processing times facilitated by modern payment platforms, is a due date of three days after payday for superannuation contributions under a due date model visible? What would prevent this time frame?

We consider a due date should be at least seven days and ideally ten days after payday to ensure that the type of issues which create delays can be addressed. Three days after payday would be manifestly insufficient in any instance where a delay requires contacting the employee for further information and instructions. We strongly believe the new system should be designed with reasonable buffers in place to promote compliance.

Due to the particular challenges with obtaining fund details for new employees, we recommend additional leeway be provided for a period of at least one month after a new employee's commencement date.

9. What impact would shorter payment timeframes have on clearing houses and other financial intermediaries that facilitate the payment of superannuation contributions to funds?

Shorter time frames will place such intermediaries under considerable pressure. While such intermediaries are already accustomed to processing large volumes of payments at similar timeframes, the quarterly regime which allows a further 28 days after the end of the quarter means that there is usually ample time to address discrepancies. In the absence of this leeway, and with obligations arising for many employers at the same time each pay cycle, the scope for errors and further delays increases.

10. Would shorter payment timeframes require regulation of these financial intermediaries to ensure payment timeframes are met?

Yes, it is likely that additional regulation would be required on the basis that contractual arrangements between employers and these entities would be insufficient to ensure the intermediaries are accountable for accelerated performance.

11. How can the payday super model be designed to ensure it can adapt to changes and innovations in payment and data platforms?

One model that may facilitate this is the allowance of Commissioner's discretion to create administrative instruments to administer detailed compliance matters. This is similar to the approach already taken in STP. However, we highlight that certainty and clarity are best supported where any changes and developments are subject to a transition period with consultation beforehand.

12. What are the benefits or risks associated with allowing multiple payment methods and how might this affect payments processing for clearing houses and superannuation funds? Would there be benefit or risks in only allowing one payment platform (such as the NPP)?

We are unable to comment on this.

13. What is the appropriate timeframe for ATO reconciliations? For example, fortnightly or monthly? Should the timeframe differ depending on the frequency of payday or would a standard timeframe be more appropriate?

Provided the ATO reconciliations first prompt a nudge rather than an assessment, an appropriate time frame should allow at least one month, up to a maximum of three months. This both provides sufficient time for any clarifications to occur, but also gives employers some reassurance that periods do not remain essentially open for review for a prolonged period before an inquiry may be made.

14. Should there be a mechanism whereby employers can pay SG charge they know they have accrued, prior to the reconciliations and assessments being issued? How should this occur?

Yes, there should be a mechanism to allow this. At a high level, this could potentially be allowed prior to the end of the period for the ATO reconciliation. An additional reporting field could highlight that this is the nature of the contribution and it would assist if a full SG disclosure was not required in this instance, as this can significantly prolong the rectification process.

15. Should the LPO and carry forward of late payments remain a feature of the SG compliance system in a payday super model? Could an alternate system be adopted whereby late payments apply retrospectively to the earliest period outstanding?

It is crucial that there is a means to apply late payments. The retrospective application of a late payment to the earliest period outstanding would be a helpful simplification. We consider the inclusion of appropriate leeway to catch up contributions an essential part of the development of Payday Super rules, acknowledging that under the current system there is sometimes a permissible lag of up to as much as four months if an employer chose to make all contributions for a quarter only at the deadline of 28 days after the end of the quarter.

16. Should late SG contributions be tax deductible under certain circumstances, for example when an employer amends the SG charge before it is assessed by the ATO?

Yes we consider late contributions should be deductible in these circumstances. This provides reasonable acknowledgement that employers are making their best efforts. In the absence of the leeway provided by a deadline of 28 days after the end of the quarter, it would really not be appropriate to penalise employers in the way that making the charge non-deductible does.

17. What kind of prompts or nudges could be provided to employers to be aware of and meet their SG obligations on time?

We do not consider routine reminders to be very effective in this regard. What would be most useful is notice where the ATO has identified a discrepancy so that this can be investigated and addressed as required, but we stress that penalties should not be imposed as a consequence of any first contact by the ATO.

18. Are there more appropriate incentives outside of the LPO to encourage employers to pay SG in a timely manner?

Where an employer has a good history of compliance with superannuation guarantee obligations this should be taken into account in allowing offsets to be recognised and reducing potential penalties. That is, employers should be rewarded for ongoing good compliance rather than immediately penalised for errors where these are unintentional and relatively rare.

19. Would changes to the SG charge be required to ensure the charge remains adequately punitive for non-compliant employers?

We do not consider any significant changes required to make the SG charge adequately punitive on the basis that it is already very punitive. The cost to the employer compounds based on the various elements of the charge and the directors face the risk of personal liability. Rather, consideration should be given to whether the respective elements are appropriate when the safeguard of more frequent payment and ATO monitoring are introduced.

Where a genuine shortfall scenario arises, the SG shortfall provides a significant penalty and disincentive. However, the change in regime will likely highlight transitional, timing and administrative shortcomings of a nature that have not been encountered by employers historically. For this reason, we consider it necessary to amend the SG shortfall regime in line with acceptable relaxation of timing so that there is not an immediate imposition of SG shortfall penalties from the revised payment due date.

20. Does the current nominal interest rate of 10 per cent per annum adequately compensate employees for the foregone interest that would have accrued in the fund had their super been paid on time?

We consider the nominal rate of 10% is adequate. Over the last 30 years this has generally exceeded average rates of return in superannuation funds and exceeds the average annual return of 7.7%¹. On the basis that it would be inappropriate for an employee to receive a lesser return and that by design there is an element of penalising employers for making contributions late, it is still considered appropriate to retain the rate of 10%. We do not consider that it would be appropriate to increase it.

An alternative approach may be for an annual rate to be updated each year and indexed to reflect inflation. The annual rate could more closely mirror actual returns of superannuation funds, with an

¹ [Super fund performance over 31 financial years \(to June 2023\) \(superguide.com.au\)](https://www.superguide.com.au/super-fund-performance-over-31-financial-years-to-june-2023)

appropriate uplift to provide a financial disincentive to employers to delay contributions. However, it does assist in the simplicity of shortfall calculations to have a fixed interest rate, so this is preferred.

21. Does a nominal interest charge of 10 per cent per annum remain appropriate in a payday super model? Or are there alternative models that could address different degrees or severity of lateness?

On the basis that the 10% rate is, on balance, appropriate, we do not consider it necessary to provide alternative models, for example differential rates that would address degrees of severity or lightness. These matters are better addressed by a more fit for purpose penalty regime, without creating additional complexities.

22. How should the administrative component of the charge apply? Is per employee, per ATO reconciliation period appropriate, considering your responses above to the appropriate timeframes for ATO reconciliations?

We consider the administrative component would be better determined as a proportion of the total shortfall rather than on a per employee, per ATO reconciliation period basis. We have experienced many examples where the administrative component actually exceeds the majority of the shortfalls paid to employees.

On the basis that payday super is likely to bring forward the identification of small shortfalls, a similar administrative charge per instance and employee could accumulate to a very significant degree. This would particularly disadvantage small businesses who may face more difficulties with compliance. We strongly recommend reconsidering the basis for applying the administrative component. We also consider it inappropriate for an administrative component to apply where delays are beyond the employer's control. Delays in employees providing fund details are a frequent example of this.

23. Should the amount of the administrative component of the charge be changed? If so, what is the appropriate amount, and why?

As outlined above we do not consider the current charge appropriate. We would prefer that it is not imposed on a per instance basis but if it was, suggest that the charge would be more appropriately set at \$10 or less.

24. Given that the current SG charge is not tax deductible, are there any circumstances where a non-compliant employer should be able to make a tax deduction for the SG charge paid?

We consider non-deductibility only an appropriate outcome where there is an element of intent or foreseeability in the failure to comply. In a voluntary disclosure situation which involves complexity and reasonable grounds for the shortfall having arisen, the additional cost of non-deductibility seems excessive.

We recommend aligning deductibility with a new penalty regime that address matters such as the taxpayers history of compliance, whether there is a good argument for the technical basis for non-compliance, and any other relevant matters.

25. Are there any other changes to the components of the SG charge that should be considered in the move to a payday super model, in the context of the purpose of the charge? For example, should the punitive aspects of the charge be more proportionate to the size of the non-compliance (that is, the size of the debt)?

Yes, as outlined above, we support a model that aligns the punitive aspects of the charge more closely to the size of the debt and the nature of the non-compliance. We particularly recommend a close reconsideration of how and when penalties are imposed, on the basis that shortfalls will be captured sooner and more frequently. Where little or no ATO effort is required to secure the settlement of a shortfall and where the employer has not made a reasonably foreseeable error, penalties should not apply.

26. What should ‘additional behavioural penalties’ look like in a payday super model?

Additional behavioural penalties could include the need for responsible executives or directors to attend education sessions.

27. Would granting the ATO flexibility to remit the SG charge in certain circumstances on the part of the employer risk the integrity of the SG charge?

We support the ATO having the flexibility to remit the SG charge in certain circumstances.

28. If you consider that the ATO should have some discretion to remit the charge, under what discrete circumstances should this be able to occur?

This would be appropriate to acknowledge the complexity of the regime and the many and varied circumstances in which employers may unintentionally failed to comply. It also acknowledges situations such as those where an individual has not expected contributions and has made arrangements on their own behalf.

29. Should any discretion to remit the SG charge apply to the entire amount due or only to certain components? For example, scope could be given to the ATO to remit the nominal interest and administrative components of the SG charge but not the SG shortfall.

We support the ATO having discretion to remit all components of the SG charge. This is appropriate for the reasons outlined above, whereby aspects such as the administrative charge arise despite no fault of the employer, outweigh the primary shortfall or the interest element is very much in excess of market returns, thereby acting to unjustly penalise the employer.

30. Would it be appropriate for the ATO to have discretion to extend the due date for the SG charge? If so, in what circumstances would this be appropriate? Further, what would be an appropriate time period for any extension? Should there be a limit on this?

It may be appropriate for the ATO to have this discretion in circumstances where the delay in payment is not in relation to a routine or foreseeable matter. We would support the ATO being able to extend the due date by up to 60-90 days.

31. Should employers be allowed to make ‘catch-up’ contributions due to errors?

Yes, where the error is due to a matter that could not reasonably be anticipated it would be reasonable to allow catch up contributions to be made.

32. What would be a reasonable time period to allow employers to make ‘catch up’ contributions that aligns with the intent to pay superannuation alongside wages? Should this time period differ depending on payday frequency?

We do not consider that the time period needs to differ depending on payday frequency. It would be reasonable to allow catch up contributions for up to three months.

33. What are the challenges in correcting SG payments under a payday model? Is this an efficient way for employers to make corrections? Should error messages be standardised across funds?

The challenges in correcting SG payments largely relate to the relatively high costs that arise automatically in relation to potentially quite small shortfalls and the inherent nature of payroll involving many adjustments. For this reason, we consider there needs to be a mechanism to make corrections, particularly for small amounts or complex matters. The additional flexibility should provide latitude in relation to small amounts, administrative issues and acting on a reasonable basis.

34. Is the 20 business day time period for superannuation funds to resolve errors appropriate in a payday super model? Policy considerations: Securing Australians’ Superannuation package | 20

We are unable to comment on this.

35. Under a ‘due date’ model, would it be appropriate for a period of grace to apply after the due date for SG contributions? If so, should the grace period apply automatically? Or should it be applied at the ATO’s discretion in certain limited circumstances?

Yes it would be appropriate for a period of grace to apply after the due date. We suggest it would make sense for this to apply automatically to avoid the need to approach the ATO to seek resolution which slows down the process further and may not be necessary for smaller matters.

36. Would a digital ATO service simplify the choice of fund process and assist employees and employers to confirm the right super details? What functionality would be required? Would this 1 Review of Your Future, Your Super Measures, Treasury: <https://treasury.gov.au/consultation/c2022-313936> Policy considerations: Securing Australians’ Superannuation package | 21 address issues with data integrity under a payday super model? Should such a service be mandated?

We do not consider that mandating an ATO digital service is essential at this point. However, if available, this would be helpful to simplify the choice of fund process and confirm super details.

37. What are the costs and benefits of requiring employers to offer stapling to employees? Are there other changes that could be made to the choice of fund process? Could a digital ATO service reduce the administrative burden associated with stapling?

Stapling can add additional steps in the onboarding process and result in delays where records are not up to date. However, on balance it is helpful for employees to have stapled funds. While in ATO digital service may assist to reduce this burden, we do not see this as a high priority but potentially a medium-term objective.

38. What are the costs and benefits of a ban on advertising super products during onboarding?

We have no comment on this.

39. How could a smooth transition be managed to aligning STP, SuperStream, MAAS and MATS reporting, either through changing the reporting requirements to year-to-date values or transaction-based reports?

STP and SuperStream reporting could be more readily integrated to leverage the same solutions. A change to transaction-based reports would be required to align the two.

40. How could a smooth transition be managed if additional fields in reporting are made mandatory?

The inclusion of additional fields could be made optional for an extended period before becoming mandatory in order to test systems and highlight potential issues. For this reason, it is recommended that there is a long transition prior to the commencement of the rules where the new requirements in full detail have been completely released and can be introduced and tested. This will be an important part of the transition.

41. Should a new unique identifier be included as a mandatory field in STP, SuperStream, and MATS which links employers, employees, and transactions?

The inclusion of a new identifier or another process to enable the linking of the data reported through these different avenues would be appropriate. Ideally consideration would be given to aligning the underlying reporting processes, which in substance are generated from the same payroll data, so that payroll solutions can simultaneously report for each purpose and that this reporting is carried through by superannuation funds and intermediaries.

42. Are there any issues or consequences with including an employer's SG liability and OTE as a mandatory, rather than optional field in STP reporting?

We agree it would be appropriate for these fields to be mandatory under payday super.

43. What is the best mechanism to avoid disadvantaging employees who would reach the concessional contributions cap in 2026-27 due to the accounting of SG contributions in the year the policy commences?

The fairest approach would be to increase the concessional contributions cap in acknowledgment of the change in law creating distortions otherwise.

44. On what period should the maximum superannuation contribution base be calculated in a payday super model? Would there be issues if it remained a quarterly calculation? Are there any other mechanisms that could help prevent employers paying over the concessional contributions cap for employees?

A quarterly maximum contribution base (MCB) calculation may be problematic under a payday model due to assumptions that are made about whether ongoing earnings will reach the quarterly threshold. For example, some employers apply a pro-rata MCB corresponding to their payroll frequency. It is possible to do this when there is still scope to reconcile on a quarterly basis.

In payday super it will not be possible to do this in the same way and therefore a new model will be required that better aligns with the requirement to make contributions at the time of payment. To make this more practical, they would need to still be a reconciliation period allowed for a reasonable time beyond the payment deadline. As noted above, a primary payment deadline with a further period for reconciliations and adjustments is recommended.

45. Are there any other changes that will be required for defined benefit members?

Modifications will be required for defined benefit members because contributions are calculated in a different manner and in some instances would not be required even though salary or wage payments having made.

It would be helpful to be able to distinguish defined benefit members in STP reporting so that contributions not aligning with SG accumulation fund rules do not trigger discrepancies with the ATO.

46. Should there be any changes to the reporting frameworks for SMSFs and/or Defined Benefit funds to the ATO?

We do not believe changes are required.

47. Are there any other changes that will be required for self-managed superannuation fund members?

We do not believe changes are required and agree with the noted comments that such members usually retain a high degree of oversight over the funds.

48. Are there any other impacts on stakeholders or considerations Government should consider in policy design?

The burden on employers to comply with a very broad range of reporting and payment obligations in a timely and accurate manner is considerable. This includes STP, SuperStream and Fair Work obligations. We urge that in the process of development of Payday Super rules, due consideration is given to how the objective of promoting compliance and achieving good outcomes for employees can be balanced with the many pressures faced by payroll departments and those overseeing them. This is a significant concern not just for payroll departments but for the broader business, with large employers facing severe challenges in being compliant across all areas even when making very considerable investments in systems and risk management.

For this reason, it is important that the new measures, as they are designed remain subject to further review and consultation and that the finalised version is available with a long lead time before introduction so that updates can be made, planning occurs, and simultaneous changes are executed with time to test.

49. What further changes would be required under the current rules to allow employers to meet payday super requirements?

As a very significant change to the superannuation guarantee regime, we recommend that the introduction of payday super should not be done in isolation from the broader superannuation guarantee legislation and system. It would be opportune to address several other matters that create complexity as these in turn create some of the issues that are likely to be encountered and potentially exacerbated under a payday model.

This includes some of the complexities around deeming of employment for contractors, superannuation obligations in relation to short term expatriates and classification of certain bonuses as OTE. We urge the consideration of a principled review of the superannuation guarantee regime as well as the timing and penalty regime.