

Submission

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The Treasury

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Dear Ms Hau

Re: Securing Australians' superannuation

Following my submission to "Securing Australian's superannuation"

Kind regards

David Morrison

INTRODUCTION

1. Thank you for your invitation to make a submission to this Inquiry. Note for completeness that I attended the Payday Super Roundtable 19 October 2023; also, my submissions and papers on wage theft.¹
2. Notwithstanding its somewhat dramatic offshore-sourced name,² wage theft has been taken up as a union-based workers' cause and the leading stakeholders for change have tended to come at the problem from an industrial law perspective, or more broadly, as a case of workers' rights. While there is no quarrel with the idea that the issue has caused a great deal of hardship for certain kinds of work and workers, it is the case that wage theft, is a complex and nuanced problem, arising in a variety of circumstances and resulting in an array of outcomes.
3. Therefore, the better view is that wage theft is not as simplistic as it is popularly presented, namely an employer purposefully depriving its employees of their earned entitlements, although in its most egregious form, it includes same.
4. Further, in response to some of the comments made at the Roundtable meeting in October, wage theft per se, does not represent an opportunity for stakeholders to assert greater Superannuation Guarantee ("SG") entitlement, the inquiry is directed to whether the phenomenon might be lessened by a payday approach to employee superannuation entitlement.
5. Finally, a significant proportion of Australian workers are organised or choose to present themselves as being contractors rather than as employees, often because of pressure imposed by head contractors, typical in the building and allied trades. SG payments are not typically made for contractors. Whether a person is truly a contractor or rather ought to be treated as an employee, (a matter of Australian Taxation Office ("ATO") governance), is understood but has not been rectified

¹ Morrison, D "Submission, Inquiry into wage theft in Queensland" Education, Employment, and Small Business Committee, Queensland Government, (2018); Morrison, D "Further Submission, Inquiry into wage theft in Queensland" Education, Employment, and Small Business Committee, Queensland Government, (2020); Morrison, D "Wage Theft and its relation to phoenixing", *ROCIT Roundtable*, Adelaide (2020); Morrison, D "Wage theft: addressing its extraordinary impact, ARC DP23 Application (2022); Morrison, D "Wage Theft and Insolvency: A familiar problem 30 *Insolvency Law Review* 209 (2022); Morrison, D "Insolvency and Wage Theft: A complex and significant problem, ARC DP24 Application (2023).

² City of San Francisco "Wage Theft Task Force Final Report" California (2013).

because the scale of such activity is large and complex and includes the apparently “unresolvable” and ongoing phoenix as a business model Australian problem.³

6. The shortfall arising in SG contributions reported in your consultation paper⁴ does not take the contractor versus employee data into account and it is suggested that it is greater in sum than that of unpaid SG for those identifying as employees and far greater if one removes genuine business failure, (as distinct from phoenix company operations).⁵
7. The view of Treasury as to the purpose of Payday Super includes “**Proactive compliance** undertaken by the ATO”.⁶ This must be viewed through the lens of how the ATO currently collects revenue and deals with “late payers”, often people and businesses using the ATO as a source of finance, en route to bankruptcy or insolvency.
8. One issue apparently not addressed, and my apologies if misunderstood, is the role of Treasury in determining the extent that the ATO pursue collection of revenue and associated shortfalls in economic times where too much of a push for enforcement might have an unacceptable adverse impact on the state of the economy, the Global Financial Crisis being an extreme example. It is unclear how this mechanism will operate, however hopefully in the case of SG, it will exclude the opportunity of “payment arrangements” made between the ATO and taxpayers, as is the case re income tax.
9. Such arrangements do not constitute the creation of a new debt and where the taxpayer does not meet those arrangements, that constitutes a breach of the payment arrangement per se. This is a matter that requires further consideration.

³ Note the way that the market for or concept of “employment” differs as between countries and changes over time, see International Labour Organisation “Non-standard employment around the world: Understanding challenges, shaping prospects” International Labour Office, Geneva (2016).

⁴ The Treasury “Securing Australians’ Superannuation, Budget 2023-24”, Consultation paper, Australian Government (October 2023) (“Treasury consultation paper”).

⁵ Morrison, D “Wage Theft and Insolvency: A familiar problem 30 *Insolvency Law Review* 209 (2022). Shortfalls identified in The Treasury “Securing Australians’ Superannuation, Budget 2023-24”, Consultation paper, Australian Government (October 2023), pages 6-7.

⁶ The Treasury, “Payday Superannuation”, Roundtable presentation paper, Australian Government (October 2023), page 5.

AN EXAMPLE

10. Assume a simple case, where an employer A, has one employee, B, who is paid above award wages with no complications (no overtime or shift work or complex award structure). B's wages are \$1,000 per week and A must cover for B, various costs, for example B costs A wages + SG + compliance with other government laws including workplace health and safety and payroll tax. Let's say that is around 40%. So, B's cost to A is \$1,400 per week.
11. In ideal circumstances, A understands that the cost of B is not \$1,000, but rather \$1,400 and before A employs B, A ensures (either personally or via an accountant), that A can "afford" B.
12. A could, in theory at least, put aside \$1,400 per week into a suspense account that is then disbursed in accordance with A's employer obligations. An amount, say \$750 directly to the employee's personal account as net wages after Pay As You Go (PAYG) is deducted, an amount to the State for Payroll Tax, the SG to the ATO, the withholding tax to the ATO and so forth.⁷
13. That is the ideal position and if followed results in no default or delay.
14. Practically and for a variety of reasons, such an ideal state is not possible for many employment circumstances, nonetheless it appears to be an ideal embedded in the notion of payday super and, as such, impacts adversely on the 'sovereignty' of the taxpayer to determine their position in complying with the law. If I am wrong about that then at the least, the move to payday super, a move akin to single touch payroll recommendations, seems in part a response to the various regulators being unable to effectively enforce the law, their default giving rise to phoenixing and wage theft per se.⁸ It is however, a complex matter, one that will not be resolved by simply pointing the finger at the ATO.⁹ It requires funding and consistent application of principle.¹⁰

⁷ Other than the initial earning of receipts by A and holding a bank account controlled by A, the disbursements and timing of same could be alienated from A via Blockchain and executed seamlessly to the nominated recipients.

⁸ Superannuation Guarantee Cross Agency Working Group "Superannuation Guarantee Non-compliance: A report to the Minister for Revenue and Financial Services", Australian Government (2017).

⁹ For example, with respect to non-reporting or delays or lags in reporting due to different reporting dates. See Inspector-General of Taxation "Submission to the Inquiry into Superannuation Guarantee non-payment", Australian Government (2017).

¹⁰ Senate Standing Committee on Economics "Superbad – Wage theft and non-compliance of the Superannuation Guarantee", Australian Government (2017), that included recommendations to require that the SG be paid monthly and to align with regular pay cycles, to extend Single Touch Payroll to all businesses, and to review the ATO's resources to ensure it is an effective regulator and compliance officer.

15. It is possible however that the increase in payment frequency of superannuation “to align with the payment of salary and wages” will increase the opportunity for employee “visibility” for those interested and aware,¹¹ and in the case of all currently viewed as employees will result, providing the superannuation funds also strictly comply, in an increase to compounded returns.¹² It will be necessary for fund audits to ensure that this in fact occurs in the same matter and pace as anticipated by the government and for those requirements to be made clear to the fund managers and trustees.
16. It is also possible that the ATO might be facilitated in an earlier detection of unpaid SG, however it is by no means proven that the “likelihood of the ATO being able to recover unpaid SG through earlier detection and compliance action” will result.¹³
17. It is difficult to imagine that the difficulties set out at paragraphs 5, 7 and 14 above will be resolved by an Australian Government commitment to legislate “for employers to pay their employees’ SG contributions at the same time that they pay salary and wages SG charge” [sic]¹⁴ and further that this will be law from 1 July 2026. Making it so will not resolve the myriad issues around non-payment prevalence. The best way to determine a realistic date is to test the proposals (paragraph 44 *infra*).

PAYDAY SUPER

18. Consultation question one: *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 easiest way to ensure that SG is paid is via the example (at paragraph 10) set out, however it cannot be implemented at present because there is so much variability in practice. The difficulty arises, in part, as to what constitutes OTE, and whether employers understand and apply it sufficiently for the additional payday requirement to be added to their SG responsibilities.
19. Consultation question two: *What implementation issues could arise when more regular SG payments are mandated?* It will be necessary to consider lenience for a period on the levying of the SG Charge for non-compliance. I agree with the intent of the updated SG Charge being based on ensuring employees are compensated without

¹¹ Treasury consultation paper, page 7.

¹² Morrison, D “Wage Theft and Insolvency: A familiar problem 30 *Insolvency Law Review* 209 (2022), page 212.

¹³ Treasury consultation paper, page 7.

¹⁴ Treasury consultation paper, page 7.

overly penalising mostly compliant employers and will facilitate the cooperation of most Australian taxpaying employers. It is important that no general discretion around the SG be given to the ATO at this stage since it complicates the issue, including those referred to at paragraphs 7-9 above.

THE SG CHARGE

20. Consultation question three: *Are there any advantages or disadvantages with the requirements of payday super being fulfilled if employers make the payment of SG contributions on 'payday' (i.e. the employer payment model)?* If sufficient time and assistance is given to employers to understand and implement payday contributions, then there is no reason why the SG payment (along with PAYG withheld) is not sent on the day the employee is paid. If for whatever reason that cannot be so, then the SG payment ought to be able to be made very shortly thereafter (unless the employer is insolvent). That said, when Business Activity Statements were introduced for the reporting and collection of the Goods and Services Tax ("GST") in Australia, one might have been forgiven for thinking that increased reporting and compliance around the GST and reporting of income and expenditure in advance of an income tax return might have resulted in taxpayers being more compliant in the payment of their income tax. It is not clear that this was the result, nor is it clear that the advent of the Business Activity Statement resulted in the ATO being able to engage in more timely noncompliance activity. The key is that system changes require increased support to the agencies responsible, in this case the ATO, lest they are burdened by the change. It is likely that employees of larger companies are paid on different days and via different awards and means (such as non-award salaries) and it might be necessary to contemplate that provided those employers are tax compliant that an end of month payment is more realistic. Without any evidence to the contrary, it does not seem appropriate to require employers to standardise paydays across organisations.
21. Consultation question four: *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)?* See paragraph 20, otherwise unsure of question's purpose, other than agreement with an incentive-based payment model. A reasonable due date with large-scale tax-compliant enterprises is end of month, it is somewhat arbitrary, however for these kinds of enterprises the compliance costs of remitting

superannuation weekly, fortnightly, and monthly are high, unless and until it can be automated as suggested at paragraph 12 (footnote 6). If consultation has yielded a result of 8-13 days after payday, then that is superior to monthly, but only if non-compliance is monitored and acted upon. It is unlikely that a week is required for smaller sized and more simply structured businesses, although other contributions may provide evidence to the contrary specific to them.

22. Consultation question five: *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?* See responses at paragraphs 20-21.
23. Consultation question six: *Would requiring a new reporting mechanism for employers under an employer payment model to the ATO on payday increase compliance burden?* Yes.
24. Consultation question seven: *How would intermediaries continue to be incentivised to expedite the processing of employer contributions under an employment payment model?* If by “intermediary” you mean a third party contracted by the employer to handle transactions on their behalf, and presuming that they are not already a risk to the collection of SG, *Plutus* notwithstanding, then reporting by the employer to both the ATO and the superannuation fund is sufficient because if the latter two do not receive and ignore the lack of receipt then a simple legislative fix to make all parties liable will provide adequate incentive to process diligently. After all, there are no technological difficulties in achieving expedition of contributions transfers, although inquiry might be made as to whether intermediaries might seek to pass on additional costs due to these changes to employers or superannuation funds.
25. Consultation question eight: *Given reduced payment processing times facilitated by modern payment platforms, is a due date of 3 days after payday for superannuation contributions under a due date model feasible? What would prevent this timeframe?* It is feasible, subject to difficulties in organisations moving from their current arrangements to those required by Treasury.
26. Consultation question nine: *What impact would shorter payment timeframes have on clearing houses and other financial intermediaries that facilitate the payment of superannuation contributions to funds?* Cannot determine.
27. Consultation question ten: *Would shorter payment timeframes require regulation of these financial intermediaries to ensure payment timeframes are met?* Suggest direct consultation with bank and non-bank financial intermediaries is necessary, along with

the gathering of data for smaller operators and their record to date within the payments system. Also suggest consulting the Australian Financial Complaints Authority for assistance with data and complaints, noting further that they fielded some 7,000 superannuation related complaints in the year ended June 2023.

28. Consultation question eleven: *How can the payday super model be designed to ensure it can adapt to changes and innovations in payment and data platforms?* Suggest contact with ATO and Treasury as to how this has been handled previously as well as State and Territory Treasury offices. It is important to be careful and possibly to legislate for, and regularly audit, smaller providers in this space.
29. Consultation question twelve: *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)?* Given the expertise at the October virtual Roundtable, this is a question best directed to others. One observation more generally is that the simpler the system the better and it is suggested that the more consistently requirements are applied to stakeholders, the more effective the compliance outcome is likely to be.

COMPLIANCE MECHANISMS

30. Consultation question thirteen: *What is the appropriate timeframe for ATO reconciliations? ... or would a standard timeframe be more appropriate?* This is a question best addressed by the ATO including when considering the requirements of Treasury.
31. Consultation question fourteen: *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?* I think if the ATO is prompt in notification and there is a requirement that the charge be similarly paid promptly, then it is reasonable to wait for the assessment. If this is not possible then it might be possible for the taxpayer can make a payment to the general ATO account and flag it with the ATO upon arrival of the assessment.

RECTIFYING UNDERPAYMENTS PRIOR TO ISSUE OF SG CHARGE ASSESSMENT

32. Consultation question fifteen: *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 important to provide no incentives for late payment and for the payday system to encourage timely payments, and at worst, for overdue payments to be made as quickly as possible.

33. Consultation question sixteen: *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?* No, remain consistent with similar costs.
34. Consultation question seventeen: *What kinds of prompts or nudges could be provided to employers to be aware of and meet their SG obligations on time?* That requires funding for the ATO to ensure timely compliance, the nudges can be notifications based on ATO knowledge and issued weekly, once issued twice, follow up with an auditor calling the employer and seeking feedback.
35. Consultation question eighteen: *Are there more appropriate incentives outside of the LPO to encourage employers to pay SG in a timely manner?* Unknown.
36. Consultation questions nineteen to twenty-four: These questions are beyond my expertise, suffice to reinforce my general view to keep it as simple as possible and to remain consistent. Whether or not 10% is better than 9% or 11% is purely subjective, if there is evidence that suggests a suitable percentage then I support using that information to charge accordingly.
37. Consultation questions twenty-seven to thirty: If the ATO can provide examples where the SG charge has been remitted or where concessions have been granted then an evaluation of past behaviour is the place to start when considering those going forward.
38. Consultation question thirty-one: *Should employers be allowed to make ‘catch-up’ contributions due to errors?* Yes. As stated, additional contributions made ought to be accepted provided they are flagged and then whether any “leeway” is offered is another matter (and one for consideration by those with expertise in the area).
39. Consultation question thirty-two: *What would be a reasonable time period... and will it differ depending on payday frequency?* My view is that contributions by employers ought to be accepted at any time and flagged appropriately so that there is adequate communication between the employer and the ATO.
40. Consultation question thirty-three: *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 standardise across funds?* Cannot comment.

41. Consultation question thirty-four: *Is the 20 business day tie period for superannuation funds to resolve errors appropriate in a payday super model?* Super funds have plenty of resources to resolve errors quickly. Treasury ought to be sceptical about long delays or lobbying for increased time because the funds are the one link in the chain with the knowhow and resources to act promptly.
42. Consultation question thirty-five: *Is a period of grace appropriate... re ATO discretion.* If the employer can afford the employee that necessarily includes the cost of having an employee in addition to wages, then SG contributions are by definition able to be made at the time the wages are paid to the employee (per paragraph 12).
43. Consultation questions thirty-six to thirty-eight: *Data integrity, stapling and advertising.* No comment.

OTHER ISSUES

44. Consultation questions thirty-nine to forty-two: *Transition arrangements, identifiers and reporting options.* As to transitional arrangements, one consideration might be to have a test sample and test run to determine how it runs. It might be conducted within a government department for example, (in-house), and then roll-out as the issues are resolved. Matter for the experts. As to the remainder, strive for transparency and require reporting and accountability wherever possible.
45. Consultation questions forty-three to forty-nine: *Various questions.* No comment.

END