01 November 2023

Retirement, Advice and Investment Division
Treasury
Langton Cres
Parkes ACT 2600

By email: paydaysuper@treasury.gov.au

Re: Securing Australians' Superannuation Budget 2023-24 Consultation Paper October 2023 (the "payday super consultation paper")

Dear Sir/Madam,

The National Tax & Accountants' Association ('NTAA') appreciates the opportunity to comment on Treasury's payday super consultation paper.

By way of background, the NTAA is a national member-based organisation that represents the interests of around 10,000 member firms, including taxation accountants and superannuation professionals.

We are focused on representing the interests of these professionals as well as their clients, which include small to medium-sized businesses and self-managed superannuation funds ('SMSFs').

As such, the NTAA is uniquely placed to comment on the policy design of the proposed payday superannuation regime, particularly with respect to how these measures may affect small to medium-sized businesses/employers.

From the outset, it is important to note that the NTAA is supportive of the Government's objective of dealing with the issue of non-payment and underpayment of superannuation guarantee ('SG') contributions. Curtailing this practice will no doubt have a positive effect on the retirement outcomes of many employees.

It is clear from the payday super consultation paper that an important element of the policy underpinning the payday superannuation regime, is the impact of any new measures on the day-to-day operation of the entities involved. However, the NTAA is concerned that a 'one size fits all' approach will detrimentally affect small and medium-sized businesses/employers. We are of the view that a different approach is needed with respect to the implementation and operation of a payday superannuation regime for smaller and medium-sized businesses/employers. This is needed to recognise the disproportionate cost and upheaval that these measures represent for these employers.

We believe that any tax/superannuation policy needs to protect the interests of small businesses and recognise the unique challenges that apply to these businesses/employers. To that end, the NTAA believes it is possible to develop an effective payday superannuation regime that finds an adequate balance between protecting the interests of the 'smaller end of town' whilst also protecting the interests of vulnerable employees.

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With this in mind, the NTAA makes the following comments in relation to (select) consultation questions contained in the payday super consultation paper.

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

There are a number of concerning implementation issues that are likely to arise if small business employers are required to make more regular SG payments.

Firstly, processing more regular SG payments will take up significantly more time as compared with the existing SG regime. For larger employers, this additional time can more easily be absorbed as the duties will be undertaken by dedicated payroll staff who can focus on that task and most of these processes are also largely automated. In contrast, small business owners will be forced to devote a disproportionate amount of additional time (when compared with larger employers) to processing these payments and reconciling amounts.

Making more regular SG payments will increase compliance costs, including transaction costs. Whilst such costs are quite low, over time and with an increase in the frequency of SG payments, these costs could be a burden for small business employers.

Further to this, more regular SG payments will need to be funded, which will potentially place additional cash flow pressure on small businesses. Whilst we agree that the timing of employee superannuation should not be used as a funding opportunity, as it currently stands, it effectively is. That is, under the existing quarterly remittance basis, businesses have three-plus months over which to fund their employee superannuation payments, thus allowing them to manage their cash flow over this period to meet their obligations. Accelerating the payment of SG will remove the ability of small businesses to do this, which will be impactful for those affected.

We believe that the payday superannuation regime imposes a disproportionately greater burden on small business employers when considered relative to medium to larger-sized employers. This is the case, notwithstanding the introduction of SuperStream and the availability of the 'Small Business Superannuation Clearing House', which is available to certain small business employers.

The NTAA is concerned that the issues associated with a change to more regular SG payments may cause small business employers to change the way they choose to remunerate their employees. For instance, a small business employer currently paying employees on a weekly basis may choose to remunerate on a monthly basis to reduce the burden of making more regular SG payments. It is also likely that any 'between pay cycle' payments to employees would be avoided for the same reason. It is the NTAA's view that this outcome would not be in the best interest of employees, who generally prefer to be paid on a more regular basis.

To alleviate these concerns, the NTAA suggests that consideration be given to excluding small business employers such that they continue to be subject to the existing SG regime. To that end, we recommend the introduction of an exclusion from the proposed payday superannuation regime **for employers with an annual turnover of less than $5 million**.

Alternatively, the NTAA recommends a deferred start date for any new payday superannuation measures for small business employers (possibly with a turnover of less than $5 million). This will help shield small business employers from any teething issues associated with a new payday superannuation regime.

Whilst implementation issues can be a costly inconvenience for larger employers, implementation costs are far more costly for smaller employers. This approach is also appropriate given the current economic climate, as small businesses generally face additional challenges in times of economic vulnerability.

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)?*

Refer to the discussion below.

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?*

If the Government determines that the new payday regime will ultimately apply to small business employers, the NTAA generally supports a modified version of the 'due date model' (i.e., in preference to the 'employer payment model').

One advantage of the due date model for small business employers is that the 'due date', being 'payday plus 'x' days', can be set to allow employers a period of time within which to meet their SG obligations. A sufficient period of time is necessary for the employer to both calculate and pay SG by the 'due date'. The period of time needed to undertake these tasks is likely to vary between small business employers and larger employers. This is because, for smaller employers, it is often the same person, the business owner or 'controller', who is required to manage these tasks as well as manage the day-to-day operation of the business.

For these reasons, the NTAA argues that it is appropriate for the 'due date' for larger employers to be defined differently to the 'due date' for small business employers (again, we suggest those employers with a turnover of less than $5 million).

For example, it may be appropriate for small business employers to move towards a monthly due date whereby the due date for SG on payments made during a month is 28 days after the end of that month. This would be an improvement on the current quarterly regime but also find a balance in terms of protecting the interests of small business employers, and protecting the legal entitlements of employees of small business employers.

The 'employer payment model' does not appear to strike an appropriate balance between the resources and disruption that applies between larger and small business employers. This model protects the interests of employees by imposing an SG charge date of 'payday plus 1 day' (thus encouraging the timely payment of SG support). However, it fails to protect the interests of small business employers, who devote a disproportionate amount of time to these activities (whilst also trying to operate their business).

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?*

It is noted that under either the 'employer payment model' or a 'due date model', after the 'due date plus 1 day' occurs, an SG charge becomes payable if the SG is unpaid.

The NTAA agrees that the SG charge is an important tool for deterring and penalising non-compliance with SG obligations. However, in a payday superannuation environment, the NTAA would argue that there may be slightly less need to penalise employers for non-compliance. This is because the ATO will play a greater role in SG compliance by encouraging employers to rectify underpayment or non-payment of these amounts. The potential for increased ATO involvement in this regard will act as a deterrent against non-compliance.

In the payday super consultation paper, the Treasury noted that, *"In a payday environment, consideration could be given to limited circumstances where a late payment or SG charge payment should remain tax deductible"*.

We believe that, for the reasons stated above, in a payday superannuation environment, the administrative fee and the 'nominal interest' charge are a sufficient deterrent against non-compliance (in conjunction with increased ATO surveillance). It is argued that the SG charge should prima facie be deductible unless a certain level of underpayment or non-payment of SG amounts has been identified by ATO compliance enforcement activities. For example, non-deductibility of the SG charge could potentially apply where an employer has been contacted by the ATO on three occasions in a current or prior income year (and an SG charge liability subsequently arises in the income year).

We further recommend that a reduction in the existing administration fee amount is needed (which is currently $20 and applies per employee per quarter). It is our view that a reduction in the amount of this fee is appropriate to avoid the potential for excessive penalties, given the new payday superannuation regime would involve more regular payments of SG.

In addition, the NTAA fully supports the Commissioner of Taxation being granted flexibility to remit or reduce the SG charge or extend the due date in discrete circumstances, where the employer is unable to meet the SG due date due to circumstances beyond their control.

We also recommend that the calculation of the SG shortfall for the purposes of the SG charge should be based on 'OTE base' rather than 'salary or wages base', under the proposed payday super regime. That is, we would like to see a simplification of the regime that ensures an employee's superannuation is calculated with reference to the same 'base', regardless of whether or not the employer is late in making the payment.

We make this recommendation for a number of reasons.

Most significantly, the concept of 'OTE base' is already complex and calculating the SG shortfall based on a different concept of 'salary or wages base' only adds to this complexity. Whilst adopting 'OTE base' as a base for calculating the SG shortfall acts as less of a deterrence against non-compliance, this must be countered against the reduction in complexity it would bring, as well as there being a somewhat reduced need for deterrence under a payday superannuation regime, as noted above.

Yours faithfully,

Geoff Boxer
Chief Executive Officer