8 November 2023

Ms Wendy Hau
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Superannuation Access and Compliance Unit
Retirement, Advice and Investment Division
Treasury
Langton Crescent
Parkes ACT 2600

By email: paydaysuper@treasury.gov.au

Dear Ms Hau,

Securing Australians' superannuation

Chartered Accountants Australia and New Zealand, CPA Australia, the Institute of Public Accountants, the SMSF Association, Financial Advice Association Australia and The Tax Institute (together, the **Joint Bodies**) write to you as the peak professional accounting and tax practitioner bodies in Australia representing the tax profession, the superannuation sector and financial advisers. The Joint Bodies welcome the opportunity to make a submission to the Treasury in relation to the consultation paper titled 'Securing Australians' Superannuation' (**Consultation Paper**).

In the development of this submission, we have closely consulted with members of the Joint Bodies who have specific knowledge, experience and expertise in taxation, superannuation and, specifically, the Superannuation Guarantee (**SG**) regime.

We set out below our responses to the issues and ideas raised in the Consultation Paper. We have limited our responses to those matters we consider are the most relevant from a tax and superannuation policy and administration perspective.

Our submission is quite technical in nature and contains a significant amount of detail. As noted throughout, the proposed change to a Payday super (**PdS**) model is complex and its successful implementation depends on a multitude of factors. We trust that the detail in our submission will assist the Government and relevant government agencies to better understand the underlying issues, and design the system to best achieve the underlying policy intent while being simpler, more efficient and equitable.

We would be pleased to work with the Government to further discuss the points raised in our submission. The Joint Bodies can provide the Government with access to the range of tax technical and industry experts who have contributed to our submission.

The Joint Bodies support the Government's proposed policy of introducing PdS. However, the shift to a PdS model represents a significant departure from the current SG regime and the operation of the Superannuation Guarantee Charge (**SGC**). The proposed policy changes will impact a wide range of legislative provisions, employers' compliance requirements, the onboarding of employees with an employer, payment and reporting systems and processes, services provided by intermediaries (including payroll providers, clearing houses and practitioners), and administration by the Australian Taxation Office (**ATO** or **the Commissioner**). As a result, every aspect of the policy and its impact needs to be carefully considered. Otherwise, there is a high likelihood of significant and unintended consequences that may affect employers' ability to comply with the PdS model.

The shift to PdS provides a rare opportunity to address a range of actual and perceived shortcomings and deficiencies in the current system to:

- ensure the PdS model operates to encourage employers to voluntarily rectify non-payment, underpayment or late payment of employees' SG entitlements;
- more equitably compensate employees' superannuation accounts for the lost earnings on unpaid SG amounts without disproportionately punishing employers;
- reduce compliance costs; and
- ensure the PdS model is more consistent with other areas of taxation and superannuation legislation, and other laws.

This will require an overhaul and re-design of existing components of the SG regime. When designing the PdS model, the Joint Bodies are of the view that the Government should consider a range of factors including, but not limited to:

- ensuring PdS is implemented in a manner that reduces compliance costs, utilises existing reporting mechanisms and avoids the duplication of efforts;
- updating the SGC so it is simpler, more accurately compensates employees' superannuation accounts for the loss in earnings for the duration their SG contributions are unpaid, and re-designs the penalty component;
- ensuring PdS imposes penalties on employers for non-compliance on a proportionate basis so those employers who make an honest mistake are treated less harshly than those who engage in egregious non-payment of their SG obligations;
- ensuring PdS incentivises employers to come forward and report SG shortfalls;
- providing for an appropriate transitional mechanism to allow employers, self-managed superannuation funds (**SMSFs**) and digital service providers (**DSPs**) the time needed to adapt to the new requirements, including an amnesty to encourage employers to rectify historical SG shortfall amounts; and
- utilising technology to ensure that the ATO's systems and software providers enable a successful implementation of PdS.

The ATO's latest tax gap estimates for 2020–21 show that the net gap for Pay as you go (**PAYG**) withholding is 1.7% ($3.871 billion) and the SG gap is 5.1% ($3.619 billion). While the majority of employers do the right thing (almost 95% of SG payments that were due were paid), the figures show that more than $3 billion a year of superannuation remains unpaid. The difference in these tax gaps demonstrates, among other things, that the current SG regime, including the more severe penalties regime, is ineffective.

It follows that a well-designed system should appropriately penalise and seek to deter those who are non-compliant but not discourage employers from self-correcting or disincentivise voluntary disclosures of SG shortfalls. The size of the SG tax gap illustrates that more is needed to encourage employers to meet their obligations to close the gap.

The SGC regime was designed and enacted in a completely different era. Its archaic legacy design is no longer fit for our times, nor fit for the future. One of the primary benefits that PdS will bring to employees is the earlier payment of their SG contributions into their superannuation account. This will therefore generate earnings on those contributions earlier and their retirement savings will benefit from the compounding effect of this over time.

Our detailed response is contained in **Appendix A**. We have included in **Appendix B** worked examples showing the difference in outcomes under the current SGC regime and our proposed SGC model.

If you would like to discuss any of the above, please contact The Tax Institute's Senior Advocate, Robyn Jacobson, on (03) 9603 2008.

Yours faithfully,

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APPENDIX A

We have set out below our detailed comments and observations for your consideration.

Payday super – the options

Currently, most employers use two systems to streamline the reporting of their employees' remuneration: Single Touch Payroll (**STP**) and SuperStream.

Single Touch Payroll

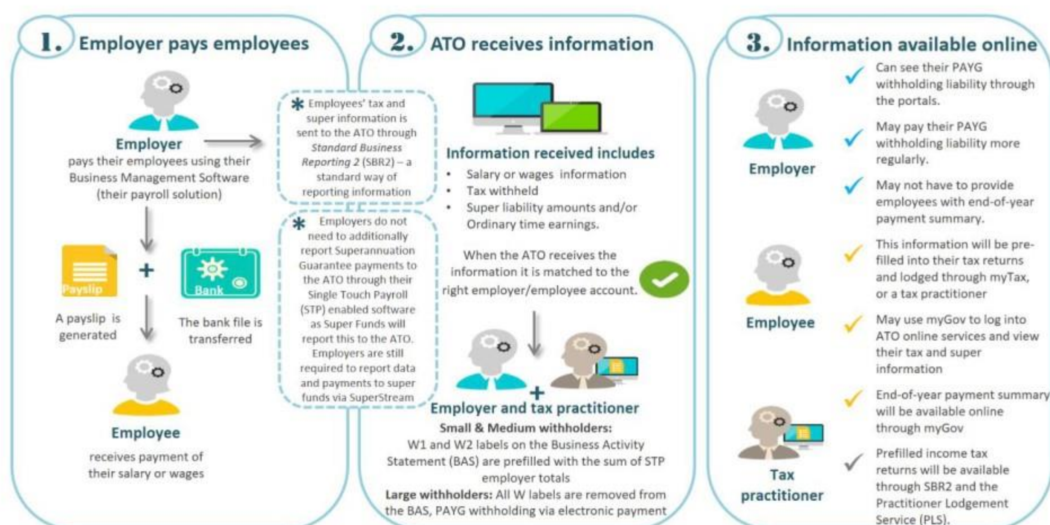
Employers are required to use STP-enabled software to report to the ATO salaries and wages, PAYG withholding and SG liability information relating to their employees. STP has been mandatory since 1 July 2018 for employers with at least 20 employees and 1 July 2019 for all other employers. A small group of micro-employers and a few other cohorts continue to be exempted from STP reporting by legislative instruments.

From 1 January 2022, the range of data reported to the ATO via STP was expanded (**STP2**) to include other data that employers report to other government departments such as Services Australia. Since this date, employers must also report salary sacrifice superannuation contributions and other fringe benefits via STP2, as well as the breakdown of allowances paid to employees.

Employers can elect to report other reportable employer superannuation contributions — for example, certain employer contributions above the minimum SG contributions that are not salary sacrifice contributions — via STP2 or by lodging an annual employer PAYG withholding annual report with the ATO. Most employers report through STP2 using STP-enabled payroll or accounting software.

The following diagram[1] is helpful to understand how STP works:

Figure 1: How Single Touch Payroll works



[1] ATO, '*Single Touch Payroll – Payroll reporting, Business implementation guide*', page 10, available here (accessed on 4 November 2023). Note that this diagram was created before the 1 January 2022 changes were put in place.

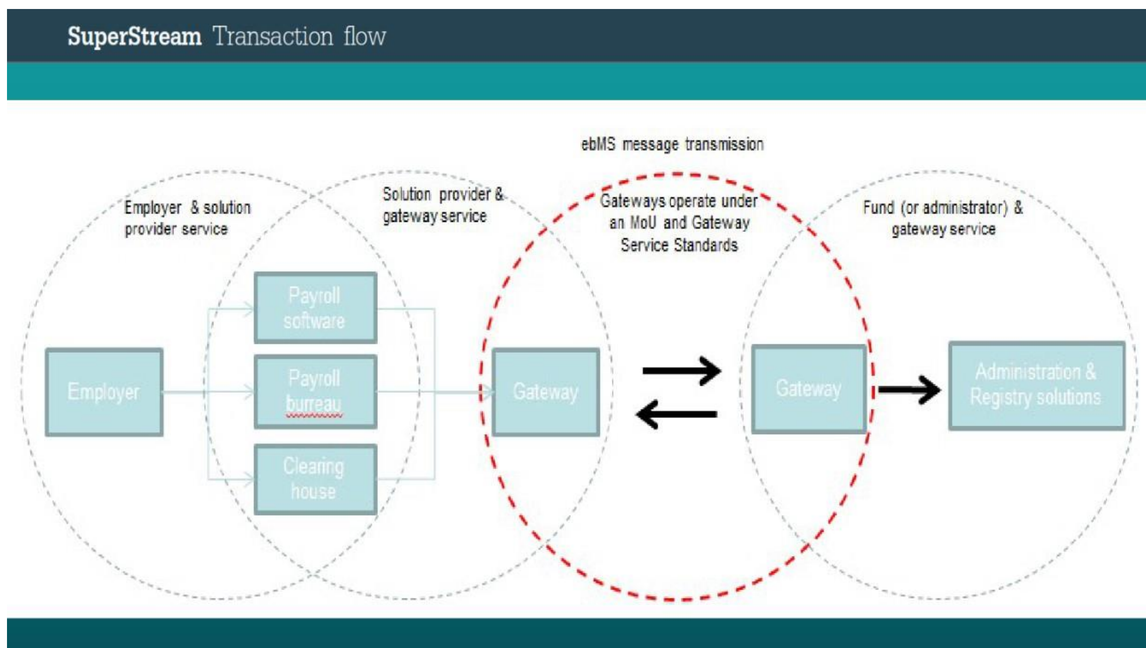
SuperStream

SuperStream is a data reporting mechanism used to report relevant data to superannuation funds about contributions made to a fund by an employer. Currently, SMSFs receiving employer contributions from a related party of the fund are not required to comply with the SuperStream standards.[2]

As noted in the above diagram:

> Employers do not need to [specifically] report Superannuation Guarantee payments to the ATO through Single Touch Payroll (STP) enabled software as Super Funds will report this to the ATO. Employers are still required to report data and payments to super funds via SuperStream.

The following diagram[3] shows how SuperStream works for employer contribution data:



As with STP, most employers access SuperStream using their payroll or accounting software. We note that SuperStream is also used for other transactions such as transfers from one superannuation fund to another, releasing money from superannuation accounts under specific provisions in the *Taxation Administration Act 1953* (Cth) (**TAA**) and various other purposes. This can result in duplication of reporting as employers report superannuation contributions twice — once via STP2 and again through SuperStream.

Moreover, the current SuperStream process allows only employers to send data and contributions to superannuation funds. It does not allow superannuation funds to do likewise — for example, when a contribution has been sent to a fund for a person who has ceased to be a member. Similarly, it does not allow for the handling of overpaid superannuation contributions. All these cases must be handled manually by superannuation funds and employers, which results in inefficiencies and increases the risk of errors.

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2 *Superannuation Industry (Supervision) Regulations 1994,* reg 7.07F(2).

3 ATO, '*SuperStream: Design to reality*', page 8, available here (accessed on 4 November 2023).

Superannuation funds that become closed for contributions (for example, due to mergers between two superannuation funds) are not required to communicate with employers. Employers ascertain this information only after attempting to lodge SuperStream data with their clearing house.

Similar issues arise where the complying fund status of an SMSF is reported as 'Regulation details removed' on Super Fund Lookup where the SMSF annual return lodgment is overdue. This prevents contributions from being made using SuperStream, and the problem is often not detected by the employer until employees' superannuation contributions are processed. Where an employee's chosen fund or stapled fund has this status at the time of the payment, there can be insufficient time for the employer to make the payment to its default fund before the SG due date.

Most employers pay salaries and wages via the Bulk Electronic Clearing System (**BECS**) which facilitates the rapid processing by banks of such payments from an employer's bank account to an employee's nominated bank account. Importantly, under this process, there is effectively a more direct relationship between the employer's bank account and the employee's bank account without the involvement of multiple intermediaries or gateways.

In contrast, the prompt processing of payments of SG contributions via BECS or BPay is not possible. As the above SuperStream diagram shows, money and data from employers are transferred to other organisations (such as clearing houses) and then via gateways to the superannuation fund. All these steps add time and distance between the employer's bank account and the bank account of the employee's nominated superannuation fund.

We understand that after processing payroll, it can take up to 10 working days for a medium-sized employer to resolve the typical issues that can arise, such as finalising pay adjustments (typically under- and overpayments of salaries and wages), receiving advice from employees about any new nominated superannuation funds and determining new superannuation fund information when an employee's previously nominated superannuation fund can no longer accept contributions. In addition, new employees have 14 days to provide employers with all relevant details such as their Tax File Number, bank account details, nominated superannuation fund and other relevant details. We understand from our members that a medium-sized employer generally requires between 4 to 7 hours to complete all these tasks for their workforce (i.e. per pay cycle across the workforce).

Proposed Payday super model

If the Government intends for the current SuperStream system to remain in place, then some improved processes would need to be designed to enable the effective operation of the employer payment model proposed in Treasury's consultation paper. This could include:

- requiring employers to make SG contributions on the day that salaries and wages are paid;
- allowing a period (say, 14 business days) within which superannuation funds could receive the contributions — if the fund receives the contributions within this prescribed period, which recognises the limitations of existing payment platforms and data processing, the employer would be taken to have paid the contributions by the due date;
- allowing a longer grace period (say, 30 calendar days) within which under- and overpayments could be rectified without penalty, although SG interest (see below) would still apply from payday;

- dealing with any underpayments by 'topping up' by the end of the 30-day grace period without penalty; and
- dealing with any overpayments by carrying them over to apply against a future SG obligation — with the exception of employees who have left the employer's employment or passed away (an efficient release mechanism would be needed to withdraw the overpayment of superannuation and return it to the employer).

SG contributions for contractors

We note that it is not mandatory for employers to report payments made to contractors via STP. A cohort of employers use their payroll software to pay contractors and may or may not use STP to report such payments to the ATO, while others use their accounts payable system to pay contractors. If an employer is required to make SG contributions for a contractor, then consider whether this should be done via SuperStream (assuming that SuperStream remains in place).

Implementation timeframes

In an ideal world, all employers would be required to comply with new SG payment timeframes at the same time. However, we acknowledge the challenges that businesses, particularly small businesses, will face in making what will generally be more frequent payments of superannuation for their employees to comply with PdS.

In our view, there may be merit in a staged implementation process by empowering the ATO to delay the implementation of the new SG payment timeframes to a group or range of employers. Some factors that may inform the Government in assessing the merits of such an approach are set out below.

- Similar to the staged STP implementation, the ATO could require compliance with the new SG payment timeframes from 1 July 2026 for those employers with at least 20 employees immediately before 1 July 2026. All other employers could be required to comply 12 months later; that is, from 1 July 2027. As with STP, a very small number of (mostly) micro-employers may not be able to comply with any new SG payment requirements, be impacted by exceptional or unforeseen circumstances as outlined in PS LA 2011/15, or run their business in an area with no internet service.[4] In these cases, the ATO should be able to administratively exempt these employers on a case-by-case basis.
- Alternatively, if the threshold for a potential staged implementation were based on aggregated turnover[5] (for example, less than $10 million), rather than the number of employees, two matters would need to be considered:
    - when an employer's aggregated turnover would be determined, given this is an annual amount and PdS involves making SG contributions, generally, weekly, fortnightly or monthly; and
    - the compliance challenges for employers who may oscillate above and below the turnover threshold from one pay period or income year to the next.

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[4] See https://www.ato.gov.au/business/single-touch-payroll/concessional-reporting/micro-employers/.

[5] See section 328-115 of the ITAA 1997.

- The liquidity and cash flow challenges arising from more frequent SG payments will more acutely impact small businesses that are already dealing with labour shortages, increased interest rates and greater supply costs (such as fuel).
- Additional compliance costs associated with small businesses ensuring their payroll software is compliant are likely to be an impediment to the immediate adoption of PdS on 1 July 2026 by this sector.

We envisage that the staggered implementation approach proposed above would operate only for 12 months, so that by 1 July 2027, all employers would have adopted PdS. Once an employer starts paying SG contributions on payday, they should not be permitted to revert to paying SG contributions on a quarterly basis, even if they have fewer than 20 employees.

Given the intensive resourcing that will be required to service business clients, we would support, and strongly encourage, a deferred approach for small employers and SMSFs (see below).

Doing so will ensure:

1. **Client support:** enabling accountants to have adequate time and resources to support their clients through the transition, addressing unique issues and providing tailored assistance as needed.
2. Optimised resource allocation: enabling accountants to strategically allocate their limited resources to effectively support the small business and SMSF sectors, thereby ensuring continued compliance.
3. Own system and process review: accountants need to be afforded the necessary time to conduct thorough reviews and updates of their own systems, processes and related services, ensuring full compliance and the maintenance of high professional standards.
4. Better preparation: accountants and their clients must have the opportunity to prepare and transition across each stage of the implementation, ensuring that they are fully equipped to meet the new system requirements.
5. Refinement: implementing changes in stages allows for ongoing feedback from all stakeholders, providing valuable insights on all systems and processes that can be used to refine and improve the process.

Amnesty for historical SG shortfalls

The *Treasury Laws Amendment (Recovering Unpaid Superannuation) Act 2020* (Cth) (**SG Amnesty Act**) amended the SGAA to provide an amnesty for eligible employers to correct historical SG amounts. The amnesty covered SG quarters from 1 July 1992 to 31 March 2018. The amnesty began on 24 May 2018 and ended on 7 September 2020[6]. However, the SG Amnesty Act received Royal Assent on 6 March 2020, effectively giving employers only six months to make use of the amnesty with the knowledge that it was enacted law.

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[6] Section 74 of the SGAA.

This six-month period coincided with the severe economic and social impacts of the COVID-19 pandemic, which left employers with a limited ability to come forward and rectify historical SG shortfalls due to difficulties accessing business records during extended lockdowns, reduced resources, constrained cash flow and access to professional advice. The amnesty period was not extended despite repeated requests by the professional bodies and industry.

The Joint Bodies consider that another SG amnesty should accompany the implementation of PdS on 1 July 2026 as it would support securing employees' entitlements. An amnesty would have multiple benefits, including encouraging employers to rectify historical SG shortfalls and minimising the need for the ATO to administer a dual system for SG shortfalls arising before and after 1 July 2026. We recognise that some employers may not have the necessary cash flow to rectify historical SG shortfalls, but for those who do, this would provide them with the opportunity to rectify shortfalls as part of the implementation of PdS.

Amounts other than SG contributions

We understand that the policy scope of PdS is proposed to be limited to changes to the existing SG regime. However, the Joint Bodies are of the view that the Government should consider extending the scope of the measure to superannuation payments by employers other than SG contributions. Differential treatment of SG payments, which are managed by the taxation and superannuation systems, and other amounts (such as salaries and wages and including salary sacrificed contributions) that fall under the *Fair Work Act 2009* (Cth) (**FWA**), will continue to entrench the dual system approach for employers.

This will result in employers having multiple sets of compliance considerations and obligations for what is ultimately the same set of payments that arise from an employee's work. It would be inefficient for employers to make SG contributions that align with employees' paydays and make salary sacrifice contributions at a different time. Further, continuing to allow employers to make salary sacrificed contributions on a date other than payday, where the PdS model is in place, may create confusion for employees regarding their expectations about the time of the payment of their remuneration where it is paid in the form of salary sacrificed contributions instead of salaries or wages.

We acknowledge that there is likely to be an interplay with the FWA but consider that there are opportunities to streamline processes, and therefore compliance costs, for employers, allowing them to invest a greater proportion of their resources into the management and growth of their businesses. It may be possible to work with the DSPs to design solutions that can reduce the duplication of efforts required for employers to comply with their SG and non-SG obligations.

Updating the SG charge

The approach to the SG charge (**SGC**) has remained fundamentally unchanged since its introduction in 1992 despite significant changes in technology and employment practices.

Across the tax and superannuation laws, employers can face around 10 different forms of penalty or adverse tax outcomes when failing to meet their SG obligations:

1. the SG shortfall is calculated using 'total salary or wages' (including overtime) rather than ordinary time earnings (OTE);

2. the nominal interest component is calculated at 10% per annum of the amount of the SG shortfall and accrues from the start of the relevant quarter in which an SG shortfall has arisen and continues to apply (beyond the date of any late payment) until the day on which the SG statement is lodged;[7]

3. the fixed administration component, calculated at $20 per employee shortfall per quarter;

4. a penalty under Part 7 of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (**SGAA**), which imposes a maximum penalty of 200% on the total of the:[8]

   - SG shortfall amounts for the quarter;
   - employer's nominal interest component for the quarter; and
   - employer's administration component for the quarter.

   The ATO has a discretion to remit the Part 7 penalty[9], but not below 100% for a quarter that started on or before 1 July 2018 and the employer did not disclose the shortfall under the SG amnesty[10];

5. a requirement to lodge an SG statement by the 28th day of the second month following the end of the relevant quarter;

6. an administrative default assessment penalty of 75% of the shortfall where a taxpayer makes a false or misleading statement which results in the taxpayer paying less than the required SGC;[11]

7. the general interest charge (**GIC**) on any late payment of the SGC;

8. a charge imposed by the *Superannuation Guarantee Charge Act 1992* is non-deductible under section 26-95 of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**);

9. directors of a company may be personally liable for the company's unpaid SGC liability through the issue of a director penalty notice (**DPN**) under Division 269 of Schedule 1 to the TAA; and

10. costs of compliance — preparation of the SG statement and calculating the amount of the shortfall and the SGC can be time-consuming and expensive as assistance from a tax professional is generally required.

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[7] Section 31 and section 46 of the SGAA.

[8] Paragraph 59(2)(a) of the SGAA.

[9] Under subsection 62(3) of the SGAA and see PS LA 2021/3.

[10] Subsection 62(4) of the SGAA.

[11] Table item 7 of subsection 284-90(1) of Schedule 1 to the TAA. In PS LA 2021/3, the ATO guides its officers to consider remitting in full an employer's liability to the TAA default assessment penalty regardless of the extent to which the Part 7 penalty is remitted. The Part 7 penalty is specifically provided for by the SGAA and is generally the more appropriate penalty to apply where both penalties are imposed.

We consider that the SGC model in its current form is overly complex and punitive. The design of the SGC and the associated penalties deter self-rectification and they therefore operate as a disincentive for employers to voluntarily report and rectify historical shortfalls. One of our key concerns is the draconian application of penalties that do not proportionately reflect the loss to employees or the 'culpability' of an employer who is in arrears.

For example, the SGC applies in the same manner to:

- an employer who is late because the SG contribution was received by the fund just one day late but does not report this to the ATO (even if the employer had taken all reasonable steps to pay the amount of the SG contribution to ensure it was received by the fund before the due date); and
- a recalcitrant employer who egregiously avoids their SG obligations.

The design of the SGC is complex and frequently leads to significant confusion and frustration for employers, resulting in a greater number of unintentional compliance errors. The penalty component of the SGC, in particular, is likely to deter employers from rectifying mistakes or missed payments. The current rules do not allow for the consideration of an employer's particular circumstances and can punish employers who have taken all reasonable steps but are nonetheless subject to the SGC due to delays beyond their control caused by intermediaries in the superannuation payment process, or honest mistakes.

The Joint Bodies consider that in the development of the PdS model, a new approach should be adopted for the SGC. The new approach should prioritise the core values of good tax law and policy: simplicity, equity and efficiency. In our view, a new SGC should:

- be designed as a streamlined, simpler model, with fewer components to reduce complexity for employers;
- more accurately compensate employees for a loss in earnings for the duration their SG contributions remain unpaid; and
- rethink the approach to penalties so they:
  - apply in a proportionate and equitable manner, and are more accurately balanced with the degree of an employer's wrongdoing;
  - utilise existing concepts and frameworks to the extent possible;
  - allow the Commissioner to reduce or increase the amount of the penalty (within limits), based on the employer's circumstances; and
  - encourage employers to rectify mistakes and historical shortfalls.

Overview of proposed SGC model

The Joint Bodies are of the view that the SGC model should apply proportionately and simply. We consider that a more suitable model than the existing framework would consist of the following four components:

- a shortfall component based on the OTE of the employee;
- an interest component (**SG interest**) that better reflects the loss of earnings to the employee's superannuation fund;
- a penalty component that is charged only on the shortfall component and is based on the existing culpability penalty regime in Division 284 of Schedule 1 to the TAA; and
- a GIC component.

We consider that changes to the current estimate regime and the DPN regime in Division 268 and Division 269 of Schedule 1 to the TAA, respectively, as they relate to the SGC are not necessary (except to the extent of any consequential amendments because of the introduction of PdS).

We discuss the specific aspects of our proposed re-designed SGC model in further detail below.

Shortfall component

Calculation of shortfall component

Under the current law, the shortfall component of the SGC is based on an employee's total salary or wages (including overtime) instead of OTE. This increased base for SGC purposes has the effect of embedding an additional penalty (aside from those separately imposed by the various components of the SGC and the associated penalties) into the calculation of the shortfall.

We consider that the shortfall component of the revised SGC should be calculated based solely on the OTE of the employee, and any penalty for non-payment, underpayment or late payment should be streamlined through the TAA and not form part of the shortfall (see below). This approach is consistent with the basis for calculating the employee's SG amount and reduces complexity.

The use of differing metrics to calculate the SG and SGC often results in confusion and a sense of inequity for employers. In effect, the current approach has a punitive effect as the calculation of the shortfall component includes amounts that would not have been included if the SG amount had been paid on time. As explained further below, we consider that the punitive aspect of the revised SGC should be contained solely in the penalty component. Further, the rationale for using differing bases is not apparent compared to, or consistent with, other principles of our taxation system which generally attempt to take a more equitable approach, taking the surrounding circumstances into consideration.

We consider that any amnesty or reduction in an employer's SGC liability should not reduce the shortfall component owing, provided that it is calculated as described above. The shortfall component is intended to reflect the employee's superannuation entitlement which should be paid in full in all circumstances.

Definition of ordinary time earnings

OTE is currently defined as the lesser of the maximum contribution base (**MCB**) or the total of:[12]

- earnings in respect of ordinary hours of work other than earnings consisting of a lump sum payment of any of the following kinds made to the employee on the termination of their employment:
    - a payment in lieu of unused sick leave;
    - an unused annual leave payment, or unused long service leave payment; and
- earnings consisting of over-award payments, shift-loading or commission.

[12] Subsection 6(1) of the SGAA.

This definition is complex and contains subjective elements that result in employees of the same class potentially having different bases on which their SG amount is calculated, depending on their contract, agreement, or interpretation by the employer. This complexity may result in employers making genuine errors despite their best efforts. In practice, this definition also requires employers to keep additional records to demonstrate the base payment the employee earns.

We consider compliance benefits would be achieved from standardising the definition and aligning it with existing reporting bases. For example, it may be possible to align the definition of OTE with the components employers are required to report under STP2. This would simplify the record-keeping and compliance requirements for businesses while also allowing for easier identification by employers and the ATO of under- or overpayments.

We suggest that a change in the legislative definition of OTE (to, for example, 'SG base') should be accompanied by an extensive education campaign to ensure that employees understand the amount of superannuation they are receiving is not expected to change in the vast majority of cases. Rather, the certainty of a standardised base would ensure greater confidence by employees that they are receiving the correct amount of their entitlements.

Timing of shortfall component

We consider that employers should be required to pay the shortfall component of the SGC from the date of payment of salaries and wages. However, given the current complexity in the SG and SGC models, and the practical challenges for businesses to pay exact amounts on time, an opportunity to identify and make adjustments as part of a regular reconciliation will be necessary. Reconciliations are discussed in further detail below.

Interest component

Calculation of nominal interest component

The Joint Bodies are of the view that the nominal interest component of the SGC (we suggest this should be renamed 'SG interest' under PdS for ease of reference and simplicity) should more accurately reflect the loss in the employee's superannuation account for earnings on late and unpaid superannuation. It should be charged on the shortfall amount, with the rate reasonably approximating the growth of the shortfall component had it been paid on time.

Currently, the SGC uses a fixed rate of 10%. However, during periods when investments are performing well, the 10% rate may not be seen as sufficiently compensating employees' superannuation accounts for lost earnings. Conversely, a flat rate of 10% may be seen as being punitive if superannuation funds were generally earning notably less in any given period due to the prevailing market conditions.

We suggest the Government consider the use of a floating rate that more closely correlates with the earnings of most superannuation funds. Examples of methodologies to calculate the appropriate benchmark rate could include:

- a rate that is based on the average performance of a sample size of superannuation accounts in a year or across multiple years (such as the long-term average mySuper earning rate), which is then applied as the following year's rate of SG interest; or

- calculating the fund average performance across all major superannuation funds for a year — although the rate determined under these approaches may not be reflective of every superannuant's account, it would better reflect the lost earnings for underpayment or late payment of SG amounts.

As further alternatives, it may be possible to link the rate for the SG interest to other market rates that are currently used. Examples include:

- basing the rate of SG interest on the prevailing market interest rates with an additional uplift or premium factor — this would reflect the fact that investments in a broad portfolio of assets usually result in a higher return than simply leaving the funds in an interest account;
- ensuring consistency with other rates used in the superannuation system — such as the earnings rate currently used to determine the excess transfer balance cap (**TBC**) amounts; or
- a rate that is benchmarked at a less frequent interval, such as a rate that is based on the historical long term performance of superannuation accounts and subject to review at longer intervals (approximately 3 years).

When using a floating rate, an effective interest rate of 0% may be required in years where there is negative growth across the relevant sample population, as it would be inappropriate to reduce the effective obligation of the employer (below zero) to compensate the employee. We recognise that a floating rate may require additional administrative resources from the ATO to calculate and publish. The Joint Bodies support the provision of additional resources for the ATO in this regard.

We suggest that further consultation with stakeholders on this issue would be beneficial.

Timing of interest component

We consider that the SG interest should be calculated from payday (when SG contributions are due to be paid) until the day the shortfall is actually paid to the employee's superannuation fund or the ATO. For the vast majority of employers that utilise STP, the dates should be readily able to be determined based on STP data. STP reporting should make it easier to identify non-payments, underpayments or late payments of SG and, therefore, the dates on which the payments should have been made.

This approach is based on the principle that the SG interest should reflect only the loss of earnings in the employee's superannuation account where the SG contributions are underpaid or paid late. Accordingly, SG interest should not continue to be charged once employers have paid the SG contributions to the fund or their SGC liability to the ATO. Linking the calculation of SG interest to the period during which the superannuation remains unpaid would remove the unfair punitive nature of the current nominal interest component as the calculation of the SGC liability would no longer embed an additional penalty on the employer in the SG interest.

Remission of SG interest

If the SG interest is designed in accordance with the principle that it serves only to reasonably recompense the employee for lost earnings, we consider that it is generally not appropriate for this component to be remitted. As a general principle, the SG interest should be treated as an amount the employee is entitled to in their superannuation account.

However, we consider that it may be inappropriate to charge the employer the full amount of the SG interest if unreasonable delays in determining the SGC are attributable to other parties. Examples may include unreasonable delays by the ATO at the audit stage where the employer took all reasonable steps to provide timely responses and co-operated with the audit, or where an intermediary took an unreasonable period to process the payment.

Penalty component

As set out above, we consider that the current design of the penalties associated with the SGC is complex and multilayered and operates as a disincentive for employers to report non-payment, underpayment or late payment of SG contributions.

Calculation of the SG penalty

Currently, employers are subject to a range of penalties for non-compliance with their SG obligations across the SGAA, ITAA 1997 and TAA. The Joint Bodies are of the view that it is more appropriate for the penalty provisions to be confined to the TAA, rather than spread across these three Acts. This approach is consistent with other regimes within our tax system. The penalties for employers incurring an SGC liability should be modelled on the existing culpability penalty regime contained in Division 284 of Schedule 1 to the TAA.

That is, a penalty (**SG penalty**) should be charged on the shortfall component at a rate of:

- 25% if the employer did not exercise reasonable care;
- 50% if the employer was reckless; or
- 75% if the employer was acting fraudulently or with intentional disregard as to the operation of the legislation.

As a starting point, the SG penalty should be applied to an employer at the prescribed default rate, and the Commissioner should be empowered to increase or remit the amount of the penalty (in full or part) based on the employer's culpability, voluntary disclosures or relevant circumstances. These factors are discussed in further detail below.

Under this model, the total penalties paid by the employer may be lower than under the current regime but this is not necessarily an inappropriate outcome, particularly given the current disproportionate impact of the SGC penalty regime.

As demonstrated in our three worked examples in **Appendix B**, the amount of the SG penalty would still be significant. The current approach of applying a 200% penalty for SGC (under Part 7) is inconsistent with other areas of our taxation and superannuation legislation, and far exceeds penalties imposed under employment law when employers fail to pay salaries or wages or fail to pay them on time. We consider that the existing regime is excessive, draconian and disproportionate to any losses sustained by the employee.

Further and importantly, it discourages the voluntary disclosure by employers of SG shortfalls, which undermines the paramount objective of securing employees' superannuation entitlements. If the Government is of the view that the proposed penalty amounts will not be sufficient, it is possible to alter the rate of the SG penalty or include an uplift factor without tweaking other aspects of the SGC.

Consideration of employers' circumstances

We consider that the SG penalty should not unfairly penalise employers who come forward and rectify SG shortfalls. Employers who come forward and voluntarily rectify SG shortfalls could, for example, become entitled to a full or partial remission (of up to 100%) of the SG penalty. This approach would be consistent with the current approach of other penalties for non-compliance with taxation obligations.

The Commissioner should have the discretion to remit the SG penalty in full in a range of scenarios. This should be limited to those circumstances where an employer does not have a high degree of 'culpability'. Examples of such circumstances include, but are not limited to, where:

- an honest or inadvertent mistake was made by the employer (e.g. a calculation error in the amount of SG payable or payment of the SG amount to the wrong account);
- the employer took all reasonable steps to ensure the SG contributions were paid on time, but unforeseen or unreasonable delays caused by third-party intermediaries resulted in the employer having an SGC liability;
- the employer has a reasonably arguable position that they were not liable to pay an employee's SG (e.g. the employer had a reasonably arguable position that the worker was a contractor, and this conclusion is later overturned during an audit); and
- unforeseen circumstances prevented the employer from paying (e.g. the employer suffered a serious injury or illness that resulted in them being admitted to hospital).

Conversely, there are instances where an employer may have acted in a manner that shows a high degree of 'culpability'. In these instances, it may be appropriate not to remit the SG penalty, or it may be appropriate to increase the rate of the penalty. Examples of such circumstances include, but are not limited to, where the employer:

- has a history of deliberately avoiding, or taking steps to attempt to avoid their taxation and superannuation obligations (e.g. a history of entering into phoenix arrangements);
- wilfully taking steps to circumvent their SG obligations or hinder an ATO review or audit; and
- repeatedly not making timely payments of SG (but not including circumstances where it would not be appropriate to impose a penalty as detailed above).

General interest charge component

The Joint Bodies support the continuing application of the GIC to unpaid SGC liabilities. As a general principle, the GIC should apply when taxpayers are late in paying their tax obligations. This encourages the timely repayments of tax debts, ensures there is consistency across our taxation and superannuation systems, and conveys the message that the ATO should not be treated as a 'bank' (i.e. a source of finance) by taxpayers.

It is important to ensure that the Commissioner's existing discretionary powers to remit an amount of GIC are retained in respect of PdS. Several reasons may explain why a taxpayer is late in making a payment of obligations, including extenuating circumstances beyond the taxpayer's control. Consistent with the current approach, the taxpayer's circumstances should be considered in determining whether remission of the GIC is appropriate.

It may also be possible to modify the application of the GIC to incentivise employers to make voluntary disclosures of SG shortfalls. For example, employers who have a lower degree of culpability and voluntarily come forward could be eligible for a lower rate of GIC from the date of the voluntary disclosure. The lower rate could be equivalent to the rate of the shortfall interest charge (**SIC**).

Other comments

Deductibility of components

Currently, a charge imposed by the *Superannuation Guarantee Charge Act 1992* (Cth) is non-deductible under section 26-95 of the ITAA 1997. Denying an income tax deduction to the employer for the amount of the SGC has the effect of embedding an additional penalty for non-compliance in the ITAA 1997.

The Joint Bodies consider that the SG shortfall, SG interest and the GIC component should be deductible for all employers, even if the employer is late in paying an employee's SG contributions. The ITAA 1997 should not act as a moral code and the current operation of section 26-95 of the ITAA adds to the complexity of managing an SG shortfall. We consider that these amounts are genuine business costs and their characterisation as deductible expenditure should not be lost due to a late payment of superannuation which is redressed by other provisions.

Allowing a deduction for the payment of the SG shortfall and the SG interest:

- is consistent with current principles that allow deductibility for the cost of employee remuneration[13] and GIC amounts;[14]
- would simplify the tax outcome of an SG shortfall; and
- would reduce the punitive aspect of the SGC as an additional penalty would no longer be embedded in the ITAA 1997 — all penalties imposed on the employer for their non-compliance should be directed through the TAA in the form of an SG penalty (discussed above), the GIC, and the use of DPNs where appropriate.

We consider that the SG penalty should remain non-deductible. The intention of a well-designed penalty regime is to proportionally penalise employers for not meeting their obligations. Employers should not be able to receive the benefit of income tax recognition of such a penalty. We consider this to be a measured and fair outcome from the perspective of the tax system as a whole.

Removal of the administration component

As noted on page 17 of the Consultation Paper, the administration component was introduced to partially reflect the costs of the ATO's compliance activities to recover the SGC. We consider that the administration component should be removed from the SGC.

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[13] Section 8-1 of the ITAA 1997.

[14] Section 25-5 of the ITAA 1997.

The administration component remains a nominal amount and is unlikely to represent a significant portion of the ATO's recovery costs. Further, it increases complexity in the SGC model and can result in increased errors or perceptions of inequity by employers. Moreover, most other penalties in our taxation and superannuation system do not have an equivalent fee, making the administration component an anomaly in the system.

If the Government seeks to partly recover the costs of the ATO's SG compliance activities, this should be achieved by varying the rate of the SG penalty. Together with the other changes we have proposed, this would ensure that only one aspect of the SGC is punitive, making it simpler and easier for taxpayers to understand the consequences of late payment or non-compliance.

The Joint Bodies also support the allocation of Commonwealth funding to the ATO to allow the appropriate allocation of the ATO's limited resources to undertake compliance, recovery and, importantly, educational activities concerning the SGC. This funding should form a regular part of the ATO's budget allocation and should not be based on, dependent on or linked to the current administration component.

Reconciliation period

Determining the correct amount of SG on payday can be difficult for various reasons and despite employers' best efforts, there is a high likelihood that employers may get it wrong.

Under- and overpayments arise for many reasons including:

- making errors in determining what falls within OTE and accurately calculating the SG contributions based on that amount;
- making insufficient SG contributions;
- making inadvertent overpayments including where contributions are made and the employees' earnings are above the MCB for the quarter;
- where employees are paid both in arrears and in advance — the expected ordinary time earnings (**OTE**) hours in the 'in advance' pay period may change after the SG contribution is made, for example:
  - the intended hours are not actually worked (e.g. in the case of a casual employee);
  - an employee leaves the employment of the employer;
  - an employee takes leave without pay;
  - an employee dies; or
  - payments can change due to public holidays, allowances, loadings, and deductions, or when overtime is reported after a pay run is complete.

Underpayments will result in the employer facing an SGC liability, while there is a business cost for employers who inadvertently overpay superannuation. When overpayments are made, it can be difficult to recoup the overpaid amount. The problem is exacerbated for employers who have weekly or fortnightly payroll, as they may not realise the error for several pay cycles.

We consider that the shift to PdS should include a reconciliation period that allows employers to rectify any under- or overpayments. Employers should be allowed at least 30 days from payday to correct any under- or overpayments of an SG amount. During this period, employers should not be subject to any penalty. However, the SG interest should remain payable on underpayments, reflecting the lost earnings in the employees' superannuation accounts. However, to ensure the calculation and payment of the SG interest is not overly burdensome for employers, ideally this process should be automated by the employer's payroll software where possible.

Mechanism to correct an overpayment

Employers are likely to face significant challenges, especially in the early years of PdS, when calculating the exact amount of SG contributions that are required to be paid. We consider it important that the provisions contain a timely mechanism to correct overpayments. If there is no change to the relationship between the employer and employee, it should be possible to carry forward an overpayment to the next SG obligation or reconciliation period.

However, in instances where the employment relationship ends, or the employee dies, between reconciliation periods, the employer that made the overpayment should be able to seek recovery of the overpaid amount. Further consultation may be needed with stakeholders representing superannuation funds and intermediaries about how to best achieve this.

When a contribution is taken to be 'made'

Currently, the ITAA 1997 does not define when a contribution is made by an employer to an employee's superannuation fund; only that a contribution made on behalf of an employee is deductible when it is 'made'.[15] Generally, the Commissioner's current approach is that a contribution is considered to be made when it is received by the superannuation fund and not when the employer makes the payment.[16] This approach frequently results in confusion and unfair outcomes for employers, who have to factor in the time taken by intermediaries to process the contribution so they are not liable for the SGC. Delays due to unforeseen circumstances by intermediaries often result in the employer being liable for the significantly punitive impact of the SGC.

We consider that the employer's obligation should be satisfied once the payment is made to the employee's superannuation fund or the relevant superannuation clearing house. This would ease the compliance burden on employers and ensure a fairer outcome. Under this approach, it may be necessary to work with the clearing houses and other intermediaries to ensure that guidelines are set surrounding the acceptable or reasonable period for the contributions to be transferred from the intermediary to the employee's superannuation account.

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[15] Section 290-60 of the ITAA 1997.

[16] See paragraph 13 of Taxation Ruling TR 2010/1: Income tax: superannuation contributions.

We consider that a longer-term objective of the shift to PdS should support employers to invest in and utilise newer and more efficient technologies, such as the New Payments Platform (**NPP**), to make real time payments to their employee's superannuation accounts. We note software and processes currently exist that enable employers to make timely payments of employees' salaries or wages directly into their bank accounts. Investment by the Government in the resources needed to update reporting systems would support employers to make timely SG payments, would better align with the policy intent of PdS, and reduce any risks posed by delays due to the involvement of intermediaries.

Removal of SG statement

Currently, employers are required to provide the Commissioner with an SG statement by the 28th day of the second month following the end of the relevant quarter if they are liable for the SGC. The form is used to report the:

- total individual SG shortfall for each employee;
- nominal interest component for each employee; and
- total SGC payable for the quarter.

Feedback from our members indicates that the SG statement requires significant time and resources to complete, the compliance costs of which can be compounded as it must be completed for each employee for each quarter for which there is an individual SG shortfall. We consider that under PdS employers should not be required to complete an SG statement. Instead, the necessary information form should be automated or digitalised to the extent possible using current and emerging technology.

Employee versus contractor

The employee-contractor distinction is a perennial source of frustration and complexity for many employers. Significant compliance costs are often involved in determining whether a worker is an employee or a contractor. The complexity arises due to the different definitions of the meaning of 'employee' for the purposes of:

- PAYG withholding — general taxation legislation, including the PAYG withholding provisions, is based on the common law definition of 'employee' which has remained flexible and undergone notable changes despite being a concept that has been in our judicial system for an extended period;[17]
- the *Fringe Benefits Tax Assessment Act 1986* (Cth);
- the SGAA, which expands the ordinary definition of 'employee' to include contractors who work under a contract that is wholly or principally for their labour;[18]

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[17] See *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1, in which the High Court held that a comprehensive contract is the primary source of determining whether a person is an employee or contractor. This contrasts with the longstanding principle in *Hollis v Vabu* [2001] HCA 44 which established that the question will be answered after considering all the factors and the totality of the relationship between the employer and worker.

[18] Subsection 12(3) of the SGAA.

- employment law — which is based on the common law definition;[19]
- payroll tax purposes — where the States and Territories may have their own definition that modifies the general principle;[20] and
- WorkCover purposes — where the States and Territories may again have their own definition that modifies the general principle.

The Joint Bodies are of the view that significant compliance savings and reduction in complexity would result from adopting a unified definition of 'employee' across State and Federal law. We recognise that this may be beyond the current policy scope of PdS, and that achieving such a change would require cooperation between State and Federal governments. However, this change would be an important step towards reducing a significant source of complexity and confusion for employers and workers.

Treatment of employer SG shortfall amounts and SG interest into employees' superannuation accounts

The Joint Bodies consider that the contribution element of the SGC (i.e. the SG shortfall) should be classed in an employee's superannuation account as a concessional contribution in the income year in which it is made. We note that the excess concessional contributions cap provisions currently provide the ATO with a discretion[21] to disregard any resultant excess contributions from an employer making late SG contributions so that employees do not face excess concessional contributions tax or withdrawal processes.

The SG interest which would also be paid into the employees' superannuation funds is a taxable component and should form part of the fund's assessable income in the income year in which it is received. That is, the SG interest should not be classed as a concessional contribution.

Compliance mechanisms

Under PdS, employers will be required to pay their employees' superannuation at the same time as salary and wages, which will be significantly more complex than STP and STP2.

As currently proposed, PdS will not be nearly as automated a system compared to STP and drawing parallels overlooks the numerous complexities of making superannuation payments, such as SuperStream, choice of fund, stapled funds, remittance processes including use of clearing houses and other intermediaries and rejected payments. PdS is a significant change from the current quarterly payment requirement which has been in place since 1 July 2003 (the rules originally introduced with effect from 1 July 1992 were based on a cheque paid half-yearly). As noted on page 27 of the Consultation Paper, more than 62% of employers pay their employees' superannuation quarterly and less than 37% pay more regularly than quarterly.

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[19] We note that the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 proposes to introduce a definition of employee for the purposes of the FWA.

[20] For example, see the relevant contracts provision in section 32 of the *Payroll Tax Act 2007* (NSW).

[21] Section 291-465 of the ITAA 1997.

PdS raises several concerns about process and efficiency. The increased frequency of payments in most cases, combined with the common involvement of intermediaries in making superannuation payments, may be problematic, if existing problems are not addressed prior to the implementation of PdS.

As noted above, it is important for PdS to be designed and implemented to minimise the chances of unintended consequences arising. In particular, the Joint Bodies have concerns that the change to PdS may give rise to the following issues:

- Employers are likely to face additional costs to comply with the PdS including payroll software, transaction fees, and time spent processing payments and addressing errors. PdS increases transaction costs, particularly for weekly payroll employers, and intermediaries used in the processing of payroll will likely charge more for their services.
- More work will be required in the early verification of data as new employees are onboarded — identifying what is the 'source of truth' of the relevant employer, employee and superannuation fund data will be more important to avoid processing errors and increase in workflows due to the required corrective actions. The process around default funds, stapled funds, ensuring employees' details on their MyGov account are up to date so employees can download a pre-populated choice of fund form that they can complete and give to their employer together with their TFN and choice of fund should be more streamlined. The window for making corrections if employees do not provide the necessary choice of fund information to their employer and the employer is required to request a stapled fund from the ATO will be extremely small, so the entire onboarding process needs to be streamlined.
- The ATO-run Small Business Superannuation Clearing House (**SBSCH**), used by around 130,000 small employers, is, in its current form, ill-equipped to handle PdS. It cannot process multiple payments in quick succession and has a history of delays, with reports of payments through the SBSCH taking months to be received by superannuation funds. A significant overhaul of the SBSCH is needed to accommodate the more frequent superannuation payments proposed under PdS. Consideration should also be given to whether a distinction between the treatment of SG contributions made using the ATO's SBSCH versus the commercial clearing houses continues to be appropriate under PdS.[22] In our view, the distinction is not warranted.
- Three-quarters of undisputed tax debts are owed by SMEs and many will find the move to PdS and the associated impact on their cash flow challenging. Some SMEs are heavily reliant on their debtor profile, so anything the Government can do to speed up the payment by debtors (*Payment Time Reporting Act 2020* (Cth)) would be of assistance to SMEs ahead of the implementation of PdS.

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[22] Currently, an employer is taken to meet their SG obligations if the SG contribution is made to the ATO's SBSCH by the due date, whereas if an employer uses a commercial clearing house, the contribution is not taken to be made for SG purposes until the superannuation fund receives the contribution.

Other Payday super issues

SG reporting frameworks

Currently, the ATO obtains confirmation of SG contribution processing from APRA-regulated superannuation funds through the Member Account Transaction Service (**MATS**), and confirmation of submission of contributions from employers via STP. These systems were developed separately, so the data does not necessarily align.

It is intended that standardised datasets will be developed to enable the ATO to establish a unified database aligning information from employers and superannuation funds. This database will offer a centralised view of the SG position in near-real time for employers and employees, thereby allowing the ATO to pinpoint instances and patterns of late or underpayments. SMSFs do not participate in MATS reporting.

We understand that, as a general principle, alignment in data sources is intended in the proposed change to PdS. However, the disadvantages of recreating similar fields across the four key reporting frameworks (STP, SuperStream, MATS and Member Accounts Attribution Service (**MAAS**)) will see additional costs borne by employers who will need to ensure that payroll systems are updated in line with new specifications.

While we recognise that SuperStream data already carries similar data to that conveyed to the ATO by MATS, the MATS framework sees data communicated to the ATO only upon the successful processing of contributions by a fund. Rejections that occur during the process often result in contributions unable to be processed, which can take time to resolve.

An ideal process would see contributions data supplemented by a robust error reporting framework. Where errors are identified at the gateways, by the superannuation funds or the ATO, this must be able to be reported back to the appropriate entity for correction. A unique payment identifier would support this reporting framework since errors would be able to be corrected in real time and support straight-through processing of corrected information.

We consider that a new unique contribution identifier under enhanced data standards would remove some of the need to match data fields in both STP and MATS. Reconciliation should be able to be carried out between STP and MATS/MAAS data at the ATO for the most part. Where these are unable to be reconciled, the reporting back of errors to superannuation funds, gateways or employers — and matching these with individual payments — will ensure that errors are corrected immediately.

STP reporting is currently designed to deal with pay details for employees. For most employees paid on a fortnightly or monthly basis, the pay component is made up of two portions: an amount paid in arrears and an amount paid in advance. For pay amounts falling into these situations, the OTE amount can be known with certainty only for the amount paid in arrears. Amounts paid in advance are likely to be a ‘best guess’ and, in the absence of confirmation to the affirmative, can only ever approximate OTE.

Employees paid weekly tend to be paid only in arrears. While this may create additional certainty as to the OTE component of such pay, corrections including late processing of certain leave types may result in adjustments to OTE after a pay cycle has been submitted.

We also consider that the mandatory reporting of both employers' SG obligations and their employees' OTE through STP may result in confusion for employees. In theory, requiring the reporting of both the SG obligation and OTE through STP would provide certainty as to the relevant amounts of SG and OTE for a single payroll cycle. However, in practice, employees may be confused by the amounts reported on their pay slips (which broadly reflect what is reported through STP) and may have difficulty distinguishing between OTE and their salary or wages, where they are not the same amounts. Although this mismatch of amounts may exist under the current regime, many employees may not be aware of this due to the timing of the receipt of their salary or wages and their SG contributions, and because OTE is generally not reported on payslips.

We are of the view that the inclusion of SG and OTE data in STP should be made compulsory only if estimations are allowed and then adjustments are permitted for any under- or overpayments. In addition, where such STP data is reported as part of payroll information provided to employees, distinctions should be made between SG payable as part of the current payroll cycle, and SG that has accrued as part of a previous payroll cycle.

SG contributions for the 2026–27 financial year

The current quarterly payment model for SG contributions has an inherent timing feature which means that contributions for the June quarter of an income year are often paid by 28 July (still complying with the employer's SG obligations). This can result in an employee's June quarter contributions counting towards their concessional contributions cap for the following income year. Ordinarily, this would not be an issue, as the SG contributions for the June quarter of that following income year are often paid in the first quarter of the subsequent income year.

As employers shift to PdS, it is likely that many employers will continue to pay the SG contributions for the June 2026 quarter by 28 July 2026. However, they will also be required to pay SG contributions relating to OTE for all the paydays throughout the 2026–27 income year, meaning that an extra quarter of SG contributions may be made during 2026–27. This is a one-off consequence of the interaction and overlap of the current SG regime and the proposed PdS regime for the first quarter of 2026–27.

In many cases, this will be detrimental to many employees who may, as a result of the extra quarter of SG contributions being made:

- exceed their concessional contributions cap for 2026–27; and/or
- have additional amounts included in their 'taxable contributions' under Division 293 which will cause them to exceed the Division 293 income threshold of $250,000 for 2026–27.

To ensure no employee is adversely affected by this policy change to PdS, we recommend that temporary transitional arrangements relating to the concessional contributions cap and Division 293 are necessary. Under such transitional arrangements:

- A one-off increase in the concessional contributions cap for 2026–27 only, to 125% of the normal cap, should be legislated, after accounting for usual indexation. This adjustment would accommodate the potential additional SG contributions due to the change in the timing of the allocation of SG contributions, ensuring that affected employees have adequate cap space without being penalised for circumstances beyond their control. This adjustment would be brought back to the normal limit (after indexation) from the 2027–28 income year.

- The income threshold for Division 293 tax would also be increased by a one-off amount, being the amount of the temporary increase in the concessional contributions cap for 2026–27 to ensure that employees are not inadvertently adversely affected.
- We suggest no change is required to be made to the non-concessional contributions cap for 2026–27 (other than the application of any standard indexation) so it should remain at a multiple of four times the standard concessional contributions cap.
- If the Government decides to phase in the implementation of PdS such that smaller employers would not be required to pay SG contributions on payday until 1 July 2027 (see above), then the proposed 125% increase to the concessional contributions cap — and a corresponding adjustment to the Division 293 income threshold — should apply to all employees for 2026–27 and 2027–28. We consider that attempting to identify whether an employee's employer has up to or fewer than 20 employees in determining the employee's concessional contributions cap for these two income years would result in unnecessary compliance costs and complexity, particularly where an employee may work for multiple employers of different sizes.

We take this opportunity to point out that the lack of indexation with respect to the total superannuation balance (**TSB**) limit on carry forward concessional contributions (fixed at $500,000) penalises Australians with lower superannuation balances and should be indexed. When the concessional contributions cap is next indexed, it is expected to increase to $30,000, which will see it equivalent to 12%[23] of $250,000 (the current income threshold for Division 293 tax). We consider that indexation of the TSB limit of $500,000 for carry forward concessional contributions and the Division 293 income threshold of $250,000 should apply for each income year after this occurs.

Maximum contribution base calculations

As explained above, the concessional contributions cap should be temporarily set for only the 2026–27 income year at an annualised amount which is 125% of the normal indexed amount. However, implementation of this measure would require a new method to ensure that the MCB — currently set as a quarterly earnings figure — can serve its current purpose for future years.

This amount could be annualised then divided by the number of the employer's pay periods in the income year to arrive at a relevant payroll figure. This could be set out in a table of figures, rather than as a single quarterly earnings amount, from 2026–27 onwards. We recommend that the MCB be made available as a table of figures for use by employers and employees in the form of weekly, fortnightly and monthly amounts for ease of use. Special arrangements would need to be made for those employees who obtain an employer shortfall exemption certificate under section 19AA of the SGAA.

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[23] This is the legislated rate of charge percentage in subsection 19(2) of the SGAA from 1 July 2025.

Defined benefit members and arrangements for non-alignment of pay and contributions

Members of defined benefit superannuation funds cannot directly benefit from a measure where contributions are remitted at the same time as salaries and wages. We note that defined benefit superannuation has different characteristics to accumulation superannuation funds, thus presenting challenges that require variations to the PdS model.

One of the challenges of regulating the superannuation system is to ensure that employers meet their obligations to provide adequate retirement benefits for their employees. To do this, the system needs to be able to act on benefit certificates issued by actuaries on behalf of defined benefit superannuation funds. These certificates specify the notional employer contribution rate, which is the percentage of salary that the employer needs to contribute to the fund to satisfy their SG obligations.

However, increases to the notional employer contribution rate may not necessarily align with the actual pay cycles of the employees. For example, the contribution rate may be calculated on an annual or ad-hoc basis, while the pay cycles may be fortnightly or monthly. Likewise, during periods of higher investment performance, it is possible that a 'contribution holiday' will result in no contributions being required from employers for certain periods. For these reasons, the system needs to be able to support the payment of superannuation contributions that do not align with pay cycles. These could be described as:

- 'nil-payroll superannuation' where a pay event is not needed to make superannuation contributions; and
- 'nil-superannuation payroll' where a pay event will not give rise to a superannuation contribution.

The provision of nil-payroll superannuation and nil-superannuation payroll would also solve similar problems such as those created by, for example, contractors eligible for SG amounts, higher income employees (in excess of the MCB), requirements under awards or agreements where employers pay administration fees or insurance premiums, or employees eligible to contribute to foreign pension funds in lieu of SG requirements. These scenarios may require different rules or calculations for superannuation contributions than those based on regular pay events. By allowing flexibility and diversity in the way superannuation contributions are made and reported, the system can better accommodate the needs and preferences of different employers and employees. This will also enhance the transparency and accountability of the superannuation system and ensure that all employees receive their full entitlement to retirement benefits.

Self-managed superannuation funds

In principle, we understand and support the need for consistency in policy design across the superannuation sector. While we broadly support the policy underpinning PdS, it is important that the unique issues applicable to the different sector participants are acknowledged and carefully considered. This is vital to ensure that PdS operates efficiently and as intended.

Issues arising for large APRA-regulated funds will differ from those of SMSFs, so a phased implementation approach should be considered to bring SMSFs within the scope of the PdS regime. Further, we recommend the development of a simplified alternative reporting framework that aligns more closely with the operational realities of SMSFs, while maintaining the integrity and objectives of the policy intent.

SMSFs play a pivotal role in the Australian superannuation landscape, and their inclusion in the legislative framework merits careful consideration. We consider that a 'one size fits all' approach, particularly one designed with larger APRA-regulated funds in mind, is not suitable for SMSFs due to their distinct nature and the potential administrative burden it could impose on SMSF trustees and the professional services firms supporting those trustees.

The key factor supporting the case for a staged approach to be considered stems from the heavy reliance placed on accountants who are essential service providers to the SMSF sector, notwithstanding that SMSF compliance obligations reside with the SMSF trustees. Additionally, accountants administer the accounting and reporting systems needed for the SMSF to operate. Access to certain services, including software, is generally not directly available to SMSF trustees, or where it is, the costs are prohibitive.

The reasons explained above (under **Implementation timeframes**) to provide a transitional period for small employers are equally applicable to SMSFs.

There are some learnings from previous policy and administrative implementations:

- **STP:** We note that a similar approach was adopted to implement STP from 1 July 2018, which applied initially only to larger employers and enabled them to test the system and ensure it was operating as intended before smaller employers were required to report through STP from 1 July 2019.
- **SuperStream rollovers:** Crucially, to ensure the success of PdS, SMSFs must be considered as part of the technology and system design from the outset. Failure to do so risks significant disruption and functionality issues in the event that SMSFs would be permitted to later plug into what would be an established operating framework. It is worth noting that SMSFs encountered various design and implementation issues with the treatment of rollovers under SuperStream (many of these issues persist), and SuperStream is processing significantly fewer transactions than what will be processed through the system under PdS.
- **TBARs:** When the quarterly transfer balance account report (**TBAR**) was introduced, despite the relatively low volume of transactions requiring reporting, accountants faced significant challenges in practice. While changes in technology have seen significant advances in SMSF administration software, it remains imperfect and often requires manual intervention and processing.

A staged approach for SMSFs could involve:

- an initial period (such as 12 months) where SMSFs are excluded from compulsory reporting under PdS;
- encouraging voluntary reporting during the transitional period which would assist in ensuring any future reporting requirements are well-informed;
- adopting an observational stance during the transitional period that would provide a more comprehensive understanding of the sector's capabilities and needs to accurately evaluate how SMSFs will manage the changes and challenges — this would ensure any future reporting obligations are necessary and feasible for the sector; and
- designing a simplified reporting process for SMSFs which could involve modifying the SMSF annual return to provide the necessary data.

During any transitional period, members of SMSFs would still be able to access superannuation data utilising the existing employee reporting mechanisms and the financial records of the SMSF.

We suggest that further consultation with stakeholders on this issue would be beneficial.

We also note the reliability of the reporting via the new generation of software providers still depends on external sources of data. Most bank data feeds (**feeds**) provide data on a prospective basis only once the feeds are in place; historical data is not readily available through the feeds. They take time to establish, and there are delays before data starts to feed into the system. This is problematic for new accounts, where changes in accounts occur, or when transferring clients to new administration systems. The latter can be due to a change in internal systems or where the SMSF trustees change accountant or administrator. Data feeds are not currently available for all account types or financial institutions, requiring the entry or import of data from bank statements.

Onboarding employees

We acknowledge that new employees can provide their TFN details and choice of fund information to their employer through myGov. However, feedback from our members indicates that, currently, the process of onboarding employees (including the stapled fund requirements) is still often completed manually and relies on the completion of paper forms by employees. This process is prone to error.

A facility whereby choice of fund data can be imported by employers from a set of standing ‘choice of fund’ instructions held with the ATO could augment the existing stapled fund arrangements and ensure that superannuation data held by employers is constantly kept up to date. This dataset would be kept current by employees utilising the ATO’s online services (via myGov or Online services for agents). This could involve simply ticking a box next to one of an employee’s superannuation funds as a chosen fund for the purposes of SG contributions, with the stapled fund preselected unless a taxpayer selects a different fund. Integrity of information would be assured by the employee’s TFN and other identifying information.

Superannuation fund data would be kept up to date at the ATO via MAAS. Employer data would ensure that, where necessary (e.g. the employee’s chosen fund becomes non-complying), the default fund details would become the active fund for making SG contributions.

The ATO could also verify through automated processes that a chosen or stapled fund can accept contributions prior to the fund information being made available to employers.

Alternative methods including paper forms or modalities for accessibility purposes (e.g. for visually impaired employees) should also be available. An online service for smaller employers should also be available so they can separately check employee fund information.

Appendix B

Worked examples illustrating the SGC penalty

The worked examples below illustrate the difference between the current SGC regime and the model proposed by the Joint Bodies in this submission. Note that these illustrative calculations are to be read in conjunction with **Appendix A** of our submission.

Assumptions

- For the relevant period, OTE is $50,000, and total salaries and wages are $60,000.
- An employer has an SG shortfall for one quarter relating to 20 staff.
- The employer pays the SG shortfall two years after the due date.
- The nominal interest component (to 30 June 2026) is charged at the rate of 10%.
- The SG interest (charged on or after 1 July 2026) is charged at the applicable market rate of 10%.
- GIC is imposed at the rate of 10%.

Example 1 — SG shortfall is due to lack of reasonable care

	Current SGC regime	Proposed SGC regime
SG shortfall	$60,000	$50,000
Nominal interest component	$12,000[24]	—
SG interest	—	$10,000
Administration component	$400	—
Part 7 penalty (at 200%)	$144,800	—
SG penalty (at **25%**)	—	$12,500
GIC	$28,960	$12,000
Total	**$246,160**	**$84,500**
Deduction	$28,960	$72,000

Example 2 — SG shortfall is due to recklessness		
	Current SGC regime	**Proposed SGC regime**
SG shortfall	$60,000	$50,000
Nominal interest component	$12,000[24]	—
SG interest	—	$10,000
Administration component	$400	—
Part 7 penalty (at 200%)	$144,800	—
SG penalty (at **50%**)	—	$25,000
GIC	$28,960	$12,000
Total	**$246,160**	**$97,000**
Deduction available	$28,960	$72,000

Example 3 — SG shortfall is due to intentional disregard		
	Current SGC regime	**Proposed SGC regime**
SG shortfall	$60,000	$50,000
Nominal interest component	$12,000[24]	—
SG interest	—	$10,000
Administration component	$400	—
Part 7 penalty (at 200%)	$144,800	—
SG penalty (at **75%**)	—	$37,500
GIC	$28,960	$12,000
Total	**$246,160**	**$109,500**
Deduction	$28,960	$72,000

[24] This is an approximation only and is not calculated based on the actual days, including back to the start of the relevant quarter.