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General Manager
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: chsuper@treasury.gov.au

Dear General Manager

RE: Superannuation Clearing House - Exposure Draft of Legislation and Associated Explanatory Material

The Association of Superannuation Funds of Australia (ASFA) is a non-profit, non-political national organisation whose mission is to protect, promote and advance the interests of Australia's superannuation funds, their trustees and their members. Our members include corporate, public sector, industry and retail superannuation funds plus service providers who provide professional services to SMSFs, account for more than 5.7 million member accounts and over 80% of superannuation savings.

ASFA is strongly supportive of this initiative which has the potential to achieve:

- A substantial increase in the number of small employers whose superannuation contributions and associated data are submitted electronically to superannuation funds,
- A significant reduction in the number of contributions made by small employers under an ineffective chosen fund election, and
- Agreement across the superannuation industry to standard minimum data requirements for enrolling a new member in a default fund and making a contribution in respect of an existing member of a superannuation fund.

ASFA would like to submit the following comments in response to the Treasury consultation paper on the Superannuation Clearing House - Exposure Draft of Legislation and Associated Explanatory Material.

GENERAL COMMENTS

ASFA understands that the regulations will list Medicare Australia as an approved clearing house.

Once Medicare Australia is listed in the regulations as an approved clearing house this, combined with the provisions in the exposure draft, will give effect to the Government's intention that

- An employer can meet their obligation to make compulsory superannuation contributions for the benefit of their employees by paying those contributions to Medicare Australia.
- A superannuation contribution made by an employer for the benefit of an employee is made in compliance with the choice of fund requirements where the contribution is made through Medicare Australia.
- An employer can meet their statutory obligation to promptly remit superannuation amounts deducted from an employee's salary or wages by paying those amounts to Medicare Australia.

ASFA is strongly supportive of the measure and of Medicare Australia's stated intention to require small employers to interact with it electronically. Should there be widespread take-up, the measure has the potential to significantly reduce the administration costs attributable to processing these contributions manually. However, ASFA has concerns in the following areas:

- Lack of operating standards to be met by an approved clearing house.
- No legislative restriction on a contributing employer's number of employees.
- Lack of a level playing field among providers of clearing house services

Each of these concerns is addressed below.

Lack of operating standards to be met by an approved clearing house

Proposed subsection 79A(3) states that an "**Approved clearing house** means a body specified in regulations for the purpose of this subsection".

It is appreciated that this legislative structure is designed to give effect to the government's decision to appoint Medicare Australia as the entity to deliver the free clearing house service for small employers. However this also means that there is no transparent appointment process. That is, there is no visible requirement that an approved clearing house is required to demonstrate a capacity to meet minimum standards of operation or to provide an assurance that it can provide the service it is offering.

Additionally there is no mechanism to impose a penalty where an approved clearing house fails to perform. This is understandable in the context of the approved clearing house being Medicare Australia and the limitation on the Commonwealth being able to impose a fine on itself. However, the absence of a penalty regime would appear to preclude the appointment of a private entity as an approved clearing house as there would be no mechanism by which the performance of private sector participants could be regulated.

A further weakness in the proposed arrangement is that should significant delays occur between a contribution being received by the approved clearing house and it being passed on to and received by the target fund there is a lack of compensation for the affected employee. Currently, where delays by clearing houses in forwarding contributions result in an employer contribution not being received by a fund by the SG due date, the employee may be entitled to a nominal interest payment as compensation for lost earnings. No such entitlement exists with similar delays by an approved clearing house as the contribution is deemed paid on receipt by the clearing house.

No legislative restriction on a contributing employer's number of employees.

The Government announcement was that access to the free superannuation clearing house (SG clearing house) would be restricted to employers with 20 or fewer employees.

The draft legislation is silent on who can use the service. That is, there is nothing within the legislation which prevents an employer with more than 20 employees from contributing to the clearing house and thus meeting their SG obligations.

Lack of a level playing field among providers of clearing house services

The draft legislation, as it stands, creates an uneven playing field between the approved clearing house and other providers of clearing house services. It does this in the following ways:

1. It provides a free service to employers who contribute to the approved clearing house (Medicare Australia),
2. It provides an employer who has contributed to an approved clearing house an assurance that their contribution will be treated, for superannuation guarantee (SG) purposes, as if the money had been paid to a complying superannuation fund.
3. It does not provide a mechanism whereby existing providers of clearing house services can gain approved clearing house status and thus give an SG assurance to employers.
4. Unlike other providers of a non-cash payment facility, the approved clearing house (Medicare Australia) is not subject to the Corporations Act's licensing and disclosure regime.

ASFA is concerned that the above features, combined with the absence of a limitation on the number of employees that an employer may have and still use the approved clearing house, has the potential to deliver commercial damage to existing providers of clearing house services.

To address the above three issues, ASFA recommends:

- That the legislation be amended so as to provide a path forward whereby private sector organisations could achieve approved clearing house status. This would achieve a level playing field. The path forward could include the establishment of operating standards combined with regulatory oversight, as envisioned by the government's original statement. Importantly, this would ensure clearing houses meet certain minimum requirements and provide a wider range of employers with the opportunity to meet their SG obligation by contributing through a clearing house.
- That the legislation be amended, or administrative arrangements be put in place, so as to prevent an employer using the Medicare Australia clearing house service without charge where, on the last day of the contribution period, the employer had more than 20 employees. (Contribution period for this purpose could be defined as the most recent employment period to which an SG contribution related.)

SPECIFIC COMMENTS

Section 23B Contribution through an approved clearing house

This section of the exposure draft, together with proposed sections 32C(2B) and 79A and various other sections of the superannuation Guarantee (Administration) Act (SG Act) uses the term 'for the benefit of an employee'. Implicit in this statement is that, at the time of contribution, the employer must provide sufficient information about both the contribution and the employee the contribution is in respect of so as to enable the trustee of the receiving fund to carry out its fiduciary responsibility with respect to the management of trust funds.

However, in the broader employer community there is a lack of appreciation of the importance of these words and a lack of appreciation of precisely what information must be provided in order for

a contribution to be considered to have been made “for the benefit of an employee”. ASFA is aware of funds that receive contributions from employers with no accompanying employee details because ‘the legislation doesn’t say you have to provide a name’.

ASFA has long argued that the current ‘lost member’ issue is primarily the result of insufficient information being received about an employee at the time of their enrolment as a fund member. Superannuation funds, for their part, have been reluctant to reject a contribution with insufficient accompanying information for a number of reasons, including a misplaced belief that the required information will be forthcoming.

The draft legislation has the potential to further complicate the situation with many employers incorrectly believing they can pass this administration problem on to the approved clearing house with respect to both chosen fund and default fund contributions. That is, the intricacies of the legislation will be lost in the message that a small employer can meet their SG obligation by paying their SG contributions to the government’s free clearing house.

ASFA considers that the introduction of the approved clearing house provides a perfect opportunity to clarify the situation for both the contributing employer and the receiving fund and at the same time strike a blow at the heart of the lost member problem.

ASFA recommends:

- That the term ‘for the benefit of an employee’ be defined within the SG Act
- That the definition of ‘for the benefit of an employee’ refer to information about the relevant employee being provided in accordance with the regulations
- That the regulations separately set out information required in respect of:
 - An existing member of a fund, and
 - An employee who is to be enrolled in the employer fund as a new member (i.e. a new employee who has not chosen a fund or an employee who has chosen a fund to which the employer is unable to contribute.)

While the actual information requirements could be decided in consultation between the government and industry, ASFA considers that an appropriate starting point for new member enrolments is the information that is contained on the ATO’s Tax File Number Declaration form.

Section 32C Contributions that satisfy the choice of fund requirements

Where an employee chooses a fund, section 32C(2B)(c) requires an employer to pass on to the approved clearing house the written chosen fund nomination (the section 32F(1) notice). This must be done within 21 days of the employee giving the notice to the employer (32C(2B)(c)(i)) and before or at the time the contribution is made (32C(2B)(c)(ii)). This provision creates two difficulties:

- It does not make provision for the situation whereby an employee has given the employer the notice more than 21 days prior to the employer deciding to use the approved clearing house.
- It mandates the physical movement of the section 32F(1) notice from the employer to the clearing house.

ASFA recommends that subparagraph 32C(2B)(c)(i) be amended to require the information to be passed on by the later of 21 days after receipt of the notice by the employer and the employer first advising the clearing house that contributions are to be made in respect of the employee.

ASFA further recommends that paragraph 32C(2B)(c) be amended to permit the information contained in the notice to be provided, in its entirety, electronically to the approved clearing house.

Should you wish any further information on this matter please contact Robert Hodge, Principal Policy Adviser (rhodge@superannuation.asn.au) (02) 80790806).

Melinda Howes
Director Policy and Industry Practice