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Australian Taxation Office

By Email: PAGSPR@ato.gov.au

Dear Mr Sargent

ATO consultation on Legislative Instrument: Draft Superannuation Guarantee (Administration) (Out-of-Cycle Qualifying Earnings) Determination 2026

The Tax Institute welcomes the opportunity to make a submission to the Australian Taxation Office (**ATO**) in relation to the consultation on the draft Legislative Instrument, LI 2026/D3: *Draft Superannuation Guarantee (Administration) (Out-of-Cycle Qualifying Earnings) Determination 2026 (LI 2026/D3)*.

In the development of this submission, we closely consulted with our National Fringe Benefits Tax (**FBT**) and Employment Taxes Technical Committee and our National Superannuation Technical Committee to prepare a considered response that represents the views of the broader membership of The Tax Institute.

We acknowledge the ATO's objective of providing clarity on the operation of the out-of-cycle qualifying earnings rules and supporting the administration of the Payday Super regime. However, we consider that certain aspects of LI 2026/D3 may give rise to interpretative uncertainty and unintended outcomes for employers seeking to comply with the new rules.

Summary of key concerns

Our key concern with LI 2026/D3 is the inconsistency in the meaning of 'entitlement' between LI 2026/D3 and Taxation Ruling TR 2001/10: *Income Tax: fringe benefits tax and superannuation guarantee: salary sacrifice arrangements (TR 2001/10)*. This inconsistency may create confusion for employers and could result in ordinary salary and wage payments being incorrectly characterised as out-of-cycle payments for the purposes of the Payday Super rules.

LI 2026/D3 contains a definition of 'payment in advance' that refers to a payment being made earlier than the time the employee would ordinarily become 'entitled to the payment'. This appears to be a reference to the usual pay day for salary and wages.

In TR 2001/10 at paragraph 23, the reference to an 'entitlement to receive salary or wages that have been earned' is explained to be a reference to the point at which the employee has performed the employment duties to which the payment relates.

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While there might be subtle differences in the actual phrases used, the point in time at which an employee is entitled to receive salary and wages is a concept that should be consistent across both pieces of guidance, and the fact that it currently is not is likely to be confusing for employers. We consider the meaning of 'entitlement' used in LI 2026/D3 to be the preferred meaning, as it is most in line with the common understanding of the concept.

In addition to the technical concerns outlined above, we consider that certain aspects of the drafting of LI 2026/D3 pose broader challenges for usability and interpretation. Clarifications in the drafting and illustrative examples would be useful to address these issues.

Our detailed analysis and recommendations to address these concerns and improve LI 2026/D3 are contained in **Appendix A**.

The Tax Institute is the leading forum for the tax community in Australia. We are committed to shaping the future of the tax profession and the continuous improvement of the tax system for the benefit of all. In this regard, The Tax Institute seeks to influence tax and revenue policy at the highest level with a view to achieving a better Australian tax system for all.

If you would like to discuss any of the above, please contact our Tax Counsel, John Storey, on (03) 9603 2003.

Yours faithfully,

Julie Abdalla

Head of Tax & Legal

Tim Sandow

President

APPENDIX A

We have set out our detailed comments below, including the key areas of concern, their implications, and our recommendations to improve LI 2026/D3.

Inconsistency in the meaning of ‘entitlement’

LI 2026/D3

LI 2026/D3 seeks to clarify the types of qualifying earnings and the circumstances under which they will qualify as out-of-cycle. One of the types of out-of-cycle payments referred to is a ‘back payment’, and this is defined as a payment made ‘after the time the employee became entitled to the payment’. Another type of payment is referred to as ‘payments in advance’, and these are defined as payments made ‘earlier than the time the employee would ordinarily become entitled to the payment’. In addition, the circumstances under which such payments may qualify as out-of-cycle are explained as payments made on days other than those in accordance with the employer’s established timing/pattern/schedule for making payments of qualifying earnings.

When combining these parts of the guidance, it appears that the reference to the time an employee would ordinarily become ‘entitled’ to their salary or wages refers to the employer’s usual pay day. This approach reflects a practical interpretation aligned with payroll processes. However, when contrasted with existing ATO guidance, it creates uncertainty as to how the concept of ‘entitlement’ should be applied in practice.

TR 2001/10

TR 2001/10 provides guidance on salary packaging arrangements, including the income tax and FBT consequences arising from the timing of such arrangements. In particular, in paragraph 23 of TR 2001/10, the reference to an ‘entitlement to receive salary or wages that have been earned’ is explained. The paragraph refers to standard pay cycles that correspond to periods during which services are performed. It indicates that an employee has earned the entitlement to payment in proportion to the services performed during the relevant period. There is a reference to such an entitlement arising even if the employee is not paid until later. However, there is no discussion of payments made before the employee performs the services to which they relate.

Overall, this guidance appears to indicate that entitlement to salary or wages arises when the services are performed, which may be before the usual pay day (although it is not clear whether it may also be after the usual pay day). This creates a different conceptual basis for determining entitlement, which may not align with the approach adopted in LI 2026/D3.

Inconsistency creates uncertainty and unintended outcomes

The difference in the two uses of the concept of entitlement may be confusing for employers. For example, consider the case of employees paid monthly, with half paid in advance and half in arrears. Under LI 2026/D3, entitlement to salary and wages would arise on pay day in the middle of the month.

Under TR 2001/10, entitlement to salary and wages for the first half of the month arises as the services are performed. It is not clear whether entitlement to salary and wages for the second half of the month would arise on pay day or as those services are performed, although it seems to be the latter.

So, if the TR 2001/10 interpretation of entitlement is applied, the normal salary payment in the middle of the month would arguably be half a back payment and half a payment in advance. This could cause the payments to be considered out-of-cycle for the purposes of the new Payday Super rules, which does not seem to fit with the intention.

This outcome highlights the potential for ordinary payroll arrangements to be treated as out-of-cycle payments, thereby increasing compliance complexity and creating uncertainty for employers. Such an outcome does not appear to be consistent with the policy intent of the Payday Super regime.

Recommendation

In our view, the LI 2026/D3 interpretation aligns more closely with the common understanding of employee entitlements and the law's intent. We consider that the ATO should update TR 2001/10 to ensure that the concept of 'entitlement' is applied consistently with LI 2026/D3. In particular, TR 2001/10 should clarify that entitlement to ordinary salary and wages arises on the employee's usual pay day. This would improve clarity and reduce the risk of misalignment.

Clarity on the 'out-of-cycle qualifying earnings' concept

While the concept of out-of-cycle qualifying earnings is broadly understood to apply to irregular or non-standard payments, the current drafting does not clearly explain how it operates in practice. In particular, it is difficult to distinguish between ordinary qualifying earnings and out-of-cycle qualifying earnings.

The absence of clear definitions and structured guidance may result in confusion for employers, particularly those without specialist tax knowledge, or ready access to professional advice, and increases the risk of misclassification of payments.

Recommendation

The ATO should revise the drafting to clearly explain:

- what constitutes ordinary qualifying earnings and the standard SG payment requirements;
- what constitutes out-of-cycle qualifying earnings and the extended payment timeframe; and
- the circumstances in which payments may move between these categories.

Providing clear definitions and a structured explanation would improve usability and reduce the risk of error.

Treatment of payments made with regular pay

LI 2026/D3 does not clearly explain whether out-of-cycle qualifying earnings retain their status when paid at the same time as ordinary salary and wages. It is unclear whether the relevant test is based on timing (for example, payments made on the same day) or payroll processing (for example, payments included in the same pay run).

This uncertainty is significant, as employers may include irregular payments such as bonuses or allowances within a regular pay cycle without realising that doing so may affect their eligibility for the extended SG payment timeframe.

Recommendation

The ATO should clarify whether out-of-cycle status is affected when irregular payments are:

- made on the same day as ordinary earnings; and/or
- processed as part of the same pay run.

Clear guidance and examples should be provided to illustrate these scenarios and their outcomes.

Examples and practical guidance

The examples provided in the Explanatory Statement to LI 2026/D3 are difficult to follow and, in some cases, combine different types of payments (for example, bonuses and allowances) in a single scenario. This reduces their effectiveness in explaining how the rules operate in practice.

Further, there is a lack of examples across different pay frequencies, which limits their usefulness for employers with varying payroll arrangements.

Recommendation

The ATO could improve the examples by:

- separating different types of payments into distinct scenarios;
- providing additional examples that reflect common situations; and
- including scenarios across different pay frequencies (for example, weekly, fortnightly and monthly payrolls).

This would make the guidance more practical and easier for employers to apply.

Calculation of the extended SG timeframe

The method for determining the extended SG payment timeframe for out-of-cycle qualifying earnings is not clearly explained. Key concepts, such as the 'next QE day' and how the additional seven business days are calculated, are difficult to follow in the current draft.

This lack of clarity increases the risk that employers may miscalculate due dates, leading to unintentional non-compliance.

Recommendation

The ATO should provide clearer guidance on how to calculate the extended timeframe by:

- including step-by-step explanations;
- clearly identifying relevant dates within examples; and
- incorporating visual aids, such as timelines, to demonstrate how the rules operate.

This would support more accurate and consistent application of the rules.

Clarification of exclusions and common scenarios

LI 2026/D3 does not clearly identify scenarios where payments should not be treated as out-of-cycle qualifying earnings. This creates a risk that standard payroll arrangements may be incorrectly classified. For example, arrangements in which employees are paid partly in advance and partly in arrears as part of a regular pay cycle may be misinterpreted as involving out-of-cycle payments.

Recommendation

The ATO should include guidance on common scenarios that should not be treated as out-of-cycle qualifying earnings, supported by clear examples. Providing this clarification would reduce the risk of misclassification and assist employers in applying the rules correctly.