



3rd May, 2012

The General Manager
Business Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: sbtr@treasury.gov.au

Dear Madam/Sir,

**Re: Tax Laws Amendment (2012 Measures No.2) Bill 2012; Pay As You Go
Withholding Non-compliance Tax Bill 2012**

The Construction and General Division of the Construction, Forestry, Mining and Energy Union ("CFMEU") welcomes yet another opportunity to provide feedback on the Exposure Drafts of the *Tax Laws Amendment (2012 Measures No.2) Bill 2012* and the *Pay As You Go Withholding Non-compliance Tax Bill 2012*. As the principal union in the building and construction industry, the CFMEU has a very widespread knowledge of 'phoenix' activity and has been very vocal and active for many years on the issue.

In the building and construction industry in particular, our experience is that 'phoenixing' continues to be used by unscrupulous operators to defraud workers of their entitlements due to them under awards, industrial instruments and industrial legislation. We further note that a corollary of this is that your Department does not receive the revenue it ought to under taxation legislation. Indeed, ATO estimates for the year 2011-2012 reveal that had the previously proposed measures been made law, they would have resulted in \$260 million in revenue in fiscal balance terms over the forward estimates and some \$245 million in increased receipts for the same period.

In our submission to the Department of the Treasury on 1 August 2011, the CFMEU outlined our broad support for measures aimed at stamping out fraudulent phoenix activity by "strengthening incentives for companies to comply with PAYG withholding and superannuation guarantee." Those measures, in summary, were:

1. Extending director penalties to make directors personally liable for their company's unpaid superannuation guarantee amounts;

2. Allowing the Commissioner of Taxation (“the Commissioner”) to immediately commence the recovery of all director penalties when the company’s unpaid liability remains unpaid and unreported after the due day; and
3. Providing the Commissioner with the discretion to prevent directors and, in some instances, their “associates” from obtaining PAYG withholding credits where the company has failed to pay amounts to the Commissioner.

In doing so, the CFMEU proposed a series of amendments to those measures in order to reinforce their effect in accordance with the policy imperative of stamping out phoenix activity, including:

1. That the three-month waiting period before the automated recovery process would activate be referable to the end of the quarter to which the SGC entitlement relates, rather than being referable to lodgement day;
2. That where the SGC is unpaid but reported, and this occurs on more than one occasion (without good cause), directors of non-compliant companies should be subjected to the automated recovery process without the need for 21 days’ notice;
3. That where a director of a non-compliant company has not remitted withheld amounts to the Commissioner, in contravention of the requirements under the *Taxation Administration Act 1953* (“TAA 1953”), he or she should not have the benefit of taxation credits where that debt continues to subsist unless that person applies for and is granted by credit by the Commissioner on substantial grounds;
4. That the period in which a director may raise a defence be shortened from 60 days to 28 days;
5. That unions and the FWO be permitted to enforce the superannuation guarantee charge as against employer companies through legal processes open to them on other matters;
6. That unions and the FWO be permitted to bring proceedings to recover director penalties in respect of the SGC under the new measures;
7. That the measures contain a mechanism by which incidences of SGC and PAYG withholding director penalties can be referred to ASIC for the purposes of director disqualification;
8. That the measures allow ASIC the discretion to disqualify de jure, de facto and shadow directors upon whom SGC and PAYG(W) director penalties have been imposed, without the requirement to have managed two or more failed companies.

All of these proposals would serve to strengthen the Australian taxation system and ensure that the integrity of the system is not undermined by the fraudulent use of the

company device. I have attached with this letter a copy of the abovementioned submission. Feedback on the latest proposed amendments is outlined below.

The Employee/Contractor ‘Chestnut’

As pointed out in that submission, it is the experience of the CFMEU that sham contracting frequently operates alongside fraudulent phoenix activity. I was therefore surprised to learn that the latest round of proposed amendments make it markedly easier for operators to effectively engage in sham contracting in that directors would not be liable to pay a director penalty where a company’s failure to pay the SGC arose from an “honest belief” that the company engaged a contractor who is actually an employee. This amendment – whilst couched in terms of “reasonable care in reaching that view” - has the potential of rendering these measures as perforated as the *Fair Work Act 2009* in stamping out sham contracting. As discussed in the March 2011 CFMEU Report on Sham Contracting in the Australian Building and Construction Industry, “Race to the Bottom”:

The scope of this defence and its significance was exposed in a case taken by the CFMEU under the equivalent provisions of the Workplace Relations Act. Although the wording has altered slightly under the FW Act, the decision in that matter made it clear that the exception in the FW Act is so wide as to make the provisions almost worthless. In CFMEU v Nubrick¹ the employer, a large and well-resourced corporation, successfully relied on the defence by showing that at the time of the representations, they did not know or were not reckless as to whether the contracts in question were contracts of employment.²

Similarly, the CFMEU submits that any defence relating to the legal distinction between employees and contractors in relation to unpaid SGC will not be effective in reining in or indeed remedying phoenix activity. The sham contracting provisions under the *Fair Work Act* stand as clear evidence of this. Rather, the employee/contractor defence will allow malfeasant directors to fraudulently misuse the device of otherwise legitimate subcontracting in the way that they fraudulently misuse corporate and insolvency devices to evade employer liabilities.

The Removal of Automated Recovery

A key and promising feature of the previous Bill was the introduction of the “automated recovery process” for unpaid superannuation contributions. Under that process, where an SGC liability remains unpaid and unreported three months after “lodgement day”, the Commissioner may commence proceedings immediately without providing 21 days’ notice of the penalty. The requirement to provide 21 days’ formal

¹ (2009) 190 IR 175.

² P 51.

notice has proved to be a major limitation on the effectiveness of the existing arrangements. As the explanatory notes accompanying the previous Bill make clear:

1.12 Some aspects of the director penalty regime limit its efficacy in deterring fraudulent phoenix activity. Most notably, as directors are provided 21 days notice of the penalty before the Commissioner is able to commence proceedings to recover the liability, some directors extinguish their personal liability by placing the company into voluntary administration or liquidation within that notice period and before the Commissioner can sue to recover their personal liability. This normally results in PAYG withholding liabilities never being recovered.

In our submission to Treasury on 1 August 2011, the CFMEU offered broad support for the automated recovery process, and in doing so, proposed that the then three-month period be referable to the end of the quarter to which the SGC liability relates so that effective action against phoenix activity may be taken in a more timely manner. A further comment in relation to the automated recovery process was that, despite potentially dispensing with the 21 day notice period, a limit to its effectiveness was that it still relied on the initiative and resources of the ATO in the handling of superannuation complaints and the Commissioner in bringing penalty proceedings.

The CFMEU's concern with the new Bill's proposal (ie that the Commissioner should have to issue a director penalty notice in all cases) is that it creates yet again another hurdle that would only be cleared with the initiative and resources of the ATO as described above.

Further Comments

Whilst the CFMEU broadly welcomed the proposed amendments as initially announced, we do not believe any of the more recently proposed amendments will positively and genuinely assist in stamping out fraudulent phoenix activity. Indeed, aspects of the latest proposals would only encourage other ways in which unscrupulous employers can defraud their employees, notably by way of sham contracting. It follows that insofar as the latest amendments weaken the measures first announced, the CFMEU does not support them.

The proposed legislation was an important opportunity for Government to finally do something about phoenix activity, which has been a longstanding problem particularly in the building and construction industry. It is the view of our organisation that that opportunity is unnecessarily being squandered through a relaxation of the amendments that were initially released for comment.

The CFMEU will continue to publicly expose the practice of phoenix activity and the extent to which the proposed measures as announced by the Government have been compromised.

Further, given the continued leak in revenue the failure to implement these measures has caused, the CFMEU is gravely concerned with the delay with which they have been dealt – particularly when both the Government and Opposition talk up the importance of budgetary surplus and the need for budgetary cuts.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'D Noonan', with a long horizontal flourish extending to the right.

Dave Noonan
National Secretary
CFMEU Construction and General Division