

2 May 2012

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

By email: sbtr@treasury.gov.au

Dear Sir/Madam

**Exposure Draft – Tax Laws Amendment (2012 Measures No. 2) Bill 2012:
Companies’ non-compliance with PAYG withholding and superannuation guarantee obligations**

I am pleased to enclose a submission prepared by the Superannuation Committee of the Legal Practice Section of the Law Council of Australia on the *Exposure Draft – Tax Laws Amendment (2012 Measures No. 2) Bill 2012*.

Due to time constraints this submission has not been considered by the Directors of the Law Council of Australia. However, the submission is supported by the Taxation Committee of the Business Law Section of the Law Council, which has also made a submission on this Exposure Draft.

Yours sincerely



Margery Nicoll
Acting Secretary-General

Exposure Draft – Tax Laws
Amendment (2012 Measures
No. 2) Bill 2012: Companies'
Non-Compliance with PAYG
Withholding and
Superannuation Guarantee
Obligations

The Treasury

Submission by the Superannuation Committee of the Legal Practice Section of the
Law Council of Australia

2 May 2012

The Superannuation Committee is a committee of the Legal Practice Section of the Law Council of Australia. Its objectives include ensuring that the law relating to superannuation in Australia is sound, equitable and demonstrably clear. It fulfils this objective in part by making submissions and providing comments on the legal aspects of proposed legislation, circulars, policy papers and other regulatory instruments.

Set out below are the Committee's comments on the exposure draft of *Tax Laws Amendment (2012 Measures No. 2) Bill 2012: Companies' non-compliance with PAYG withholding and superannuation guarantee obligations (Draft Bill)*.

The Draft Bill proposes a range of changes to the directors' penalty regime in respect of PAYG withholding, in addition to extending the regime to superannuation guarantee obligations. The Committee's comments are confined to the provisions that extend the regime to superannuation guarantee obligations.

1 Statement of legislative policy

The Government's response to submissions on the *Exposure Draft – Tax Laws Amendment (2011 Measures No. 8) Bill 2011* identifies a number of concerns raised in the submissions. The concerns included that the proposed amendments are not targeted at dealing with "phoenix activity". The Government's response is that the "*Government is not proposing amendments to restrict the director penalty regime, or the proposed amendments to it, to cases of phoenix activity*".

The Government's announced policy platform was to introduce reforms that target phoenix companies. The Draft Bill represents a fundamental shift in the Government's stated policy intention.

It seems the Government's approach to dealing with the submissions that the proposed law is inadequate to implement the Government's announced policy is to state that the policy has changed, with no explanation or justification for the change or any clear statement of the new policy.

The Committee is concerned that this approach undermines the legitimacy of the public consultation process, and significantly compromises sensible analysis of the draft legislation as the objectives of the legislation are now unclear.

2 Use of power to estimate liability

The Draft Bill introduces a power for the ATO to issue a director penalty notice on the basis of an estimate of superannuation guarantee charge liability. The director then has 7 days to lodge a declaration or affidavit verifying the amount of the liability.

The draft Explanatory Statement says:

The ability to estimate a superannuation guarantee charge reduces the scope of phoenix operators to escape liabilities once they become aware that the Commissioner is pursuing them. For example, the issue of an estimate enables the Commissioner to take prompt action when an opportunity arises to secure recovery, without having to delay recovery by waiting for an assessment to be issued.

The draft Explanatory Statement also says:

The policy objective of the director penalty regime is to ensure that directors cause the company to meet certain tax obligations or promptly put the company into liquidation or voluntary administration.

However, the power to estimate a superannuation guarantee charge applies whether or not the Commissioner has any grounds to believe the directors are phoenix operators or are otherwise engaged in any wrongdoing and whether or not the solvency of the company is in doubt. While the Committee acknowledges that in these circumstances there is a need for the Commissioner to have power to take urgent action, it is not clear how the Commissioner would determine whether or not to exercise this power in other circumstances.

There are significant differences between PAYG withholding and superannuation guarantee obligations. Companies are required to deduct PAYG from each employee's gross salary or wages and remit the amount deducted to the ATO. Where PAYG has not been remitted, normally the employer would have nevertheless deducted the PAYG amount from the employees' salary or wages. As the employer has already deducted the amount (or at least has refrained from paying that part of the employee's remuneration to the employee), the obligation to pay it is easily identified and estimated (by both the ATO and the taxpayer). Therefore while some areas of complexity arise in determining whether PAYG withholding applies in respect of certain payments, the scope for uncertainty to exist in respect of these PAYG obligations is relatively limited.

By way of contrast, superannuation guarantee obligations are complex and breaches are often inadvertent. Non-payment is often the result of an incorrect interpretation of the obligations in respect of particular categories of employees or their categories of pay, not from any deliberate withholding of amounts that have already been deducted from employees' salary or wages.

Under the current superannuation guarantee legislation, the ATO has power to issue an assessment where an employer fails to lodge a superannuation guarantee shortfall statement. If the ATO becomes aware that an employer may not be paying superannuation contributions as required (for example, where the ATO receives a complaint from an employee), the ATO is able to conduct an audit and issue an assessment where the audit identifies that a superannuation guarantee shortfall statement should have been lodged.

The Committee submits that the ATO's existing powers are appropriate and adequate in all circumstances where the ATO has no reason to believe that an assessment will not be paid when issued.

The new estimates provisions effectively authorise the ATO to issue a penalty notice to directors without having issued an assessment to the company and without having made any investigation into whether any superannuation guarantee charge is actually payable; a director then has 7 days to investigate the matter and make a decision about whether the amount of the estimate is correct, and lodge a declaration or affidavit. The Committee is concerned that these provisions appear to be draconian, particularly in their potential application to small businesses that may not have the resources to properly investigate the allegation within the timeframe. The Committee also considers it unlikely, as a practical matter, that directors would be able to obtain definitive professional advice regarding complex superannuation guarantee issues within a period of 7 days.

The Committee therefore submits that the new provisions authorising the ATO to issue a director penalty notice on an estimate of a liability should be restricted to circumstances where the ATO has formed a reasonable belief that it is probable that:

- the company would not produce the required information necessary for the ATO to conduct an audit; or
- the company would not pay a superannuation guarantee charge assessment if this were issued; or
- the issue of an estimate is necessary to avoid the directors taking action to avoid payment of the superannuation guarantee charge.

The Superannuation Committee of the Law Council of Australia would welcome the opportunity to discuss these issues further with Treasury. At first instance, please contact the Chair of the Committee, Heather Gray – (03) 9724 5321 heather.gray@dlapiper.com .

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 56,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2012 Executive are:

- Ms Catherine Gale, President
- Mr Joe Catanzariti, President-Elect
- Mr Michael Colbran QC, Treasurer
- Mr Duncan McConnel, Executive Member
- Ms Leanne Topfer, Executive Member
- Mr Stuart Westgarth, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.