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The General Manager
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Wednesday, May 2 2012

Dear Sir or Madam,

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

The ACTU welcomes the opportunity to comment on the exposure drafts of above Bills. We acknowledge that measures contained therein are intended to build on the government's Fair Entitlement's Guarantee in ensuring that a safety net to protect workers entitlements is complimented by penalties and disincentives against corporate misbehaviour that send a clear message that limited liability is a privilege not be abused, rather than an entitlement with no strings attached.

We are broadly of the view that, at the conceptual level, both the primary element of allocating responsibility for unpaid Superannuation Guarantee contributions through an extension of the director penalty regime and the secondary element of imposing a PAYG withholding non-compliance tax on directors and their associates (akin to a reduction of the PAYG(W) credits otherwise available to them) are well targeted policy initiatives. Given the experience of our affiliates as to the structuring, personal interests and roles of phoenix directors and their relatives or business partners with whom they serially act in concert with, attaching liability on these actors should have a deterrent effect on illegitimate corporate conduct. Having said that, there are some provisions in the proposed Bills which in our view require reconsideration to ensure they do not miss the mark.

Whilst we see the attraction in utilising and extending the existing director penalty regime as the means of recovering unpaid superannuation guarantee, there are some features of that regime,

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either as amended or adopted, that have some elements that are not ideal in particular circumstances post an insolvency related retrenchment or after a significant period of underpayment where employees may be in desperate financial circumstances that would justify an application for a release of some of their superannuation account balance (such as while they are awaiting the processing of a GEERS or Fair Entitlements Guarantee application).

We are of the view that the 60 day period in which directors may raise a defence to a director penalty is unnecessarily long. It is our view that 28 days is sufficient. This would allow directors sufficient time to receive legal advice and to respond accordingly. Any more than 28 days will simply prolong the process of recovery, with the potential of incurring further costs for the ATO. We consider that Item 2 of Schedule 3 should also make clear, as the explanatory material does, that an assertion of insufficient funds will not satisfy the criteria that there were "no reasonable steps" that could have been taken. This comment applies equally to the circumstances in which a reduction to PAYG withholding non-compliance tax can be decreased under the proposed section 18-130 (2) and (3).

We note that these Bills are a revision of content in two previous Bills introduced into the Parliament and referred to a Senate Committee: the *Tax Laws Amendment (2011 Measures No.8) Bill* 2012; P*ay As You Go Withholding Non-compliance Tax Bill* 2011. The revisions, and our comments in relation to them, are as follows.

> *Removal of automated recovery process for director penalties.*
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> The formerly proposed recovery process would have operated as an extension to the recovery process of all liabilities in respect of which the director penalty regime operated, and would have permitted the Commissioner to commence proceedings without prior issue of a director penalty notice three months after the relevant liability arose. As we noted in our submission to the Senate Committee at the time, we had concerns that interaction between the Bill and the relevant provisions in the *Superannuation Guarantee (Administration) Act 1992* had the result that in some circumstances the proposed recovery could not be utilised to recover an unpaid superannuation contribution until eight months passed from the day on which the entitlement to which the contribution related was earned by the employee. In such circumstances, the penalty notice

regime (which itself contains delays we would like to see minimised) would likely have been more conducive to a prompt recovery, particularly when the deemed due date and estimate provisions for superannuation guarantee amounts are taken into account. Conscious of this, we are of the view that a reformulation of the automated recovery process to permit more timely recovery would have been the most appropriate and effective revision. Noting this concern we are unconvinced but hopeful that changed approach as evidenced in the exposure draft (inclusive of the complimentary arrangement which removes after 3 months the option of placing a company into administration or winding it up as a means of avoiding payment) will lead to timely recovery.

Reasonable care / arguable case: errors in self assessment

We do not support the introduction of the defence to Superannuation Guarantee related director penalties contained in Item 56 of Schedule 3. In our view, the Superannuation Guarantee framework is one which is either complied with, or it isn't. And where it isn't, appropriate penalties should apply. It is appropriate in our view that that message is communicated clearly both in legislation and in explanatory and educative materials distributed by Government and its agencies. We are concerned that the introduction of the proposed defence sends the wrong message by effectively adopting the business lobby's mantra that, when it comes to figuring out who their employees are and paying and reporting in respect of their superannuation, "its all too hard". The proposed defence also shifts the focus of contestability to what is "reasonably arguable" and what is "reasonable care" in respect of a legal obligation, rather than what the obligation actually is. This has the potential to at best create uncertainties where none presently exist. Having said that, the positive obligation to take "reasonable care" is at least more favorable than the "was not reckless" condition which is an element of the defence to sham contracting prosecutions under the *Fair Work Act* 2009.

Further, we are of the view that the defence is unnecessary if the power to issue the director penalty notice or estimate is subject the usual incidents of such powers, being powers to vary and revoke. Such powers would enable disputes as to liability to be dealt with on the basis of a proportional recovery to the

extent of the agreed uncontested sum, without any formal legislative endorsement or accommodation of the “its all to hard” defence.

Whichever option is ultimately adopted, it is critical that the unpaid contributions are recovered to the maximum extent possible and allocated for the benefit of the workers who have suffered the loss.

Service on registered tax agents

Non-payment of superannuation contributions is primarily a corporate governance and an industrial relations issue. It becomes a tax issue because it has tax consequences. Directors should in our view take an active interest in compliance and be personally notified of non-compliance and its consequences, however we have no objection to penalty notices being served on registered tax agents as an additional step.

Relief for new directors – extension to 30 days

We note that the relief provided to new directors impacts the entirety of the obligations presently subject to the director penalty regime, rather than being limited to areas where reform is proposed by the Bills. This is not a matter made clear on the face of the explanatory material, which tends to indicate (at paragraph 1.27) that the change was responsive to the asserted additional complexities associated with ensuring Superannuation Guarantee obligations are complied with. In that respect, this aspect of the reform is at best poorly targeted given the stated objective.

Be that as it may, and as is evident from the above discussion, we do not support reform in the nature of concessions to business lobbying about the complexity of the Superannuation Guarantee system. The Superannuation Guarantee system has been a feature of tax regulation for two decades. These Bills do nothing to change the underlying basis of the Superannuation Guarantee charge liability, they merely provide new enforcement mechanisms to recover the loss and discourage non compliance with those longstanding obligations. There is no case for regulatory relief.

We note that the draft legislation is largely in line with the overview of the 2011-12 budget revenue measure "Tax compliance – countering fraudulent phoenix activities by company directors". We are pleased that the government is acting on this important initiative. We note that the budget measure also identified an increase in ATO expenses of $22.1 million in the forward estimates period in association with the reforms, although it is not clear to us if the expenditure held through the delayed implementation can now be front loaded to ensure that the ATO is appropriately resourced from the outset to implement these important new reforms.

In a joint submission (ACTU, Industry Super Network, Industry Funds Credit Control and the Australian Institute of Superannuation Trustees) in July 2009 to the Review into ATO administration of the Superannuation Guarantee Charge, we identified that while up to a third of Australian employees may be affected by non-compliance with superannuation obligations, less that 5% made complaints to the ATO. At that time the ATO's staff in the superannuation division were overwhelmed and were requesting superannuation funds to stop reporting 'lost super' accounts because they did not have the resources to act on them. Accordingly, we would request that the resourcing and training that could be realised via the 2011-12 budget funding be implemented as soon as possible and note that it would be extremely disappointing if the abandonment of the litigation recovery process, which was an element of the policy as contained in the 2011-12 budget, was cited as any justification to reduce the funding allocation in the coming budget. One needs only to have regard to our insolvent trading laws, and the reliance placed on insolvency practitioners and ASIC in civil and criminal prosecution thereof, to gain an appreciation of the critical dependency between legislative policy and effective resources.

Finally, whilst we support the intent of the Bills as articulated in the underlying government policy commitments and are committed to consulting and working with government to ensure the successful implementation of these and the remaining elements announced in the Protecting Workers' Entitlements package, tax measures are clearly only element of what is required to successfully address phoenix activity. In this regard we urge government to implement further reforms, including legislation that would:

- Define a phoenix company;

- Allow ASIC to ban a phoenix company from using the company or trading name that was used by the failed predecessor company (we acknowledge legislation has been reached exposure draft stage in this regard, in relation to which we have made a submission);
- Permit creditors of the failed predecessor company (and persons seeking to establish that they are creditors thereof) to start or continue litigation against the failed company, without the leave of a court;
- Make the phoenix company vicariously liable for the debts incurred by the failed predecessor company. This will allow the Commonwealth to recover tax debts and Fair Entitlement Guarantee payments as well as provide proceeds for the types of litigation contemplated above; and
- Make the phoenix company vicariously liable in any unfair dismissal claim brought against the failed predecessor company by its former employees. Employees should be able to bring claims within 12 months of discovering that the failed company has 'phoenixed' (instead of the normal requirement that claims be brought within 14 days of dismissal).

Since phoenix operators are usually small businesses, the government could consider only applying some of the above measures in cases where the second company had a turnover that is less than a given threshold (e.g. $1 million). Furthermore, in our view the government should consider strong punitive and oversight measures to deter and remedy the effects of phoenix behavior, such as:

- Imposing a significant civil penalty for persons (whether directors, insolvency practitioners, financial advisers or others) involved in the establishment of a company that is or was a phoenix company, where this is done for the purpose of avoiding obligations to employees or creditors of the failed company;
- Allowing ASIC to ban people involved in the establishment of a company that is or was a phoenix company from being a director or manager of any company;
- Imposing more onerous financial reporting requirements on companies for the period that they are phoenix companies

Both unions and the Fair Work Ombudsman could assist in the enforcement role of some such reforms, and some consideration should be given as to whether the legislation ought to provide them with such a role. We add that even administrative arrangements and consultation protocols as between those agencies concerned with phoenix conduct (e.g. ATO, ASIC, FWO) and unions may result in greater efficiency, better implementation and more holistic enforcement outcomes.

Should the Treasury or other departments or agencies at any time consider examining these expanded reform issues we would welcome the opportunity to contribute to such deliberations.

Yours faithfully,

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Australian Council of Trade Unions