18 September 2012

Institute of Chartered Accountants Australia

Ms Louise Lilley
Benefits and Regulation Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: strongersuper@treasury.gov.au

Dear Louise,

Exposure Draft legislation - Administrative Consequences and Penalties for Trustees of SMSFs

The Institute of Chartered Accountants in Australia (the Institute) would like to take this opportunity to make the following comments in relation to the draft legislation for Administrative Consequences and Penalties for Trustees of SMSFs.

The Institute is the professional body for Chartered Accountants in Australia and members operating throughout the world.

Representing more than 70,000 current and future professionals and business leaders, the Institute has a pivotal role in upholding financial integrity in society. Members strive to uphold the profession's commitment to ethics and quality in everything they do, alongside an unwavering dedication to act in the public interest.

Chartered Accountants hold diverse positions across the business community, as well as in professional services, government, not-for-profit, education and academia. The leadership and business acumen of members underpin the Institute's deep knowledge base in a broad range of policy areas impacting the Australian economy and domestic and international capital markets.

The Institute of Chartered Accountants in Australia was established by Royal Charter in 1928 and today has around 60,000 members and more than 12,000 talented graduates working and undertaking the Chartered Accountants Program.

The Institute is a founding member of the Global Accounting Alliance (GAA), which is an international coalition of accounting bodies and an 800,000-strong network of professionals and leaders worldwide.

If you have any questions regarding our submission, please do not hesitate to contact me on 02 9290 5704 or via email on liz.westover@charteredaccountants.com.au.

Yours sincerely,

Liz Westover
Head of Superannuation

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Tax Laws Amendment (Stronger Super Self Managed Superannuation Funds) Bill 2012: Administrative Penalties

The Institute supports the introduction of administrative consequences and penalties for trustees of Self Managed Superannuation Funds (SMSFs). These new measures will provide a logical and practical alternative to the current penalties available to the Australian Taxation Office for trustees who do not adequately understand and/or undertake their roles and responsibilities as SMSF trustees.

Broadly, the exposure draft has been well written. The Institute believes that little refinement is needed to the draft legislation. However, we make the following comments.

Section 104A(1)

The Institute agrees with the inclusion of a requirement for SMSF trustees to sign a new trustee declaration under circumstances where they have undertaken a course of education in compliance with an education direction.

As a result of this requirement, in order for a trustee to be able to confidently sign the declaration, it will be important that when approving a course of education, the regulator ensure that the components of the trustee declaration form are clearly and definitively covered within an approved course.

The Institute encourages the inclusion of a direction to this effect within the Explanatory Memorandum.

Section 164 Variation on request

The Institute does not believe that the inclusion of this section is appropriate. The Regulator should be required to notify the trustee of an outcome of a variation request within a 28 day time frame, even if such advice is that they will require more time to make a definitive decision. If the regulator does not make a decision within 28 days, they should be required to notify the trustee of same and advise when they expect to make a decision. We believe it will create uncertainty for a trustee to rely on a lack of communication from the regulator as a determination of a refusal of request. Where an application for variation is made by a trustee, they should be able to rely on the regulator to provide a written response as a means of acceptance or refusal of the application.

Section 166 Penalties

While the Institute supports the imposition of the new penalty regime, we are concerned that the penalty units assigned to certain breaches may be excessive. Some breaches may incur a $6,600 fine (60 penalty units) which is a significant amount of money for trustees to pay.

While we appreciate that the operation of the Taxation Administration Act 1953 will afford certain discretionary powers to the Commissioner of Taxation for the remission of penalties, the Institute would encourage clear guidelines from the regulator regarding where and when the penalties will be imposed and circumstances under which they may exercise discretion to reduce or remit a penalty.

The Institute supports the imposition of a substantial penalty for blatant and significant breaches of the law. However, we are concerned that the maximum penalty could have considerable and onerous consequences for some trustees, particularly where they may already be under financial distress (which may have led to the breach).

Imposition of administrative penalties

While the mechanics of how an administrative penalty would be imposed on corporate trustees are clear in the explanatory memorandum, it is not clear how penalties will be imposed where an SMSF has individual trustees.

With both trustee structures, where an individual has breached the law by their own direct action or inaction such as failure to sign a trustee declaration, a penalty can be imposed on that person.

The law provides for joint and several liability for directors of the trustee company such that the fine is imposed on the fund and payable by all directors. It is not clear however, how a fine is dealt with where the fund has individual trustees. Is the penalty imposed on the fund and then payable by the individuals under a similar joint and several liability model? Do all trustees receive a penalty? Is the penalty directed to one trustee over another? How would a particular trustee be identified for imposition of the fine? An example within the explanatory memorandum would be beneficial to explain.