Law Council
OF AUSTRALIA

2 May 2012

The General Manager
Business Tax Division
The Treasury
Langton Crescent
PARKES ACT 260

Dear Sir or Madam,

Submission - Tax Laws Amendment (2012 Measures No. 2): Companies' non-compliance with PAYG withholding and superannuation guarantee obligations Exposure Draft legislation

The Taxation Committee of the Business Law Section of the Law Council of Australia (**Committee**) welcomes the opportunity to make a submission in relation to the Tax Laws Amendment (2012 Measures No. 2): Companies' non-compliance with PAYG withholding and superannuation guarantee obligations Exposure Draft legislation (**Exposure Draft**).

This submission has the support of the Insolvency and Reconstruction Law Committee of the Business Law Section of the Law Council of Australia (**Insolvency and Reconstruction Law Committee**).

The Committee refers to its previous submissions (together, the **Previous Submissions**) on these measures:

- Submission to Dr Richard Grant, Acting Senate Standing Committee on Economics, 11 November 2011
- Submission to Treasury by the Committee on 10 February 2010
- Submission to Treasury by the Insolvency and Reconstruction Committee on 4 March 2010.

A copy of each of the Previous Submissions is **attached** to this letter. The arguments raised in the Previous Submissions continue to be of relevance to the measures proposed in the Exposure Draft. However, the Committee does recognise that some features of the proposed regime have been amended with positive effect in the Exposure Draft, including in relation to the requirement for notice periods to be applied in all cases; and the extension of the period available to a new director to make reasonable enquiries as to the compliance of the company with withholding obligations.

The Committee restates its concern that the new PAYG withholding non-compliance tax (**PAYG NCT**) as drafted could give rise to unfair and unreasonable application in respect of associates of directors. The Committee suggests that the imposition of PAYG NCT against associates of directors should ***only*** apply in cases where the associate had actual

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knowledge of non-compliance and was actively involved in the day-to-day management of the company. The safeguards built into proposed section 18-13(3) of the *Taxation Administration Act* (Cth) *1953* are inadequate to protect innocent associates from penalty.

The Committee also restates its concern that, due to the complexity of the law in determining the application of superannuation guarantee laws, including (but not limited to) characterisation of people as employees or contractors, the penalties applicable under Division 269 of the *Superannuation Guarantee (Administration) Act* (Cth) *1992* should not apply if the taxpayer took reasonable care *or* has a reasonably arguable position (**RAP**).

In the media release which accompanied the draft legislation, Assistant Treasurer Bradbury stated:

> *The draft legislation also includes a new defence for directors liable to penalties for superannuation debts where, broadly, they reasonably thought the worker was a contractor and not an employee,"*

This defence apparently arises under proposed subsection 269-35(3A of the *Superannuation Guarantee (Administration) Act 1992*), which provides:

> *(3A) You are not liable to a penalty under this Division to the extent that the penalty resulted from the company treating the Superannuation Guarantee (Administration) Act 1992 as applying to a matter or identical matters in a particular way that was *reasonably arguable, if the company took reasonable care in connection with applying that Act to the matter or matters.*

It is explained in the draft Explanatory Material (**EM**) (refer the table on page 4 and paragraph 1.56) as follows:

> *In addition to these defences, a director that becomes liable to a director penalty for not causing its company to comply with its superannuation obligations is not liable to a director penalty if the company treated the SGA Act 1992 as applying to a matter in a way that was reasonably arguable and the company took reasonable care in applying the SGA Act 1992 to the matter.*

It is submitted that:

- for clarity, the EM should specifically refer to the example in the media release. That is, the EM should identify that there is a defence for directors who reasonably thought that a worker was a contractor and not an employee; and
- the defence should be available if the director can establish that the company took reasonable care or there was a RAP. It is acknowledged in the draft EM at paragraph 1.1 that there can be cases where a company might not be able to show reasonable care but has a RAP:

  > *Generally, if a company has a reasonably arguable position, it will have also exercised reasonable care. However, there may be unusual cases where a company has failed to exercise reasonable care, but by chance has a reasonably arguable position.*

It is submitted that it would be inequitable for a penalty to apply if it could be demonstrated there was a RAP in relation to whether or not an individual was an employee but the

company for some reason was not found to have exercised reasonable care. Similarly, it would be unfair if a company had taken reasonable care but for some reason did not have a RAP. For example, it would be unfair if there was no defence to a penalty being imposed if a company was found:

- to have a RAP because authorities supported that position, but was found not to have taken reasonable care because it did not give all relevant information its tax agent; or
- had a RAP but was treated as not taking reasonable care because it had relied solely on industry practice; or
- had taken reasonable care in giving appropriate serious attention to the issue but subsequently being found not to have a RAP because the view of authorities was seen by the ATO as tipping in favour of the individual being an employee rather than a contractor.

It ought not be forgotten that the system design is one of self assessment and that the topic of discussion is penalty. Members of the community are asked to determine whether or not particular provisions apply to them in an ever increasingly complex legislative framework. The consistent theme of penalty systems in these settings is not to punish people who, in good faith, adopt positions that are as likely as not to be correct but turn out to be incorrect. If a position is adopted which is consistent with authority and turns out to be incorrect, penalty ought not apply without further tests applying.

Should you wish to discuss any aspect of this matter please contact the Committee Chair, Ms Teresa Dyson, on 07 3259 7369.

Yours faithfully,

Margery Nicoll
Acting Secretary-General