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

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## The Treasury

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

14 September 2012

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The Law Council of Australia is the peak national representative body of the Australian Legal Profession and represents some 56,000 legal practitioners nationwide. The Superannuation Committee (Committee) is a Committee of the Legal Practice Section of the Law Council of Australia. The Committee's objectives are to ensure that the law relating to superannuation in Australia is sound, equitable and demonstrably clear. The Committee fulfils these objectives in part by making submissions and providing comments on the legal aspects of virtually all proposed legislation, circulars, policy papers and other regulatory instruments that affect regulated superannuation funds.

In this submission, the Committee provides comments on *Exposure Draft - Tax Laws Amendment (Stronger Super Self Managed Superannuation Funds) Bill 2012: Administrative Penalties* (Exposure Draft).

### **Requests for variation of directions**

Proposed new section 164(7) of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) provides for the extension of the period in which compliance with a rectification direction or an education direction is required, where a person has requested a variation of that direction. Provision is made for the compliance period to be extended by one day for each day in the period beginning at the start of the day the request was made, and ending at the earlier of the end of the day on which the Regulator makes a decision on the request, or the end of the period of 28 days from the making of the request where the Regulator has not made a decision and is therefore taken to have refused the request.

It appears to be intended that the running of the compliance period should effectively be frozen while a request for variation is on foot. The Committee agrees with this approach in principle.

However, the Committee is concerned that the 'mechanics' of the provisions may result in unintended results. It seems possible, for example, that a person might receive a rectification direction requiring compliance within 45 days. Say that the person lodges a request for a variation of the direction on day 44 (under proposed section 164(2) such a request must be made before the end of the specified compliance period). The Regulator refuses the request 20 days after it was made. Applying proposed section 164(7), the period for compliance would be extended from the original 45 days to 65 days, as one day would be added for each day from the making of the request until the Regulator's decision. However, assuming that the person received the Regulator's decision on the request for variation on the same day on which it was made, they would be required to achieve compliance with the rectification direction by the following day, as that would be the day on which the compliance period would expire - there being no effective extension. This seems unrealistic and potentially unfair, particularly as failure to comply will result in commission of a strict liability offence.

While the Committee acknowledges that these provisions should not operate in such a way that persons are able to manipulate the period for compliance, it is equally important that trustees and trustee directors who are properly exercising their rights to seek a variation of a direction, and who do so other than at the very beginning of the period for compliance specified in the original direction, should not suffer the imposition of unrealistically truncated compliance periods. The Committee **recommends** that these timing issues be further considered. At the least, the Committee suggests that the Commissioner should have power to substitute a (longer) compliance period where a request to vary has been refused and the compliance period that would otherwise apply would be unreasonably short.

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There is also some uncertainty as to how the proposed provisions will operate where the Regulator has varied a direction by extending the period required for compliance, as neither proposed section 159 or 160 includes provision for references to a direction to be read as including a direction as varied. A literal reading of the provisions indicates that the original compliance period would still apply. The Committee **recommends** that this be clarified.

Proposed section 163 allows the Regulator to vary (or revoke) a direction by written notice given to the person to whom the direction was given. The Committee **recommends** that this provision be expanded to make clear that, in the case of a variation, the varied direction cannot reduce the period in which compliance is required (in other words, the period for compliance in the original direction cannot be varied so that it is reduced).

The Committee also notes that while the Regulator is required to notify the applicant of the Regulator's decision and to give the applicant a copy of any varied direction or written reasons for a refusal to vary (or to vary other than in accordance with the request), there is no requirement for this to be done within any particular timeframe. It therefore seems possible that a person who had made a request for variation of a direction might receive notice of the refusal of that request at a time when the compliance period has already expired. The Committee expects that it is not intended that the request for variation mechanism should allow this to happen. The Committee therefore **recommends** that the reference in proposed section 164(7)(b)(i) to 'the end of the day the Regulator makes a decision on the request' should be changed to a reference to 'the end of the day the Regulator notifies the person of the Regulator's decision'.

#### **Query**

The Committee notes that proposed new section 166 of the SIS Act, which sets out a list of provisions of the SIS Act where a contravention will attract an administrative penalty, includes reference to (proposed new) section 160(4) of the SIS Act. The Committee queries whether it is intended that the corresponding provision dealing with rectification directions (section 159(6)) should also be listed?

The Committee would welcome the opportunity to discuss its submission further. In the first instance, please contact the Chair of the Superannuation Committee of the Legal Practice Section of the Law Council of Australia, Heather Gray on (03) 9274 5321 or at [heather.gray@dlapiper.com](mailto:heather.gray@dlapiper.com).

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## **Attachment A: Profile of the Law Council of Australia**

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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.