

20 February 2012

The Manager
Contributions and Accumulation Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: payslipsuper@treasury.gov.au

Dear Sir/Madam

Exposure Draft – Payslip Reporting of Superannuation Contributions

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 – Payslip Reporting of Superannuation Contributions*.

Due to time constraints this submission has not been considered by the Directors of the Law Council of Australia.

Yours sincerely


Margery Nicoll
Acting Secretary-General.

Exposure Draft: Payslip Reporting of Superannuation Contributions

The Treasury

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

20 February 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 *Superannuation Legislation Amendment (Stronger Super and Other Measures Bill) (No.2) Bill 2012; giving information about superannuation contributions (draft bill)*.

1. The draft bill proposes to regulate all employers without reference to the constitutional power pursuant to which the Commonwealth Parliament would rely for this purpose. Reference is made to the existence of section 64 of the *Superannuation Industry (Supervision) Act 1993 (SIS Act)* as an example of a pre-existing provision that regulates employers. Other provisions also impose obligations upon employers under the SIS Act and Superannuation Industry (Supervision) (SIS) Regulations, for example see section 68 of the SIS Act and regulation 9.08 of the SIS Regulations. The Committee notes that the constitutional validity of these provisions of the SIS legislation has never been tested. The Committee questions whether the Commonwealth has power to enact new section 336JA under the SIS Act.
2. Further, the Committee notes pursuant to paragraph 6 of the draft explanatory memorandum that the purpose of moving the requirements for payslip reporting of superannuation contributions to the SIS Act is to overcome the limited coverage of these employer obligations under the *Fair Work Act 2009*. However, there does not appear to be any explanation provided as to the head of constitutional power that would be relied upon to expand the reach of the payslip obligations to other employers under the SIS Act. Instead there appears to be an assumption that this issue must have previously been addressed. To the Committee's knowledge this issue has not previously been addressed.
3. The Committee is also concerned about the use of the word "can" in new subsection 336JA(1)(b) as being too broad. It is likely that employers "can" make contributions for their employees to any number of superannuation funds; the more critical point is whether the employer proposes to make a contribution to a particular superannuation fund for an employee. The draft explanatory memorandum states that the purpose of the word "can" is to expand the reporting obligation beyond those contributions which an employer is *obliged* to make to those which an employer *chooses* to make. However, in the Committee's view, this purpose could still be achieved by replacing the reference to "can" with "intends" or "proposes". It is accepted that the provision may then need to be expanded to refer to contributions made or proposed to be made in respect of an employee's salary and wages.
4. The Committee also queries whether the reference to "salary and wages" is appropriate under new subsection 336JA(c). There may be scenarios where a proposed (or past) superannuation contribution will not relate to salary and wages reported on the payslip – for example, an employee may determine to make a one-off salary sacrifice lump sum contribution of a gratuitous bonus amount. Also, it is possible that an employee (eg a director) might determine to salary sacrifice their entire salary and wages (eg directors fees) in which case there would not then

appear to be any reporting obligation. It may be that the legislature is less concerned about these kinds of scenarios and is prepared to accept that there may be some gaps that occur.

5. Finally, the Committee notes that there are some limitations to its review of the draft bill because the proposed form of regulations containing the “prescribed information” is not provided. It is understood that those regulations would set out the specific details to be included about the amount and timing of superannuation contributions. It would be useful to consider these regulations prior to the finalisation of the draft bill.

The Superannuation Committee of the Law Council of Australia would welcome the opportunity to discuss these issues further with Treasury.

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.