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AUSTRALIA + NEW ZEALAND

6 June 2018

Committee Secretary
Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Submitted via: www.aph.gov.au online submission function

Dear Sir/Madam,

Submission – Treasury Laws Amendment (2018 Superannuation Measures No. 1) Bill 2018

Chartered Accountants Australia and New Zealand welcomes the invitation to make a submission on Committee's review of the above Bill.

We would be pleased to discuss any aspect of our submission.

Chartered Accountants Australia and New Zealand is a professional body comprised of over 120,000 diverse, talented and financially astute members who utilise their skills every day to make a difference for businesses the world over.

Members are known for their professional integrity, principled judgment, financial discipline and a forward-looking approach to business which contributes to the prosperity of our nations.

We focus on the education and lifelong learning of our members, and engage in advocacy and thought leadership in areas of public interest that impact the economy and domestic and international markets. We are a member of the International Federation of Accountants, and are connected globally through the 800,000-strong Global Accounting Alliance and Chartered Accountants Worldwide which brings together leading Institutes in Australia, England and Wales, Ireland, New Zealand, Scotland and South Africa to support and promote over 320,000 Chartered Accountants in more than 180 countries.

We also have a strategic alliance with the Association of Chartered Certified Accountants. The alliance represents 788,000 current and next generation accounting professionals across 181 countries and is one of the largest accounting alliances in the world providing the full range of accounting qualifications to students and business.

Our submission deals with each schedule of the proposed legislation.

Introductory Comments

Overall we strongly support the Super Guarantee amnesty measures contained in the Bill, including the provisions to limit exposure to excess concessional contributions tax and/or higher income earners

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contribution tax when an employer accesses the amnesty.

Chartered Accountants ANZ has long advocated adjusting the penalty regime in the *Superannuation Guarantee (Administration) Act 1992* (SGAA) because we believe its penalties for non-compliance discourages employers from seeking to correct their mistakes.

This is certainly the case when the penalties might be the unpaid contributions, an administrative fee, notional lost earnings and other penalties all of which can add up to a considerable sum of money. A tax deduction is specifically denied for any of these amounts.

Taken together all these penalties can be a significant disincentive for small to medium businesses to admit their error and dissuades some employers from submitting a Super Guarantee Charge (SGC) assessment to the Commissioner. While this 'head in the sand approach' only makes the problem worse, it is an understandable reaction if the payment of these amounts might see a business cease trading.

Schedule 1 – Superannuation Guarantee amnesty

We are therefore pleased that the proposed amnesty would remit all usual SGAA non-payment penalties and administrative fees and permit the claiming of other amounts (contributions and notional earnings) as a tax deduction.

We note that one criticism of this measure is that it seems to reward employers by allowing potentially systemic SG non-compliance to be tax effectively written off. We believe the fact that the amnesty means payment of previously unpaid SG contributions and generous notional earnings outweigh this concern.

In an answer to a Parliamentary question without notice, the Prime Minister noted that "the legislation … is designed to recover over $200 million - hopefully more - of unpaid contributions for the benefit of workers and for the benefit of employees."

We do not know how this amount was arrived at but have no reason to doubt its accuracy and note that the recent Federal Court case *Australian Workers' Union v BlueScope Steel (AIS) Pty Ltd [2018] FCA 80* concluded that employee ordinary time earnings used to avoid having to pay the SGC had a broader definition than some had assumed for many years.

We believe that this judgement may have caught some employers unawares and that they may have to pay SGC on some earnings given this new interpretation. The benefit of the amnesty is that it will help these employers and others who have inadvertently not complied with the SG provisions promptly fix their contribution shortfalls.

Lengthened amnesty window

We note that in order to access the amnesty an employer must approach the ATO between 24 May 2018 and 23 May 2019. The Amnesty applies to previously undeclared SG shortfalls for any period from 1 July 1992 up to 31 March 2018.

We appreciate that the government wants to incentivize employers to act quickly and in many cases 12 months should be adequate. However we believe there should be some flexibility built into the eligibility period, especially if there is a delay in passing these proposed rules through Parliament. We believe two

options are appropriate:

- Allowing the ATO to accept employer amnesty applications after the end of the 12 month period if there are extenuating circumstances for the delay in applying, or
- Allowing the making of regulations to extend the amnesty's end date

Deceased employees

In some cases employers may be required to make SGC contributions under the amnesty for former employees who have died. If death occurred many years ago, the deceased's estate may have been wound up. In ATO Interpretative Decision 2014/31, the ATO said that Super Guarantee contributions remain payable on an employee's death. We suggest that in some cases – for example, where the ATO is aware a former employee has died but is unable to locate the deceased's executors and/or dependants – a provision to allow those amounts to remain in consolidated revenue would be appropriate.

Other potential areas of Super Guarantee reform

We take this opportunity to note other areas of reform in the Super Guarantee laws that would improve the system:

- There are significant inconsistencies between the definition of employee under the Super Guarantee legislation, general tax laws (that typically applies to PAYG withholding) and industrial relations legislation. Most employers find dealing with all these different requirements time consuming and costly. Urgent reform is required.

- To avoid paying the SGC, employers are required to make contributions based on each employee's ordinary time earnings however the SGC is determined on salary and wages. We believe consistency here would make the system simpler to understand and hence easier for employers to comply.

- The penalties for SG non-payment are designed as a major deterrent. However in our view they are often oppressive and, as we have noted above, actively discourage employers from approaching the ATO about their failure to make super contributions. We think this comment applies to ATO administered tax penalty regimes generally. This is an area in urgent need of reform.

Schedule 2 – Employees with multiple employers

We support the policy intent of this schedule which is to permit employees who have multiple employees to avoid breaching their concessional contribution cap by opting out of the Super Guarantee regime for one or more employers.

Our preference however is for this policy proposal to apply to any higher income earner including those who only have one employer.

We also think higher income earners should be permitted to opt out of the SG regime for all their remuneration if that is their preference.

Schedule 3 – Non-arm's length income of complying superannuation entities

We note that these proposed amendments would apply for the 2018/19 and later years.

In our view this should give super funds time to determine if this policy will or will not apply to them.

Suggested Amendment

We suggest that the following note should be added under Sec 295-550 ITAA 1997:

> *Note 1: Subsection 295-550(1) and 295-550(5) were amended with effect from the 2018/19 income year and later income years.*

Without this proposed amendment it will be difficult for those reading the amended legislation to know that the proposed provision had been inserted with effect from the 2018/19 income year unless they also view the amendment history of these specific provisions which is sometimes not readily available.

Schedule 4 – Limited Recourse Borrowing Arrangements Amendments

We agree that without this proposed measure it may be possible for a super fund member to use an LRBA to reduce their Total Superannuation Balance thereby enabling them to make additional non-concessional contributions or access the carry forward concession for concessional contributions.

We note that this proposed amendment would not:

- "apply to refinancing of existing LRBA loans and certain contracts that straddle the application date of the measure" (we note the commencement date of this change is 1 July 2018), and
- will only count to a member's specific portion of their loan which will be determined by comparing the value of a member's superannuation interest that is supported by the asset(s) secured by the borrowing and the total of such interests in a super fund

Suggested Amendments

1. We believe this exemption definition needs to be amended to ensure that only net outstanding amounts should be counted in a member's TSB.

   Take the following example – suppose a SMSF has a LRBA in place and the loan's contract term charges interest on the net outstanding borrowings determined by taking the amount borrowed less any amounts held on deposit in linked bank accounts often called "loan offset accounts". In the financial accounts for this arrangement the outstanding loan will be the official amount borrowed and the amounts deposited in the bank accounts will be recorded as another asset.

   We consider that this amended rule should only apply when the interest charged on an LRBA has been adjusted to reflect the use of specified loan offset accounts by a financial institution.

2. This provision should apply to all super funds – there is nothing in the SIS Act's LRBA provisions

prohibiting non-SMSFs and non-small APRA regulated funds from entering into LRBAs either for the fund as a whole or for specific members. For the sake of consistency, equity and fairness if the government elects to proceed with this provision then it should re-write proposed sub-Sec 307-231(3) ITAA 1997 so that the provision applies to all super funds.

3. Putting to one side our suggested amendment in point two above, proposed sub-Sec 307-231(4) ITAA 1997 limits this provision to SMSFs and other fund types that have less than 5 members. Given the government intends to expand the minimum number of members in SMSFs and Small APRA Funds to six members we believe paragraph (b) of the subsection should be amended to cater for that increase in the number of allowed members.

Should you require any further information or wish to discuss the contents of this submission, please contact Tony Negline, Head of Superannuation on [redacted] or by email at [redacted]

Yours sincerely,

[redacted]

Liz Stamford FCA
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Chartered Accountants Australia and New Zealand