THE TAX INSTITUTE

28 May 2018

Mr Mark Fitt
Committee Secretary
Senate Economics Legislation Committee

By email: Economics.Sen@aph.gov.au

Dear Mr Fitt

Inquiry into the Treasury Laws Amendment (2018 Measures No. 4) Bill 2018

The Tax Institute welcomes the invitation to make a submission to the Senate Economics Legislation Committee in relation to the Treasury Laws Amendment (2018 Measures No. 4) Bill 2018 (**Bill**).

In this regard, we note that we have previously prepared a submission in relation to the Taxation and Superannuation Guarantee Integrity Measures Bill 2018 (Cth) (Exposure Draft) and the accompanying exposure draft explanatory material (EM). We have attached this submission in Annexure A (**Submission**). The Submission covers the points we would like to raise in relation to the Bill.

Therefore, we request the Committee to review the comments in our Submission. We have no further points to make in relation to the Bill.

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If you would like to discuss, please contact either me or Tax Counsel, Angie Ananda, on [redacted]

Yours sincerely

[redacted]

Tracey Rens
President

Level 10, 175 Pitt Street
Sydney NSW 2000

Tel: 02 8223 0000
Fax: 02 8223 0077

info@taxinstitute.com.au
taxinstitute.com.au
ABN 45 008 392 37

Annexure A

THE TAX INSTITUTE

15 March 2018

Manager
Retirement Income Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: superannuation@treasury.gov.au

Dear Manager

Superannuation Guarantee Integrity Package

The Tax Institute (**TTI**) welcomes the opportunity to make a submission in relation to the Superannuation Guarantee (**SG**) Integrity Package.

The proposed SG measures for this package are contained in the *Treasury Laws Amendment (Taxation and Superannuation Guarantee Integrity Measures) Bill 2018* (Cth) (**Exposure Draft**) and the accompanying exposure draft explanatory material (**EM**).

Submission

We submit the following in relation to the SG Exposure Draft:

a) Proposed section 296-15 in the Exposure Draft, imposes a penalty of 50 penalty units or imprisonment of 12 months (or both) on employers that fail to pay an SG charge following receipt of a direction to pay the outstanding amount from the Commissioner of Taxation. In our opinion, this provision should not be introduced as the current penalty regime already provides for significant penalties.

b) Introducing imprisonment as a penalty under the SG regime is not justifiable.

c) In our experience, the vast majority of employers seek to comply with their SG obligations. Therefore, rather than introducing a provision that seeks to target the small percentage of non-complying employers, the focus should be on reforming the existing SG regime to encourage full compliance.

Background

Treasury outlined the rationale for the SG reforms in the EM. The EM states that the measures are to 'enhance compliance with [the] superannuation guarantee [regime] by employers'. The EM also states the following:

> "1.14 An employer's failure to comply with their superannuation guarantee obligations can occur for a variety of reasons. In particular, smaller

Level 10, 175 Pitt Street
Sydney NSW 2000
Tel: 02 8223 0000
Fax: 02 8223 0077
info@taxinstitute.com.au
taxinstitute.com.au
ABN 45 008 392 37

employers may not be fully aware of their superannuation guarantee obligations under the SGAA 1992. Employers may also misclassify payments which result in an underpayment of superannuation guarantee.

1.15 In other cases, there are recalcitrant employers who have intentionally failed to provide their employees with their superannuation guarantee entitlements and repeatedly disregarded their obligations and continuously failed to pay their superannuation liabilities."

We agree that compliance with the SG regime is important. However, in our opinion, the proposed SG measures outlined in the Exposure Draft are unlikely to enhance compliance. We have outlined our concerns with the Exposure Draft in detail below.

Proposed new penalty – Division 296

The proposed new penalty under the SG regime is set out in Division 296 of the Exposure Draft. The EM provides that criminal sanctions can be applied by the ATO where a person fails to comply with a written direction to comply with their SG obligations within a specified time. Refer to paragraph 1.69 of the EM

"1.69 Applying criminal sanctions to failures to comply with a direction to pay an outstanding liability in respect of superannuation guarantee charge reflects that, unlike other debts owed to the Commonwealth, amounts of superannuation guarantee charge are paid to the Commissioner and then distributed to the superannuation funds of employees who did not receive the minimum level of contributions from their employer. The additional penalties that can apply to this new direction provide additional incentives to employers to ensure that they are fully compliant with their existing obligations under the SGAA 1992 and related obligations under the TAA 1953."

In our opinion, the proposed new penalty under the SG regime will give the ATO too much power and discretion. In our opinion, this is not appropriate.

Therefore, we submit that proposed Division 296 should not be enacted.

The existing penalties under the SG regime are already significant in nature and can adversely affect entities (especially small and medium enterprises (**SMEs**)). In this regard, we note that if an employer fails to meet their quarterly SG payments on time, they need to pay the SG charge and lodge a SG statement. The SG charge comprises of:

- the employee's SG shortfall amount;
- general interest rate (which is currently 10% per annum); and
- an administration fee of $20 for each employee with a shortfall per quarter.

Unlike normal SG contributions, the SG charge amounts are not tax deductible, even if an employer pays the outstanding amount. That is, if the employer pays the SG late, they can no longer deduct the SG amount even if they bring the payment up to date.

The calculation for the SG charge is different to the usual calculation for normal SG. The SG charge is calculated using the relevant employee's 'salary or wages' rather than their ordinary time earnings (**OTE**). In some circumstances, an employee's 'salary and wages' may be considerably higher than their OTE, particularly if employees are paid for overtime.

In addition to the above SG shortfall amounts, employers may be penalised by having to pay other penalties under the regime.

If, despite our submission, proposed Division 296 is enacted, we submit the following:

a) Division 296 should not include strict liability offences as the penalties are severe. In particular, proposed s 296-15 should not be a strict liability offence as the taxpayer has the reverse burden of proof. The SG regime is an extremely complex area of the law and obtaining professional advice is very costly. Given there are criminal ramifications (especially the possibility of imprisonment), the ATO should have to prove beyond reasonable doubt that the taxpayer has not used reasonable care or taken reasonable measures to comply with their SG obligations.

b) Proposed s 296-10 should be conditional on an employer already having failed to comply with the SG regime on at least one prior occasion within a 12 month period in circumstances where the amount of the SG shortfall is more than $20,000.

c) Proposed s 296-10(3) should set out how the amount has been calculated and split the amount up into the discrete components (ie SG shortfall, interest, administrative fees and any other amounts) so that an employer can review and check the components.

d) Proposed s 296-15(3) provides a defence where:
   - "you took all reasonable steps to comply with the direction before the end of the period specified in the direction…; [and]
   - you took all reasonable steps to ensure that the liability was discharged before the direction was given."

   In practice, we anticipate that not many taxpayers would be capable of satisfying this defence as in many cases the issue is likely to relate to cashflow. Further, the second limb is likely to be difficult to satisfy as there would be no need for an ATO direction if the taxpayer took all reasonable steps before the direction was issued to ensure the liability is discharged.

   The defence should also take into account other factors that may be relevant including extenuating circumstances such as where an employer's non-compliance with SG payments relates to unforeseen circumstances such as IT problems, medical or personal issues. These employers should not be unfairly penalised or imprisoned.

   The EM states that it is intended that directions will only be issued where there are serious contraventions. However, there is nothing in the proposed legislation to support this in the EM. In our opinion, express wording in the legislation is required to ensure that penalties under Division 296 are a last resort measure for serious contraventions.

e) Proposed s 296-25(3) should be deleted. It is inappropriate that a taxpayer may successfully prove that there is, for instance, no genuine liability at all but is still subject to a strict liability offence. Naturally, if a taxpayer proves that they have complied with the SG provisions, there should be no offence.

f) As noted above, the SG regime is complex and technical. Many employers may be caught by a technical interpretation or the complexity of the SG regime. The risk of imprisonment is not appropriate given the uncertainty created by the complex and technical nature of the SG regime.

g) Finally, any direction should be suspended if the taxpayer objects or seeks a review or appeal of the ATO's position. This right of objection, review or appeal should not be limited to a time that falls before the end of the period specified in the direction, as that will preclude many objections, review and appeals. The right to object, review or appeal should be extensive so that it can also occur after the expiry of the direction period as many taxpayers are likely to need to remedy their cash flow situation before obtaining advice and then taking appropriate action. The legislation should be amended to provide this flexibility.

In our experience, we are aware of numerous cases where the penalties under the current law have resulted in employers losing their businesses. We recognise that there needs to be consequences for businesses and employers that are 'recalcitrant' and /or avoid their SG obligations. However, the impact of making the already harsh SG shortfall and penalty regime harsher may have potentially detrimental results for many businesses.

Without adequate review procedures and safeguards, it is inappropriate to proceed with these provisions that may result in imprisonment.

To summarise, the proposed Division 296 does not have sufficient safeguards especially given the prospect of someone serving a term of imprisonment. Our submission therefore is that proposed Division 296 should be withdrawn. However, if it is to be enacted, then we submit that proper safeguards (such as those outlined above) should be included in the legislation.

Recommendations for the SG regime

We recommend the following be introduced to enhance and encourage voluntary compliance with the SG requirements:

a) **Change to annual reconciliation for SG statements**: In our opinion, the current SG regime system is too strict, in that quarterly SG shortfalls are due in respect each quarter and failure to pay the requisite minimum SG by an employer gives rise to an immediate liability for the SG shortfall and associated amounts — even for small sums where there are administrative errors or for being 1 day late.

   Instead of the current excessive regime, there should be an annual reconciliation for SMEs. Under this recommendation, an underpayment of SG for a quarter does not give rise to an SG shortfall or penalties but can be adjusted or reconciled in the final SG quarter. In the event that an employer has not satisfied the minimum SG to adjust or reconcile, there may be an SG shortfall statement for each 30 June period. A reasonable level of interest on the late payment could be accrued to reflect market interest rates.

b) **Encourage voluntary compliance**: in our opinion, the existing penalties do not encourage full voluntary compliance. We consider that increasing the penalties may not necessarily result in increased compliance once a deadline is missed or a shortfall arises. We are concerned that if the penalties and liabilities arising

from missing an SG payment are excessive, then employers may choose not to disclose or rectify the breach.

As an incentive to encourage voluntary disclosure, the Commissioner of Taxation could be granted a discretion to allow employers to make late SG payments (plus an earnings component) rather than paying the SG charge. Such discretion could be provided to taxpayers who otherwise have a good compliance history and have not previously sought the application of such a discretion.

c) **Updating the general interest rate to reflect current interest rates**: currently, the general interest rate is 10%. This current interest rate is unreasonably high given the current worldwide long-term low rates. Employers should not be expected to pay 10% as penalty interest when interest rates and investment returns are at historic lows. The 10% level was set at a time when interest rates were significantly higher as is no longer appropriate.

d) **Assignment of earnings base**: in our opinion, simplifying the SG charge by aligning the earnings base for calculating the SG charge (currently, total salary and wages) with the earnings base for calculating OTE is a sensible change. This change may alleviate some of the excessive penalties for employers who are subject to the SG charge without disadvantaging employees.

Single Touch Payroll

The EM discusses the proposed dates for the rollout of the Single Touch Payroll (**STP**) to employers:

> "3.17 The amendments requiring all employers to report under the Single Touch Payroll reporting rules apply in relation to an amount that an entity is required to report under Single Touch Payroll if the requirement to notify arises on or after 1 July 2018. ***[Schedule 3, item 10, subsection (1)]***
>
> 3.18 For small employers who are not 'substantial employers' (entities with 20 or more employees), Single Touch Payroll reporting commences from 1 July 2019. For 'substantial employers' at 1 July 2018, these entities must continue to report under the existing Single Touch Payroll rules as they are required to report before 1 July 2019."

In our opinion, the proposed dates do not provide employers with adequate time due to the enormity of recent superannuation reforms. We recommend that the ATO run a major education campaign to educate employers about the new system before it is implemented.

We considered that many SMEs will be ill-equipped and not ready by the proposed dates since they have not been adequately informed and educated. Further, even when they are informed, SMEs are unlikely to be able to roll-out new and often expensive software systems by the proposed dates. The Government should also provide a tax incentive for SMEs to upgrade software and obtain training to comply with these proposed changes.

We recommend that the dates for the rollout of STP be pushed back for a minimum of 1 year for 'substantial employers' and 2 years for SMEs.

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If you would like to discuss, please contact either me or Tax Counsel, Angie Ananda, on [redacted]

Yours sincerely

[redacted]

Tracey Rens
President