

29 July 2011

The General Manager
Business Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: phoenix_companies@treasury.gov.au

RE: Exposure Draft - Tax Law Amendments to Strengthen Company Director Obligations and Deter Fraudulent Phoenix Activity

Dear Sir/Madam,

The Australian Institute of Superannuation Trustees (AIST) is an independent, not-for-profit professional body whose mission is to protect the interests of Australia's \$450 billion not-for-profit superannuation sector. AIST's members are the trustee directors and staff of industry, corporate and public-sector superannuation funds, who manage the superannuation accounts of two-thirds of the Australian workforce.

In making its submissions to Treasury, AIST confirms the following regarding the proposed Exposure Draft (ED):

- AIST supports the provisions contained within the ED to make directors of phoenix companies personally liable for unpaid amounts arising as a result of the superannuation guarantee, however we would further draw your attention to pursuing additional unpaid amounts that may arise where such payments are similarly mandated by awards, industrial agreements, contractual arrangements or similar in excess of the Superannuation Guarantee (SG);
- We consider it reasonable that the Commissioner should be granted the discretion to estimate a SG charge in addition to PAYG withholding liabilities; and
- We support the strengthened position of the Commissioner in being able to immediately commence action to recover unpaid amounts three months after payment is due.

AIST also supports the remaining provisions of the ED, including restricting director access, and access of their associates, to PAYG withholding credits.

Extension of the director penalty regime to superannuation guarantee amounts

AIST supports the addition of unpaid SG amounts to the existing director penalty regime.

We note the explanation provided in paragraph 1.17 of the Explanatory Memorandum (EM):

1.17 Extending the director penalty regime to superannuation guarantee amounts better secures workers' entitlements. These amounts represent amounts of unpaid superannuation guarantee that should have been applied for the benefit of the employee, by providing it to a superannuation fund, in the same way as superannuation guarantee amounts collected under the Superannuation Guarantee Administration Act 1992 (SGA Act 1992).

The Superannuation Guarantee (SG) represents an amount that is payable under the law as an absolute minimum on behalf of all Australian employees. However, employers may also be legally obliged to make additional payments into superannuation funds on behalf of employees, where such payments are mandated by awards, industrial agreements or contractual arrangements. Conceptually, we fail to see the difference between SG amounts and additional over-SG amounts that would otherwise be payable in this instance, and recommend that consideration be given to these additional amounts in this legislation.

We wish to draw your attention to the history of these payments. A historic reason for payments in excess of the SG minimum include payments into superannuation in lieu of amounts where PAYG tax would ordinarily be payable. To not include over-SG amounts in this instance deprives certain employees of the retirement savings they are entitled to at the same time as depriving the government of normal PAYG revenue.

A feasible outcome of this hole in the legislation will see an incentive created for employers to negotiate agreements that increase the super to taxable income ratio of employees overall packages, secure in the knowledge that their contingent personal liability to the tax office in the event of corporate failure is reduced. The downside of this, is that over-SG amounts to be paid on behalf of employees thus become an excellent example of the kind of avoided debt explained in paragraph 1.8 of the EM.

We do not see mandated over-SG amounts as being inconsistent with the scope of this ED and propose that the ED be expanded to include additional mandated superannuation amounts.

Imposing and quantifying director penalties

We consider the granting of discretion to the Commissioner to estimate directors' liability for SG penalties to be a logical extension of this ED and we welcome this measure.

Timing – when company directors become personally liable

We welcome the proposal to ensure that penalties for SG payment shortfalls are payable from the lodgment date, regardless of whether they have yet been assessed.

Expanding the estimates regime to cover unpaid superannuation guarantee

AIST supports expansion of the estimates regime to cover any unpaid SG. We agree with the statement in paragraph 1.33 of the EM, where it is stated that:

The ability to estimate a superannuation guarantee charge will enable the Commissioner to take prompt action when a small window of opportunity arises to secure recovery, without having to delay recovery by waiting for a default assessment to be issued. This reduces the scope of phoenix operators to escape liabilities once they become aware that the Commissioner is pursuing them.

We agree with the intention of this measure, and believe that the solution in this measure is appropriate.

Additional provisions

AIST supports all remaining provisions in this ED.

If you have any further questions regarding this submission, please contact Tom Garcia, Policy and Regulatory Manager on (03) 8677 3804 or tgarcia@aist.asn.au.

Yours sincerely

A handwritten signature in black ink that reads 'Fiona Reynolds'.

Fiona Reynolds
Chief Executive Officer