



Law Council  
OF AUSTRALIA

*Legal Practice Section*

6 June 2018

Senate Standing Committee on Economics  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

By email: [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

Dear Sir/Madam

**TREASURY LAWS AMENDMENT (2018 SUPERANNUATION MEASURES NO. 1) BILL  
2018 [Provisions]**

1. This submission has been prepared by the Law Council of Australia's Superannuation Committee (**the Committee**),<sup>1</sup> which is a committee of the Legal Practice Section of the Law Council of Australia.
2. This submission does not seek to raise issues concerning matters of practice or policy. Rather, the Committee raises some specific queries relating to its objective of ensuring that the law relating to superannuation in Australia is sound, equitable and demonstrably clear.

**Schedule 1 - Superannuation Guarantee Amnesty**

Breadth of 'examine' terminology

3. Proposed section 74(1)(c) states as follows (emphasis added):

*... the Commissioner has not, at any time before the disclosure, informed the employer that the Commissioner is examining, or intends to examine, the employer's compliance with an obligation to pay the superannuation guarantee charge for the quarter.*

4. The Committee notes that the words 'examining' and 'examine' are very broad and are not defined. Accordingly, the Committee queries whether there will be sufficient certainty as to what the words encompass in order for an employer to understand if it can utilise the amnesty provisions.

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

Retrospective application

5. Schedule 3 expands the current operation of the non-arm's length income provisions (including for large Australian Prudential Regulation Authority funds) so that any

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<sup>1</sup> The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

assets acquired by a fund, or expenses incurred which are determined not to have been paid for on arm's length terms, will then go on to 'taint' any income and capital gains such that the highest marginal tax rate then applies to anything connected to the related or linked investment.

6. Examples are given in the Explanatory Memorandum as to how the new provisions might work for industry and retail funds (see for instance, Example 3.2 on page 37). The Committee is concerned that the proposals appear to be intended to effectively operate in a **retrospective** manner because it will apply to any capital gains or income from 1 July 2018 where the underlying investment or asset was acquired in the past (perhaps at a price lower than market price or on favourable terms).
7. The Explanatory Memorandum acknowledges that the pre-existing legislation probably did not allow the Australian Taxation Office to pursue non-arm's length expenditure. Therefore, it appears clear that the new measures have a retrospective impact and they are not merely 'clarifying' the law as might otherwise be suggested.
8. A retrospective effect could be potentially extremely significant for some funds which have made investments on favourable terms, for example through direct infrastructure trusts and the like, or which might have been offered securities off-market.
9. The Committee does not object to the new measure applying prospectively as there is reasonable scope to ensure compliance, but does object to it being introduced with retrospective application and submits that this aspect be carefully considered by the Senate Standing Committees on Economics.

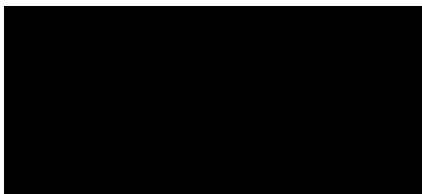
## Contact

The Committee would welcome the opportunity to discuss its submission further and to provide additional information in respect of the comments made above. In the first instance, please contact:

- Mr Luke Barrett, Chair, Superannuation Committee  
T: [REDACTED]  
E: [REDACTED]; or

Ms Lisa Butler Beatty, Deputy Chair, Superannuation Committee  
T: [REDACTED]  
E: [REDACTED]

Yours sincerely



**Jonathan Smithers**  
**Chief Executive Officer**