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Dr Richard Grant
Sentate Standing Committee on Economics, SG.64
PO Box 6100
Parliament House
CANBERRA ACT 2600

By Online Submission

Friday, November 11, 2011

Dear Dr Grant

***Tax Laws Amendment (2011 Measures No. 8) Bill* 2011; P*ay As You Go Withholding Non-compliance Tax Bill* 2011**

The ACTU welcomes the opportunity to comment on the above Bills. Our comments are restricted to the measures which form part of Schedule 3 to first mentioned Bill. We acknowledge that measures contained therein build on the government's Fair Entitlement's Guarantee in ensuring that a safety net to protect workers is complimented by penalties and disincentives against corporate misbehaviour that sends a clear message that limited liability is a privilege not be abused, rather than an entitlement with no strings attached.

We are of the view that both the primary element of allocating responsibility for unpaid SG contributions through an extension of the director penalty regime and the secondary element of imposing a PAYG withholding non-compliance tax on directors and their associates (akin to a reduction of the PAYG(W) credits otherwise available to them) are well targeted policy initiatives. Given the experience of our affiliates as to the structuring, personal interests and roles of phoenix directors and their relatives or business partners with whom they serially act in concert with, attaching liability on these actors should have a deterrent effect on illegitimate corporate conduct.

Whilst we see the attraction in utilising and extending the existing director penalty regime as the means of recovering unpaid superannuation guarantee, there are some features of that regime, either as amended or adopted, that have some elements that are not ideal in particular circumstances post an insolvency related retrenchment or after a significant period of underpayment where employees may be in desperate financial circumstances that would justify an application for a release of some of their superannuation account balance (such as while they are awaiting the processing of a GEERS or Fair Entitlements Guarantee application).

We are of the view that the 60 day period in which directors may raise a defence is unnecessarily long. It is our view that 28 days is sufficient. This would allow directors sufficient time to receive legal advice and to respond accordingly. Any more than 28 days will simply prolong the process of recovery, with the potential of incurring further costs for the ATO. As to the circumstances in which the reduction can be decreased under section 18-130 (2) and (3), it should also be made clear that it is not sufficient for a director to assert that there were no reasonable steps available because the company had insufficient funds. For the avoidance of doubt we suggest the legislation be amended in order to achieve this intention unambiguously.

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We note that a company's superannuation guarantee charge for a quarter under the *Superannuation Guarantee (Administration) Act 1992* is treated as being payable on the day by which the company must lodge a superannuation guarantee statement for the quarter under section 33 of that Act. Accordingly, if an employee earns an amount of superannuation on 1 January, the applicable lodgement day is 28 May in the next quarter. In these circumstances the automated process cannot be used to recover the entitlement until (at least) some eight months passed from the day on which the entitlement was earned by the employee. We are of the view that this period is too long and we recommend that the three month waiting period be referable to the end of the quarter to which the entitlements relate rather than on lodgement day. This would provide greater scope for effective action against phoenix activities.

Further, where the ATO's automated recovery process may commence, a superannuation guarantee shortfall will have to remain unreported *and* unpaid for the Commissioner for recovery to occur without providing 21 days' notice. In this respect, we foresee scope for abuse of the reporting regime as the rule applies consistently even where entitlements have been repeatedly unpaid. We suggest that where superannuation is unpaid but reported, and this occurs on more than one occasion (without good cause) directors of non-compliant companies should be subjected to the automated recovery process without the need for 21 days' notice.

We note that the draft legislation is in line with the overview of the 2011-12 budget revenue measure "Tax compliance – countering fraudulent phoenix activities by company directors" and we are pleased that the government is acting quickly on this important feature. We note that the budget measure also identified an increase in ATO expenses of $22.1 million in the forward estimates period in association with the reforms, although it was not clear to us if the expenditure was front loaded to ensure that the ATO was appropriately resourced from the outset to implement these important new reforms.

In a joint submission (ACTU, Industry Super Network, Industry Funds Credit Control and the Australian Institute of Superannuation Trustees) in July 2009 to the Review into ATO administration of the Superannuation Guarantee Charge, we identified that while up to a third of Australian employees may be affected by non-compliance with superannuation obligations, less that 5% made complaints to the ATO. At that time the ATO's staff in the superannuation division were overwhelmed and were requesting superannuation funds to stop reporting 'lost super' accounts because they did not have the resources to report them. Accordingly, we would request that the resourcing and training be implemented as soon as possible. One needs only to have regard to our insolvent trading laws, and the reliance placed on insolvency practitioners and ASIC in civil and criminal prosecution thereof, to gain an appreciation of the critical dependency between legislative policy and effective resources. Both Unions and the Fair Work Ombudsman could assist in the enforcement role, it some consideration should be given as to whether the legislation ought to provide them with such a role. We add that even administrative arrangements and consultation protocols as between those agencies concerned with phoenix conduct (e.g. ATO, ASIC, FWO) and unions may result in greater efficiency, better implementation and more holistic enforcement outcomes.

Finally, whilst we support the Bills in principle and are committed to consulting and working with government to ensure the successful implementation or these reforms and the remaining elements announced in the Protecting Workers' Entitlements package, tax measures are clearly only element of what is required to successfully address phoenix activity. In this regard we urge government to implement further reforms, including legislation that would:

- Define a phoenix company;
- Allow ASIC to ban a phoenix company from using the company or trading name that was used by the failed predecessor company;
- Permit creditors of the failed predecessor company (and persons seeking to establish that they are creditors thereof) to start or continue litigation against the failed company, without the leave of a court;
- Make the phoenix company vicariously liable for the debts incurred by the failed predecessor company. This will allow the Commonwealth to recover tax debts and Fair Entitlement Guarantee payments as well as provide proceeds for the types of litigation contemplated above; and
- Make the phoenix company vicariously liable in any unfair dismissal claim brought against the failed predecessor company by its former employees. Employees should be able to bring claims within 12 months of discovering that the failed company has 'phoenixed' (instead of the normal requirement that claims be brought within 14 days of dismissal).

Since phoenix operators are usually small businesses, the government could consider only applying the above measures in cases where the second company had a turnover that is less than a given threshold (e.g. $1 million). Furthermore, in our view the government should consider strong punitive and oversight measures to deter and remedy the effects of phoenix behavior, such as:

- Imposing a significant civil penalty for persons (whether directors, insolvency practitioners, financial advisers or others) involved in the establishment of a company that is or was a phoenix company, where this is done for the purpose of avoiding obligations to employees or creditors of the failed company;
- Allowing ASIC to ban people involved in the establishment of a company that is or was a phoenix company from being a director or manager of any company;
- Imposing more onerous financial reporting requirements on companies for the period that they are phoenix companies

Should the Committee at any time consider examining these expanded reform issues we would welcome the opportunity to contribute to its deliberations.

Yours faithfully,

Trevor Clarke
Legal & Industrial Officer
Australian Council of Trade Unions