



Law Council  
OF AUSTRALIA

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# Re:think: Tax discussion paper

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## **Tax White Paper Task Force**

### **The Treasury**

**Submission by the Superannuation Committee of the Legal Practice Section of the Law Council of Australia**

**1 June 2015**

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## Introduction

1. This submission, prepared for the Law Council of Australia by the Superannuation Committee of the Legal Practice Section (the 'Superannuation Committee'), responds to Questions 1, 14 and 22 of the March 2015 [Re:think: Tax Discussion paper](#) ('White Paper') in the context of the legal and regulatory system underpinning the taxing of superannuation.
2. The objectives of the Superannuation Committee are to ensure that the law relating to superannuation in Australia is sound, equitable and demonstrably clear. The Superannuation Committee makes submissions and provides comments on the legal aspects of virtually all proposed legislation, circulars, policy papers and other regulatory instruments which affect superannuation funds.
3. The Law Council of Australia is the peak national representative body of the Australian legal profession and represents more than 60,000 legal practitioners nationwide. [Attachment A](#) provides more information about the Law Council.
4. The White Paper is the initial stage of Treasury's community consultation to explore options to create a better tax system that delivers taxes that are lower, simpler and fairer.
5. Comments by the Government in the weeks following the announcement of the 2015 Budget indicate that it does not intend making changes to the taxation of superannuation during the current term, or the next term should it be re-elected. Nonetheless, while the Superannuation Committee generally does not comment on matters of policy, it wishes to highlight some considerations that it considers should inform a review of the superannuation taxation system.
6. As a general point, the Superannuation Committee notes that the superannuation system is impacted not only by changes to superannuation laws and taxes, but to changes to age pensions, social security arrangements more broadly, and the tax treatment of other savings vehicles. With that in mind, the Superannuation Committee endorses the whole of tax system approach detailed in the White Paper.

## Specific responses

7. The questions to be responded to in this submission are:
  - Q1. Can we address the challenges that our tax system faces by refining our current tax system? Alternatively, is more fundamental change required and what might this look like?
  - Q4. To what extent should reducing complexity be a priority for tax reform?
  - Q22. How appropriate are the tax arrangements for superannuation in terms of their fairness and complexity? How could they be improved?
- Q1. Can we address the challenges that our tax system faces by refining our current tax system? Alternatively, is more fundamental change required and what might this look like?**
8. The Superannuation Committee agrees that efficient tax systems must be sustainable and that tax differentials impact savings choices and may distort

decision making or undermine other policy objectives.

9. Because of the interaction between superannuation as a retirement savings vehicle, social security arrangements and other parts of the financial system, the Superannuation Committee considers that the development of sound superannuation taxation policy requires a fundamental reconsideration of the principles underpinning the tax system. The current debate regarding the targeting of tax concessions is directed towards part only of the superannuation tax system, and adjustments to these rules in the absence of reforms to other aspects of the tax system, and to social security rules, may simply result in new distortions elsewhere. Importantly, the Superannuation Committee considers that a critical element of the process must be the establishment of clear objectives for the Government's retirement incomes policy, the superannuation system (including tax), and the tax system more broadly.

**Q4. To what extent should reducing complexity be a priority for tax reform?**

10. Australia's superannuation regulatory regime is highly complex, as are our superannuation tax arrangements. The Superannuation Committee is aware that a major challenge to the public support of the superannuation system and, in particular, the willingness of many individuals to make additional contributions, is the perception that the rules are difficult to understand and subject to constant change, and that superannuation savings are at risk of being made subject to higher or additional taxes or other imposts. It is desirable, therefore, that reforms not be made piecemeal over a lengthy period, but are put forward as far as possible in a single tranche that can be relied upon by the public as a framework informing their long term planning.
11. The debates about particular technical issues that frequently arise among accountants, financial planners and lawyers who are active in the superannuation area demonstrate the difficulties the industry faces in applying the current complex regulatory regime. Fund members, especially retirees, generally need to access financial planning advice in order to navigate an efficient path through the web of superannuation, pension, social security and taxation rules.
12. The Superannuation Committee considers that public confidence in our superannuation system and tax system will be best served by a reduction in complexity. A simpler system could also be expected to result in lower costs for the industry overall, as complexity adds to administration costs for funds, costs for fund members seeking to manage their superannuation interests, and costs of regulation and supervision.
13. The Superannuation Committee cautions that the goal of reducing complexity should not override the need for transitional arrangements in respect of reforms that would otherwise retrospectively and adversely impact accrued entitlements, or the position of taxpayers who are nearing retirement. Changes that did not protect the position of these groups would in the Superannuation Committee's view severely damage public confidence in the superannuation system going forward, and would have the potential to create significant unfairness. The Superannuation Committee considers that the delivery of greater equity and fairness and less complexity should be the twin goals of superannuation tax policy development.
14. The Superannuation Committee sees merit in the adoption of a Tax Complexity Index. It is very likely that superannuation taxation would be rather high on such a Complexity Index, and that the superannuation system would greatly benefit from resources being prioritised to reduce complexity while maintaining fairness.

**Q22. How appropriate are the tax arrangements for superannuation in terms of their fairness and complexity? How could they be improved?**

15. The Superannuation Committee agrees that flat tax rates that apply to superannuation contributions and earnings must inevitably advantage wealthier savers. Any such review of these arrangements should factor in the compulsory nature of superannuation; the longer term outworking of the contribution limits (which only commenced in 2007), the restrictions placed on access until retirement or reaching age 65, and Australia's broader retirement income arrangements (including the age pension). Noting that the current superannuation tax arrangements have both compulsory elements and tax concessions, the Superannuation Committee suggests that the question of fairness must also have regard to the behavioural outcomes that are sought by use of the current 'carrot and stick' approach to superannuation taxation.
16. The Superannuation Committee would support the development of NZ and UK style processes to more systematically reform the law. It seems reasonable to expect that an approach which detailed a revenue strategy in advance of the announcement of any particular reforms, with formal consultation with interested parties as each key stage of policy development, would deliver better policy. Superannuation tax policy development would in the Superannuation Committee's view benefit in particular from the adoption of such a process. A consultation process that encouraged the building of bipartisan political support for superannuation taxation reform would also be better suited to the development of long term reforms.
17. It is worth noting that the taxation of superannuation over the last 20 years has seen the roll-out of several initiatives that would rate highly on any Tax Complexity Index and which demonstrate the pitfalls of inadequate consultation and piecemeal policy development. For example, the Superannuation Contributions Surcharge which operated from 1997 until 2005 was a superannuation tax that was subject to protracted legal uncertainty, caused significant costs to regulators (which were passed onto superannuation fund members via industry levies) and proved to be an onerous administrative burden on the nation's superannuation funds. Ultimately, the administrative and legal complexity of the Surcharge resulted in significantly less tax revenue being raised than was projected. Surcharge assessments are still being issued ten years after its abolition, representing a costly on-going 'legacy' of this failed initiative. Certainty and clarity, the hallmark of good law, have not been served by superannuation taxes such as the Surcharge.

## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive are:

- Mr Duncan McConnel, President
- Mr Stuart Clark, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Dr Christopher Kendall, Executive Member
- Mr Morry Bailes, Executive Member
- Mr Ian Brown, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.