The Institute of Chartered Accountants in Australia

16 February 2009

Mr John Hawkins
Committee Secretary
Senate Economic Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: economics.sen@aph.gov.au

Dear Mr Hawkins

**Supplementary submission to the Inquiry**
**Tax Laws Amendment (Taxation of Financial Arrangements) Bill 2008**

On 20 January 2009, the Institute of Chartered Accountants in Australia (the Institute) lodged with the Inquiry our submission into the proposed Tax Laws Amendment (Taxation of Financial Arrangements) Bill 2008.

Since the time of lodging that submission, the Institute has been made aware of specific concerns from our members in respect of the proposed legislation which the Institute believes ought to be brought to the attention of the Inquiry. On that basis, this supplementary submission should be read in conjunction with our 20 January 2009 submission.

**TOFA exclusion tests under section 230-455**

During earlier consultation processes between Treasury and other stakeholders (including the Institute), it was proposed that the exclusion test (ie. the threshold under which business taxpayers would not be required to comply with the complex TOFA rules) would apply where an entity's aggregated turnover was less than $100m for an income year. The original design of this exclusion test required that only the 'aggregated turnover' threshold test would need to be satisfied.

The aggregated turnover threshold test was a key consultative issue addressed by the previous Government. In his press release dated 20 September 2007, the then Assistant Treasurer, the Hon Peter Dutton MP, stated:

> "The Bill has been further refined since the release of an exposure draft in January 2007. 'Importantly, the aggregated turnover threshold for mandatory entry into the regime is $100 million for non-financial entity taxpayers. Financial entities will be subject to an aggregated turnover test of $20 million. This turnover threshold for non-financial entity taxpayers will ensure that the measure applies only to taxpayers with sophisticated financial arrangements,' Mr Dutton said."

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Up until the time of the final exposure draft that was released in September 2008, the aggregated turnover threshold test remained consistent with the prior Government's announcement on the issue. However, when the exposure draft legislation was subsequently released as draft legislation for introduction into Parliament, the exclusion test was broadened such that in order for a non-financial entity to be excluded from the TOFA regime, it must in fact satisfy three threshold tests, those being:

1. aggregated turnover must be less than $100m; and

2. value of financial assets at the end of the preceding year must be less than $100m; and

3. value of the entity's total assets at the end of the preceding year must be less than $300m.

Requiring non-financial entity taxpayers to satisfy all three threshold tests is a significant departure from the previously understood policy position of the Government in relation to the TOFA regime.

It is worth noting that the Institute has been one of the main advocates for the threshold-based exclusion principally targeted at non-financial small to medium sized entities (or SMEs). Furthermore, the Institute highlights that the current Government has not – to date – made any announcement signalling its intention to change the previously announced exclusion threshold in relation to the application of the TOFA regime to non-financial entities.

The primary policy intention of the exclusion test is to provide an appropriate mechanism to allow SMEs who are not principally engaged in financial services-type businesses to be excluded from the TOFA regime unless they elect to voluntarily participate. The prior $100m threshold test was developed and agreed with the prior Government after significant consultation with the Institute.

On the basis of the three exclusion tests as they stand at the moment, the Institute believes that there may be a significant risk that the cumulative nature of the three tests will mean that some businesses will now be forced to comply with the TOFA regime, notwithstanding that it has been previously announced by the Government that mandatory compliance with TOFA for such entities would not be required.

**Adverse impact on businesses forced to comply with TOFA regime**

The implication for non-financial SME businesses of being required to comply with the new TOFA regime will be that they will be faced with increased compliance costs resulting from the complex nature of the new TOFA rules.

Given the current economic climate, requiring SME businesses to comply with the TOFA regime (and in doing so incur significant additional expenditure and resource costs) is likely to place undue strain on such businesses. This is of particular concern given that the prevailing economic conditions are already adversely impacting many SME businesses.

**Recommendation**

The Institute believes that the concerns raised by our members which we have spelt out above warrant immediate and specific rectification in the draft legislation. On this basis, the Institute respectfully requests the Committee recommend in its report that the exclusion tests under subsection 230-455(4) be amended back to the original form which is in-line with the previous announcement of the Government. Making such an amendment will allow entities with a

aggregated turnover of less than $100m to fall outside the scope of the TOFA regime if they so elect.

The Institute would be pleased to provide further information to the Committee during its deliberations on the proposed legislation. If you would like to discuss this supplementary submission further, please do not hesitate to contact the Institute's Tax Counsel, Yasser El-Ansary on 02 9290 5623, or Linda Wang on 02 9290 5750.

Yours faithfully

**Graham Meyer**
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The Institute of Chartered Accountants in Australia