



**AUSTRALIAN BANKERS' ASSOCIATION INC.**

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Committee Secretary  
Senate Economics Committee  
Department of the Senate  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Email: Economics.sec@aph.gov.au

Dear Committee Secretary,

**Inquiry into the Tax Laws Amendment (Taxation of Financial Arrangements) Bill 2008**

The Australian Bankers' Association (**ABA**), Australia's peak banking industry body, supports the passage of *Tax Laws Amendment (Taxation of Financial Arrangements) Bill 2008* (**Bill**) which was introduced into Parliament on 4 December 2008.

**ABA recommendations**

In summary, the ABA recommends that:

- (1) The Bill be enacted as soon as possible;
- (2) A process be established to address already identified "must fix" and other first-order issues for entities electing into TOFA at 1 July 2009; and
- (3) Further amendments to be made to the TOFA regime as and when additional issues arise during the implementation process.

**Discussion**

The ABA has supported the TOFA project since its inception, in 1991. In particular, the ABA has been an active participant in extensive consultations with both Treasury and the Australian Taxation Office (**ATO**) in relation to the development and refinement of the Bill upon which the Committee has been asked to report.

ABA-#91667-v6-TOFA\_sub\_-\_23Jan09.DOC

Over the past two years in particular, the ABA has participated in an ongoing consultation with Treasury and the ATO in relation to all exposure drafts (both public and confidential) of the legislation that have been released, as well as an earlier iteration of the Bill that was introduced into Parliament by the previous Government, on 20 September 2007, which lapsed when the last federal election was called.

As part of this consultation process, the ABA has provided Treasury with many detailed written recommendations for changes to and refinements of the legislation, to ensure that it accomplishes its stated objectives and is workable for all taxpayers in practice. The submissions made by the ABA in relation to public Exposure Draft legislation released in 2007 and 2008 are publicly available on Treasury's website:

<http://tofa.treasury.gov.au/content/submissions.asp?NavID=004>

The ABA's submissions include the issues that members view as being critical to the workability of the legislation (see in particular the submission on the 2008 Exposure Draft (**2008 Submission**)) along with many more subtle technical refinements (see in particular the detailed table accompanying the ABA's submission on the 2007 Exposure Draft (**2007 Submission**)).

Treasury has done much in the way of addressing, in particular, the nine "must fix" items identified in the 2008 Submission. The ABA believes that the core principles underpinning the Bill are sound, and justify its passage and enactment, subject to the comments below as to subsequent amendments to the regime.

Given the complexity of the subject matter, and of the provisions of the Bill, it is perhaps inevitable that the Bill may not be perfect. The same can be said of many other major pieces of tax reform over many years – which are typically subject to a number of amendments to fine tune their operation.

In the ABA's view, quick passage of the Bill will assist the tax community at large to swiftly identify remaining issues, and for the ATO to provide the crucial interpretative advice which they are unable to provide before Royal Assent. It will also give taxpayers the time necessary to implement required systems and corporate and tax governance requirements, which will be an essential requirement of the TOFA regime.

The ABA's preference is for immediate enactment of the Bill, and to preserve the optional 1 July 2009 start date.

This will require that a process be confirmed with Treasury and the ATO to:

- (1) Address already identified "must fix" and other first-order issues for entities electing into TOFA at 1 July 2009; and,
- (2) Develop further amendments to be made to the TOFA regime as and when additional issues arise during the implementation process.

Attached to this letter is a table setting out the nine "must fix" items identified in the 2008 Submission, and their status subsequent to the release of the Bill (greater detail surrounding the ABA's recommendations in relation to these items is set out in the 2007 Submission and the 2008 Submission).

Other issues have already been identified, such as the need for analysis of TOFA outcomes based on economic substance.

It is likely that as taxpayers and their advisers work through the TOFA measures, further refinements will be required.

The TOFA reforms in the Bill represent a major and much needed tax reform initiative. The ABA notes that other major tax reform projects (e.g. tax consolidation, foreign exchange, thin capitalisation, debt/equity) are commonly subject to at least one and often numerous amending bills subsequent to their enactment, so as to address outstanding issues and refinements. In this respect, the TOFA Bill will be no different.

Like other tax reform initiatives, ongoing consultations between Treasury, the ATO, tax professionals and industry play a key role in this process. To this end, a plan for on-going consultation between the ABA, Treasury and the ATO (and other interested parties) has already been initiated in relation to the TOFA reform project.

The ABA wishes to emphasise once again the importance of the TOFA reform project to the banking industry and its support for passage of the Bill through Parliament.

Yours sincerely

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**Tony Burke**

cc Assistant Treasurer

## ATTACHMENT

### List of the 9 “must fix” issues identified in the ABA’s 2008 Submission and their status in relation to the Bill as introduced

Issue #	Issue raised and brief description	Status of issue under the Bill
<b>1</b>	<b>Accruals rules:</b> simplification of the accruals methodology including removal of the “overall gain/loss” concept.	<b>ADOPTED IN PRINCIPLE</b> - <i>further refinements may be necessary post-enactment of the Bill.</i>
<b>2</b>	<b>Treatment of swaps, including total return swaps and credit default swaps:</b> This is an example of the accruals rules: see the Attachment and Table Items G27 and P42.	<b>ADOPTED IN PART</b> - <i>further refinements, currently under consideration by Treasury, are necessary.</i>
<b>3</b>	<b>Portfolio treatment of purchased premiums/discounts as well as fees and related hedges:</b> There is a need to not only modify the current proposal for portfolio fees and hedges, but to extend the rule to premiums/discounts upon the acquisition of portfolios of loans/other financial assets	<b>LARGELY ADOPTED</b> – <i>The portfolio rules have been extended to premiums/discounts on the acquisition of portfolios, but further refinements, currently under consideration by Treasury, are necessary.</i>
<b>4</b>	<b>“Impairment” treatment:</b> what should be the full/correct treatment of impaired loans is still not reflected in the legislation	<b>NOT ADOPTED</b> - <i>further changes, currently under consideration by Treasury, are necessary.</i>
<b>5</b>	<b>Application of forex (Div.775) rules to ADIs:</b> The forex rules should only be “switched on” from the start of the taxpayer’s “first applicable income year” for TOFA purposes.	<b>ADOPTED</b> – <i>no further action required at this time.</i>

ABA-#91667-v6-TOFA\_sub\_-\_23Jan09.DOC

<b>Issue #</b>	<b>Issue raised and brief description</b>	<b>Status of issue under the Bill</b>
6	<b>Securitisation transactions:</b> An example of how TOFA will apply to a typical securitisation structure should be included in the explanatory memorandum.	<b>ADOPTED</b> – <i>no further legislative action required at this time.</i>
7	<b>Bad debts arising for securitization vehicles:</b> Deductibility for bad debts needs to be clarified.	<b>NOT ADOPTED</b> – <i>further action by Treasury currently under consideration.</i>
8	<b>NANE income/losses:</b> Previously proposed s.230-35 needs to be reinstated, and proposed s.230-30(1A) retained.	<b>ADOPTED</b> – <i>no further legislative action required at this time.</i>
9	<b>TOFA, tax consolidation and liabilities:</b> The interaction of TOFA and tax consolidation, especially as regards liabilities, constitutes an important area for resolution. The ABA will be liaising with other professional bodies to ensure these matters are addressed	<b>ADOPTED IN PRINCIPLE</b> - <i>further refinements may be necessary, following enactment of the Bill</i>