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19th December, 2012

The General Manager
Business Tax Division
The Treasury
By email : partIVA@treasury.gov.au

**Submission to Treasury
Exposure Draft – Tax Laws Amendment (2013 Measures No.1) Bill 2013:
General anti-avoidance rules**

We appreciate this opportunity to make a brief submission on the proposed changes to the general anti-avoidance provisions of Part IVA of the *Income Tax Assessment Act 1936*.

Cummings Flavel McCormack

Cummings Flavel McCormack is a Chartered Accounting firm based in Melbourne. Our clients include many privately-owned small and medium sized enterprises (“SME”).

We wish to highlight aspects of the proposed amendments that may adversely impact the SME market.

Submission

We support the general proposition that Part IVA should primarily focus on the dominant purpose of a transaction or arrangement, however, we submit that the tax benefit associated with any arrangement must be quantified on a rational and objective basis. In our view, the proposed amendments represent an extreme over-reaction, will create significant uncertainty and threaten the integrity of Part IVA.

Specifically, we submit that:

- The proposed amendments extend far beyond the simple measures required to deal with the “do nothing” counterfactual as originally announced by the Government;

- Of primary concern is the proposal that the alternative postulate should have no regard to taxation whatsoever. This potentially promotes an alternative postulate that is completely irrational and uncommercial. For example, in determining the quantum of the tax benefit, the proposed amendments would seemingly make it possible for the ATO to adopt an alternate postulate that incurs the maximum amount of taxation, multiple levels of taxation or even double taxation. If Part IVA is applied to a transaction, the tax outcome should be predictable and the administration of Part IVA must require a reasonable, objective and rational approach to determining the quantum of the tax benefit. We note that taxpayers in the SME market will often lack the resources to dispute Part IVA assessments in the courts;
- It appears that a subjective mentality has skewed the legislative drafting, the accompanying explanatory material and examples. The proposed amendments and explanatory material reflect polarised views and an over-reaction to the ATO losses in several high profile cases involving large corporate restructures. Consequently, the proposed amendments do not appear balanced and do not give appropriate regard to the potential adverse implications for the vast majority of bona fide commercial transactions and taxpayers that are not the subject of high profile tax cases;
- Substantive amendments to the general anti-avoidance provisions will cause considerable uncertainty. Part IVA has generally operated effectively. Court decisions over two decades have provided substantial guidance to both the ATO and taxpayers. We submit that minor amendments could resolve the current issues and preserve the integrity of Part IVA. The current proposals will potentially trigger further decades of case law to clarify the operation of the amended Part IVA;
- In our view, it is unproductive for Treasury to question the correctness of recent court decisions in the explanatory material. While we have some sympathy for the ATO's position, the losses in those cases were substantially attributable to poor judgement exercised by the ATO (a fact admitted by the ATO). The ATO has publicly expressed their disappointment with the outcome, however, we feel that the ATO's views and technical arguments should not be echoed by Treasury in the explanatory material.

If you have any queries in relation to this submission, please contact me on 03 9252 0800 or via email at dkent@cfmc.com.au.

Yours faithfully

Cummings Flavel McCormack Pty Ltd

David Kent

Director