ACSA
Australian Custodial Services Association

Australian Custodial Services Association Limited
26/44 Market St
Sydney NSW 2000

16 November 2021

Tax Treaties Branch
Corporate and International Tax Division
Treasury
Langton Cres
Parkes ACT 2600

By email: RGCITDTaxTreatiesBranch@TREASURY.GOV.AU, cc David.Hawkins@treasury.gov.au

Dear Sir/Madam,

# Treasury consultation on expanding Australia's tax treaty network

The Australian Custodial Services Association ("ACSA") is the peak industry body representing members of Australia's custodial and investment administration sector. Our mission is to promote efficiency and international best practice for members, our clients and the market. Collectively, the members of ACSA hold securities and investments in excess of AUD $4 trillion in value in custody and under administration. Members of ACSA include NAB Asset Servicing, J.P. Morgan, HSBC, State Street, BNP Paribas Securities Services, Citi Security Services and Northern Trust.

ACSA welcomes the opportunity to engage in Treasury's consultation on expanding Australia's tax treaty network, with a plan to enter into 10 new and updated tax treaties by 2023, building on Australia's existing network of 45 bilateral tax treaties.

ACSA supports the Government's plan to ensure that Australia's tax treaty network will cover 80 per cent of foreign investment in Australia and about $6.3 trillion of Australia's two-way trade and investment.

Please note that the views expressed in this letter are prepared by ACSA for the purposes of consideration by Treasury in the consultation on expanding Australia's tax treaty network and should not be relied upon for any other purpose. The comments in this letter do not comprise financial, legal or taxation advice and should not be regarded as the views of any particular member of ACSA.

**Key Industry Feedback**

Australia is set to become the 12th largest economy in the world in 2021 and has the 10th highest GDP per capita according to the world Bank, IMF figures and statistics of the Australian Government. As far as total foreign direct investments are concerned, AUD 1 trillion at the end of 2020 (in 2012 around EUR 550 billion) has been invested from all over the world, with the United States, Japan and United Kingdom being the leading investor countries.

ACSA
Australian Custodial Services Association

**Access to tax treaties for collective investment vehicles**

ACSA respectfully submits that one of the key outcomes Australia should seek in negotiating tax treaties is to achieve greater certainty on the application of tax treaties to collective investment vehicles. This includes Australia's Division 6 trusts, Managed Investment Trusts, Attribution Managed Investment Trusts, and the newly proposed Corporate Collective Investment Vehicles.

ACSA respectfully submits that new, and existing, tax treaties should include a definition of a collective investment vehicle in Article 3. These entities should then be included within the definition of a "resident" under article 4.

For example, in the Australia and Germany tax treaty, a collective investment vehicle is defined as follows:

> *4 Notwithstanding the other provisions of this Agreement, a collective investment vehicle which is established in a Contracting State and which receives income (including profits and gains) arising in the other Contracting State shall be treated, for the purposes of applying the Agreement to such income, as an individual who is a resident of the Contracting State in which it is established and as the beneficial owner of the income it receives (provided that, if an individual who is a resident of the first-mentioned State had received the income in the same circumstances, such individual would have been considered to be the beneficial owner thereof), but only to the extent that the beneficial interests in the collective investment vehicle are owned by residents of the Contracting State in which the collective investment vehicle is established and equivalent beneficiaries. However, if:*
>
> *(a) in the case of a collective investment vehicle established in Australia, the principal class of shares, units or other comparable interests in the collective investment vehicle is listed and regularly traded on a recognised stock exchange in Australia;*
>
> *(b) at least 75 per cent of the value of the beneficial interests in the collective investment vehicle is owned by residents of the Contracting State in which the collective investment vehicle is established; or*
>
> *(c) at least 90 per cent of the value of the beneficial interests in the collective investment vehicle is owned by equivalent beneficiaries,*
>
> *the collective investment vehicle shall be treated as an individual who is a resident of the Contracting State in which it is established and as the beneficial owner of all the income it receives (provided that, if an individual who is a resident of that State had received the income in the same circumstances, such individual would have been considered to be the beneficial owner thereof).*
>
> *5 For purposes of paragraph 4, the term "equivalent beneficiary" means:*
>
> *(a) a resident of the Contracting State in which the collective investment vehicle is established; and*
>
> *(b) a resident of any other State with which the Contracting State in which the income arises has a tax agreement that provides for effective and comprehensive information exchange who would, if such resident received the particular item of income for which benefits are being claimed under this Agreement, be entitled under that agreement, or under the domestic law of the Contracting State in which the income arises, to a rate of tax with respect to that item of income that is at least as low as the rate claimed under this Agreement by the collective investment vehicle with respect to that item of income.*

ACSA suggests the definition of the term "resident" should generally cover collective investment vehicles established in both countries.

**Access to tax treaties for Australian Superannuation funds**

Australia's superannuation system (approximately AUD 3.3 trillion) is the fifth largest pension scheme in the world. There are also currently over a hundred different industry, retail, corporate and public sector superannuation funds. Australian superannuation funds hold significant investments offshore and this trend is expected to continue in the future. It is therefore important for Australian superannuation funds to have access to tax treaty relief.

ACSA respectfully submits that a consistent definition of an Australian superannuation fund be included in new, and existing, tax treaties.

To facilitate tax treaty access, and double taxation relief, being available to an Australian superannuation fund, ACSA respectfully submits that a definition of a superannuation fund should be inserted into Article 3. An appropriate definition could be drawn from the existing tax treaty between the Swiss Confederation and Australia. A further example is the tax treaty between Australia and Israel, which includes the following definition:

*"the term "recognised pension fund" of a Contracting State means an entity or arrangement established in that State that is treated as a separate person under the taxation laws of that State or, in the case of Australia, an Australian superannuation fund for the purposes of Australian tax,*

*(i) and that is established and operated exclusively or almost exclusively to administer or provide retirement benefits and ancillary or incidental benefits to individuals and that is regulated as such by that State or one of its political subdivisions or local authorities; or*

*(ii) that is established and operated exclusively or almost exclusively to invest funds for the benefit of entities or arrangements referred to in sub subparagraph (i) or, in the case of Australia, to invest such funds, or the complying superannuation assets or segregated exempt assets of a life insurance company that is a resident of Australia, or any combination thereof."*

**Specific issues for the negotiations between Australian and Luxembourg**

The conclusion of a comprehensive tax treaty between Australia and Luxembourg is critical to advertise the local funds management industry to foreign investors, and on the other hand to increase the attractiveness of Australia as a destination for capital, improve the ability of Australian fund managers to compete in managing global capital on behalf of foreign investors[1] and reduce tax barriers to cross-border investment between Luxembourg and Australia.

Luxembourg is an important centre in the financial services industry including the banking, insurance, funds, and alternative investment industry. With more than EUR 5.54 trillion in net assets under management, Luxembourg is Europe's largest investment fund centre and the second largest worldwide after the US. As such, it would be beneficial for a fund manager operating out of Australia to set-up a Luxembourg fund vehicle that would be able to invest in different markets, being EU markets or not, and,

[1] Information obtained from the Australian Financial Services Council (2019–20 Federal Budget).

more importantly, to attract investments in Australia from Luxembourg funds, which would benefit the Australian economy (in particular the funds management industry in Australia).

In the case of Luxembourg, the term "collective investment vehicles" should cover funds within the terms of the EU Directive 2014/91/EU of 23 July 2014 and the EU Directive 2011/61/EU of 8 June 2011 (AIFMD). For the reasons mentioned above in section A and to facilitate access to EU markets from Australia, it should not only include the Luxembourg UCITS but also Alternative Investment Funds (AIFs), thus capturing the entire Luxembourg industry toolbox e.g., for future investments in Alternative assets by both jurisdictions. See below sample wording:

> *"For the purposes of this Agreement, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management or any other criterion of a similar nature, and also includes that State and any local authority or statutory body thereof (…) It is understood that a* ***collective investment vehicle is a resident of a Contracting State*** *if under the domestic laws of that State it is liable to tax therein by reason of its domicile, residence, place of management or any other criterion of a similar nature. A collective investment vehicle is also considered liable to tax if it is subject to the tax laws of that Contracting State* ***but is exempt from tax only if it meets all the requirements for exemption specified in the tax laws of that Contracting State."*** [2]

ACSA also recommends extending the definition of the term "resident" to collective investment vehicles which may be fiscally transparent but nevertheless have a minimum threshold of investors that are tax resident in the same Contracting State as the collective investment vehicle.

As the fund industry is significant (i.e., EUR 5.54tn AuM in Luxembourg), access to treaty provisions is important to collective investment vehicles established both in Australia (e.g., managed funds and superannuation funds) and in Luxembourg.

Given the aim is to achieve greater certainty on the application of the treaty to fund vehicles, ACSA suggests expressly noting under Article 4 that collective investment vehicles as defined in Article 3 would include:

- For Luxembourg: UCI Part II, SIF, SICAR, as well as the RAIF, established under any admitted legal form as per Luxembourg Law of 10 August 1915 on commercial companies (i.e., SARL, SCA, SA, FCP, SCS, SCSp)

- For Australia: Trusts, MITs, AMITs and if introduced, CCIVs.

In addition, ACSA proposes to add to the list a generic sentence such as "any entity with a similar regime" in order to cover new type(s) of funds which could be created in the future.

ACSA suggests that the specific fund entities mentioned above from both jurisdictions are included in the residency article (or in a protocol of the tax treaty) and are granted access to the double tax treaty.

[2] Extract from Article 4 and Protocol of the double tax treaty between Luxembourg and Singapore.

ACSA
Australian Custodial Services Association

**The Multilateral Instrument and Principal Purpose Test**

Both Australia and Luxembourg have opted for the Principal Purpose Test ("PPT") in Article 7(1) of the Multilateral Instrument ("MLI").

ACSA agrees that the double tax treaty between these jurisdictions should include the PPT and not a detailed list of requirements to be fulfilled in order to be granted access to treaty benefits (i.e., the Simplified Limitation on Benefits Rule)[3]. This is because the intent of the tax treaty is to provide benefits to encourage cross-border investments between Australia and Luxembourg, and ACSA believes that the inclusion of inflexible requirements to be a qualified person under the treaty would ultimately be detrimental to the funds management industry.

In addition, both Australia and Luxembourg have opted for the additional provision in article 7(4) of the MLI. On the basis of the MLI positions, ACSA agrees that the double tax treaty between these jurisdictions should also include the additional provision[4]. We also note that in some recent bilateral treaties[5], the treaty language of article 7(4) of the MLI has been broadened so as to allow the relevant competent authority to grant "benefits would have been granted to [the person denied the benefit by the PPT], **or to another person**, in the absence of the transaction or arrangement referred to in [the PPT]" *(emphasis added)*. It is submitted that the modified version of article 7(4) of the MLI provides an appropriate and reasonable discretion and is aligned with the example in paragraph 186 of the 2017 OECD Model Commentary on Article 29.

**Negotiations between Australian and Hong Kong**

Hong Kong is a major regional financial centre in Asia. The two-way capital flows, trade and investment between Australia and Hong Kong are significant.

ACSA respectfully submits that a tax treaty between Australia and Hong Kong is required in order to help reduce tax barriers and facilitate cross border trade and investment between Australia and Hong Kong.

ACSA supports the Government's negotiations with India, Luxembourg and Iceland as part of the first phase of the program followed by negotiations with Greece, Portugal and Slovenia as part of the second phase. ASCA respectfully submits that the Australian Government negotiates with Hong Kong with the aim of executing a tax treaty between Australia and Hong Kong as part of the Government's plan to expand Australia's tax treaties.

---

[3] It is noted that the PPT has been included in Australia's two bilateral tax treaties which have been signed since the release of the OECD Reports in 2015, being treaties with Germany (signed in 2015) and Israel (signed in 2019)

[4] It is noted that Australia's recent bilateral tax treaties with Germany and Israel did not include an equivalent of MLI article 7(4). Neither Germany nor Israel have chosen to adopt MLI article 7(4) for the purposes of the MLI.

[5] Article 27(2), Switzerland / Ethiopia treaty signed in July 2021: Where a benefit under this Convention is denied to a person under paragraph 1, the competent authority of the Contracting State that would otherwise have granted this benefit shall nevertheless treat that person as being entitled to this benefit, or to different benefits with respect to a specific item of income, if such competent authority, upon request from that person and after consideration of the relevant facts and circumstances, determines that such benefits would have been granted to that person, **or to another person**, in the absence of the transaction or arrangement referred to in paragraph 1. The competent authority of the Contracting State to which the request has been made will consult with the competent authority of the other State before rejecting a request made under this paragraph by a resident of that other State. (emphasis added)

**Opportunity to update existing tax treaties**

The Australian Government's initiative to expand Australia's tax treaty network provides an opportunity for Australia to update existing tax treaties (in circumstances where Australia is treated, in that treaty, less favourably compared to other countries).

ACSA respectfully submits that priority should be afforded to updating tax treaties with Australia's most significant trade and investment partners (in particular, the US).

*Australia/US tax treaty*

The current tax treaty between Australia and the US treats Australian superannuation funds unfavourably compared to pension funds from other countries.

A consistent definition of an Australian superannuation (as outlined above) should also be inserted in the current tax treaty between Australia and the US.

*Australia/India tax treaty*

The current tax treaty between Australia and India treats Australian investors unfavourably compared to investors from various other countries.

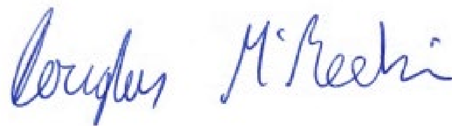
ACSA respectfully submits that the capital gains (in particular, for non 'land rich' portfolio investments), interest and dividend articles in the tax treaty between Australia and India be updated to align with India's tax treaties with other countries. This is to ensure that Australian investors have access to the same tax exemptions, and lower tax rates, as India affords to other various countries.

**Contact Information**

ACSA welcomes the opportunity for further dialogue with Treasury representatives on the views of ASCA.

If you have any questions in relation to this letter, please direct them to Duncan Lyon on email duncan.lyon@jpmorgan.com or Doug McMeekin on email Douglas.R.McMeekin@nab.com.au.

Yours faithfully,



Duncan Lyon
Chair, ACSA Tax Working Group
Email: duncan.lyon@jpmorgan.com

Doug McMeekin
Deputy Chair, ACSA Tax Working Group
Email: douglas.r.mcmeekin@nab.com.au