Public Submission with request to withhold name from Public, as I write as a private individual and not an organisation. I acknowledge your copy write.

Re: Expanding Australia's Tax Treaty Network. Submission in request for submissions "…and any other issues related to Australia's tax treaty network."

My Submission is in regards to the Australia-U.S. Tax Treaty.

For Australians resident in Australia who are considered U.S. Persons, of which I am one since moving to Australia in 1997…

The Treaty lacks clarity and exemptions from U.S. double taxation which quickly becomes unfathomable, requiring costly consultation with double tax specialists. Even with the professionals there are a few different interpretations with how super should be double taxed.

Good government, in my view, is proactive in ensuring that individuals are not over-regulated with complex and conflicting laws causing unnecessary anxiety, time, and expense.

An Australian citizen resident in Australia should pay no more tax on superannuation than what is outlined on the ATO website. For Australia to not recognise and prevent U.S. double taxation on superannuation is wrong. The Australian law permitting it – the tax treaty – needs review.

However, in the past there appears to have been a lack of Australian government interest, controls and/or ineffectiveness of controls: in regards to monitoring and reporting with transparency how well the treaty meets its key aim of "avoidance of double taxation" for individuals, and pursuit of remedies for tax treaty "gaps."

I received a letter from the Assistant Treasurer in 2019 that suggested things that I may do and appeared to suggest that I contact the U.S. government in the first instance, as the double taxation may change with a change in the U.S. "domestic law". While I appreciate the suggestions, I was not satisfied with a lack of focus in the letter on what the Australian government may do.

In the context of the recent subs deal Dutton said his job was the Australian interest. The same should apply here for Australian Treasury stewardship of the tax treaty, to act in the Australian interest to protect Australian resident citizens; and NOT to defer to the U.S. in the first instance matters of Australian sovereignty, as if the U.S. would care about and would prioritise compliance and tax matters in Australian's sovereign interest. There is international consensus called the Master Nationality Rule that generally, for differences in law with another nation, that a country and its law shall be the definitive law within its borders to the exclusion of the extraterritorial law of another country, especially if these persons are citizens and tax residents of Australia.

Heightened imagination and leadership within the Australian government is necessary to fulfil the responsibility here. My suggestions are as follows:

1) Pursue Transparency.

a) Conduct an audit of how well the Treaty avoids double taxation for individuals with highlight of where it may guarantee double taxation – and to table this with the Joint Standing Committee on Treaties in Parliament. In my view, the Australian Treasury in the past has mislead Parliament: when Treasury forwarded to Parliament for passage the Treaty as if it were "an all good agreement,"

as if it were wholly similar to treaties with other nations, and without an accompanying audit of how well the proposed treaty would meet its key aim of 'avoiding double taxation', with highlight of where it may guarantee double taxation, as part of the documentation packet.

The audit will form a basis for further actions. Yes there may be some expense with this yet it has never been done, which in my opinion does not reflect well on the governance of the Treaty by previous Treasurers. As part of the current review of the tax treaty network money has been budgeted for treaty review.

b) Post the audit results on the ATO website under Tax Treaties. Currently the site just says tax treaties mitigate double taxation with no further explanation. Provide footnotes for key sections of the ATO website such as under superannuation to suggest the potential for the double tax overlay – and not to pretend that only Australian domestic tax may apply for Australian resident superannuation.

c) Provide warning for Australian residents who are U.S. Persons that generally Australian law – the Treaty – obliges the overlay of the U.S tax code on top of the Australian tax code. There may be double taxation for any existing and new federal taxes that the U.S. has but not Australia. That the U.S. does not recognise Australian Superannuation and does not provide tax credit for any Australian tax paid on Superannuation; nor does Australia provide tax credit for any U.S. tax on Australian resident Superannuation. **Superannuation is a good example where the Treaty does not work to "avoid double taxation" for Australians in Australia and also in the U.S.**

The Australian government provides health and safety warnings for Australians travelling overseas. Lately there have been Australian government warnings within Australia in regards to covid. This Treaty warning would be in regards to protection from double taxation and double compliance guaranteed under Australian law – the Treaty.

d) Provide warning to the Australian Financial Planning Association that their members may be providing detrimental financial planning advice in regards to superannuation and other financial planning matters to Australians who are U.S. Persons. The vast majority of The Certified Australian Financial Planners are not certified in matters around the U.S. tax code overlay for Australian residents and thus should not be providing advice to these Australians.

Alternatively, a few ATO rulings as the "Competent Authority" under the Treaty may avoid some of the need for such warnings. Australia need not rely on permission from the U.S. for such rulings, similar to the fact that the U.S. does not ask permission of Australia to add new taxes on Australian source for resident Australians. The big difference here is that Australia may claim a sovereign right to issue these rulings.

2) ATO Ruling that superannuation is exempt from U.S. double taxation and U.S. double compliance for Australian tax residents. The ATO may do this as the "Competent Authority" under the Treaty.

Articles 18 and 19 of the Treaty outlines explicit exclusion from U.S. taxation of Australian government pensions. Government employees are explicitly protected but not Australian

government mandated superannuation for nongovernment persons. The Treaty was passed in 1984 before the existence of superannuation. Such a ruling on superannuation is decades overdue.

The Australian Competent Authority may rule that "superannuation" falls under Articles 18 and 19 of the Treaty. All types of Superannuation (including "Employer," "Employee" "after tax" and "Self Managed Super Funds") should be labelled explicitly as exempt from U.S. double taxation under the Treaty for Australian residents.

U.S. domestic tax law does not specify that "superannuation" for U.S. Persons who are Australian residents should be double taxed. Thus U.S. double taxation of Australian resident superannuation has reduced to no standing in regards to being backed by a 'legitimate purpose' as none is enunciated.

3) ATO Ruling limiting the possibility under the Treaty for Australian Residents to also be claimed simultaneously as U.S. Residents, in unequivocal support of the Australian public policy and international norm of Residence Based Taxation. And also as protection from the compliance quagmire and double tax sinkhole of a disparate tax code being overlayed on top of the Australian tax code under Australian law.

The Assistant Treasurer wrote to me that double tax issues may be resolved with a change in U.S. domestic law. Indeed one measure pursued by U.S. Person overseas groups for years has been an administrative change in the definition of "resident" in the U.S. tax code, to exclude those who are not actual U.S. residents, such as those tax resident in Australia, (this would not need legislation passed by Congress, a legislative body some have characterised as passing nearly all tax law with zero consideration or care of how the laws impact U.S. Persons tax resident in other countries).

The Australian government could assist in these areas via this ATO ruling as suggested, AND to formally ask for such administrative change in the definition of resident in the U.S. domestic tax code from the U.S. Treasury. Normally, governments may refrain from asking other governments to change their domestic law as this may be characterised as 'interfering with the internal affairs of another country' generally and internationally viewed as "a bad."

Point of Information, it is the U.S. with their "domestic" law who is interfering with the internal affairs of Australia; with an extraterritorial portion of their "domestic" law imposed as a parallel tax system within Australia unjustifiably dipping into the tax base of Australia; and as an impingement on a number of Australian domestic policies and their aims such as superannuation retirement savings accounts, Residence Based Taxation, certification of Australian Financial Planners, and others.

4) **ATO ruling of Exemption from U.S. Taxation of "Passive Foreign Investment Corporation"** punitive taxation and reporting, explicitly for Australian Mutual Funds, Self Managed Super Funds, and other structures under Australian law for Australian tax residents. That the Australian government does not consider these as "foreign" for Australian tax residents, so any adverse "foreign" treatment, reporting, and extra penalties by U.S. extraterritorial tax law shall not apply.

5) ATO ruling of Exemption of Australian source from U.S. net investment income tax (NIIT) 3.8% tax for Australian tax residents. If Australia adhered to the aims of "avoiding double taxation" Australia would provide credit for this tax on Australian and U.S. source, instead of pretending it is not a tax on investment income and gains. It should explicitly be exempted for Australian source for Australian residents.

6) ATO ruling on the definition of double taxation.

Some of the guaranteed double taxation is through acceptance of the U.S. Treasury Department definition of avoiding double taxation, which may consider types of taxes in 'silos', with additional silos created simply by having a tax by a different name than the other country, or a tax that the other country does not have; with the result of leaving credits on taxes paid that are not usable in a year, for years, or never.

For instance: with NIIT the tax is no higher than either the level of Australia or the U.S.; then the 3.8% U.S. tax may always apply when thresholds are met because Australia does not have a "NIIT."

Sometimes taxes have a different name such as "Superannuation" which does not fit the U.S. definition of U.S. domiciled 401K / IRA / Keogh IRA plans and is treated less favourably as an 'unqualified pension plan.' No doubt the intent of the U.S. law is to funnel U.S. domestic retirement savings into "qualified" U.S. pension funds, yet these types of U.S. qualified funds are not an option for the superannuation "guarantee" or added superannuation contributions under Australian law.

The definition of avoiding double taxation would benefit those impacted through consideration of all tax paid in aggregate and for taxes paid to be applicable to other categories, to break 'silos' where credits may be unusable.

<u>The definition of 'avoidance of double taxation" the Australian government should adapt</u> should fit the following circumstance: If an Australian tax resident individual has zero U.S. source income/assets then there should be zero U.S. taxation and zero U.S. compliance.

The Treaty should be especially viewed through this group of individuals: Accidental Americans, those Australians who may have had a parent born in the U.S. or were born there but left at an early age and presently have very tenuous ties to the U.S. <u>All Australian residents should be treated equally under Australian law regardless of where their parents are from or where they were born.</u>

Items 1-6 above could be a start. There are other taxes with double tax implications. There should be robustness in the Treaty and monitoring of it to avoid current and future double taxation especially where it may be caused by changes to either U.S. or Australian tax codes. It should not take 29 years and counting for the Australian Treasury/ATO Competent Authority to pursue Treaty implications and exemptions for superannuation, for instance.

Perhaps Treasury may explain to me the legitimate purpose of the Treaty to require the overlay of the U.S. tax code on Australian residents who are Accidental Americans. Or Treasury may agree with me that the Australian law requiring the overlay of the U.S. tax code on any Australian residents is unjustifiable in view of Australian sovereignty. Then transparency should be pursued including audit identifying double taxation guaranteed under Australian law – the Treaty. Corrective short and

longer term measures should then be implemented.

I have attached a letter from FixTheTaxTreaty sent in response to the call for public submissions to on the Tax Treaty Network.

Regards,

Private Citizen

Hon XXXXXXXXXXXX MP

Thank you for relaying to me the letter dated 05.12.19 from the Hon Michael Sukkar, Assistant Treasurer, who stated: "Your correspondence has been referred to me as I have responsibility for this matter [the Australia-U.S. Tax Treaty]." My letter was in regards to tax treaty gaps and U.S. double taxation of Superannuation of Australian residents guaranteed under Australian law.

Hon XXXXXXXXXXXX, please forward this letter in response to Michael Sukkar. If you wish I and my wife (Australian only) may be happy to discuss with yourself in your North Sydney Office or by Zoom.

The Honorable Micheal Sukkar, Assistant Treasurer

Thank you for your letter and confirmation that you are responsible for the Australia-U.S. Tax Treaty.

Instead of focus on what I may do, may I ask your focus on what actions you and the Australian government may take in regards to ending double taxation of Australians? Please consider the short term suggestions below.

Why you should consider the below short-term suggestions.
* The Australia-U.S. Tax Treaty is under your area of responsibility.

* To make amends for apparent lack of Australian government interest, controls and/or ineffectiveness of controls, in regards to monitoring how well the treaty meets its aims including "avoidance of double taxation." Such oversight appears left to the leadership and intervention of the Minister responsible. I am now asking for your help in your capacity of responsible Minister to step up and fill the void.

*To defend the sovereignty of Australia including the right of equal benefit of superannuation (net of tax) for all Australian residents no matter where they were born. In the context of the recent subs deal Dutton said his job was the Australian interest. The same should apply here for your stewardship of the tax treaty, to act in the Australian interest to protect Australian resident citizens; and NOT to defer to the U.S. in the first instance matters of Australian sovereignty. There is international consensus that generally, for differences in law with another nation, that a country and its law shall be the definitive law within its borders to the exclusion of the extraterritorial law of another country.

Heightened imagination and leadership within the Australian government is necessary to fulfil the responsibility here. My suggestions are as follows:

1) Pursue Transparency.
a) Conduct an audit of how well the Treaty avoids double taxation for individuals with highlight of where it may guarantee double taxation – and to table this with the Joint Standing Committee on Treaties in Parliament. In my view, the Australian Treasury has in the past mislead Parliament: when Treasury forwarded to Parliament for passage the Treaty as if it were "an all good agreement," similar to treaties with other nations, and without an accompanying audit of how well the proposed

treaty meets its aims of 'avoiding double taxation' as part of the documentation packet.

The audit will form a basis for further actions. Yes there may be some expense with this yet it has never been done, which in my opinion does not reflect well on your predecessors. The expense would be nil compared to the $40+ billion a year spent on Defence with a related key aim to "protect our way of life."

b) Post the audit results on the ATO website under Tax Treaties. Currently the site just says tax treaties mitigate double taxation with no further explanation. Provide footnotes for key sections of the ATO website such as under Superannuation to suggest the potential for the double tax overlay – and not to pretend only Australian domestic tax may apply for Australian resident superannuation.

c) Provide warning for Australian residents who are U.S. Persons that generally Australian law – the Treaty – obliges the overlay of the U.S tax code on top of the Australian tax code. There may be double taxation for any existing and new federal taxes that the U.S. has but not Australia. That the U.S. does not recognise Australian Superannuation and does not provide tax credit for any Australian tax paid on Superannuation; nor does Australia provide tax credit for any U.S. tax on Australian resident Superannuation. **Superannuation is a good example where the Treaty does not work to "avoid double taxation" for Australians in Australia and also in the U.S.**

The Australian government provides health and safety warnings for Australians travelling overseas. Lately there have been Australian government warnings within Australia in regards to covid. This Treaty warning would be in regards to protection from double taxation and double compliance guaranteed under Australian law – the Treaty.

d) Provide warning to the Australian Financial Planning Association that their members may be providing detrimental financial planning advice in regards to Superannuation and other financial planning matters to Australians who are U.S. Persons. The vast majority of The Certified Australian Financial Planners are not certified in matters around the U.S. tax code overlay for Australian residents and thus should not be providing advice to these Australians.

Alternatively, a few ATO rulings as the "Competent Authority" under the Treaty may avoid some of the need for such warnings. Australia need not rely on permission of the U.S. for such rulings, similar to the fact that the U.S. does not ask permission of Australia to add new taxes on Australians. The big difference here is that Australia may claim a sovereign right to issue these rulings.

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Articles 18 and 19 of the Treaty outlines explicit exclusion from U.S. taxation of Australian government pensions. Government employees are explicitly protected but not Australian government mandated Superannuation for nongovernment persons. The Treaty was passed in 1984 before the existence of Superannuation. Such a ruling is decades overdue.

The Australian Competent Authority may rule that "Superannuation" falls under Articles 18 and 19

of the Treaty. All types of Superannuation (including “Employer,” “Employee” “after tax” and “Self Managed Super Funds”) should be labelled explicitly as exempt from U.S. double taxation under the Treaty for Australian residents.

U.S. domestic tax law does not specify that “Superannuation” for U.S. Persons who are Australian residents should be taxed.

3) ATO Ruling limiting the possibility under the Treaty for Australian Residents to also be claimed simultaneously as U.S. Residents, in unequivocal support of the Australian public policy and international norm of Residence Based Taxation.

Hon Michael Sukkar, in your letter to me you said that double tax issues may be resolved with a change in U.S. domestic law. Indeed one measure pursued by U.S. Person overseas groups for years has been an administrative change in the definition of “resident” in the U.S. tax code, to exclude those who are not actual U.S. residents such as those tax resident in Australia (this would not need legislation passed by Congress, which some have characterised as passing nearly all tax law with zero consideration or care of how the laws impact U.S. Persons tax resident in other countries).

The Australian government could assist in these areas via this ATO ruling as suggested and to formally ask for such administrative change from the U.S. Treasury. Normally, governments may refrain from asking other governments to change their domestic law as this may be characterised as ‘interfering with the internal affairs of another country.’ Point of Information, it is the U.S. with their “domestic” law who is interfering with the internal affairs of Australia; with an extraterritorial portion of their “domestic” law acting as a parallel tax system within Australia unjustifiably dipping into the tax base of Australia, and as an impingement to a number of Australian domestic policies and their aims such as Superannuation, certification of Australian Financial Planners, Residence Based Taxation, and others.

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leaving credits on taxes paid that are not usable.

For instance: with NIIT the tax is no higher than either Australia or the U.S. so then the 3.8% U.S. tax may always apply when thresholds are met because Australia does not have a "NIIT" and thus the Australian NIIT is considered 0%.

Sometimes taxes have a different name such as "Superannuation" which does not fit the U.S. definition of U.S. domiciled 401K / IRA / Keogh IRA plans and is treated less favourably as an 'unqualified pension plan.' No doubt the intent of the U.S. law is to funnel U.S. domestic retirement savings into "qualified" U.S. pension funds, yet these types of U.S. qualified funds are not an option for the Superannuation "guarantee" or added superannuation contributions under Australian law.

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The definition of 'avoidance of double taxation" the Australian government should adapt should fit the following circumstance: If an Australian tax resident individual has zero U.S. source income/assets then there should be zero U.S. taxation and zero U.S. compliance.

The Treaty should be especially viewed through this group of individuals: Accidental Americans, those Australians who may have had a parent born in the U.S. or were born there but left at an early age and presently have very tenuous ties to the U.S. All Australian residents should be treated equally under Australian law regardless of where their parents are from or where they were born.

Items 1-6 above could be a start. There are other taxes with double tax implications. There should be robustness in the Treaty and monitoring of it to avoid current and future double taxation especially where it may be caused by changes to either U.S. and Australian tax codes. It should not take 37 years and counting for the Australian Treasury/ATO to pursue Treaty implications and exemptions for Superannuation, for instance.

Mr. Sukkar please explain to me the legitimate purpose of the Treaty to require the overlay of the U.S. tax code on Australian residents who are Accidental Americans. Or you may agree with me that the Australian law requiring the overlay of the U.S. tax code on Australians is unjustifiable. Then transparency should be pursued including audit identifying double taxation guaranteed under Australian law – the Treaty. Corrective short and longer measures should then be implemented.

I appreciate your attention to these issues. There is a website that outlines areas of double taxation and compliance for Australian residents that may be helpful in the audit: www.fixthetaxtreaty.org. There is an international group called SEATNow.org that also highlights areas of double taxation.

Regards,