Update Proposal for the outdated Australia – US Tax Treaty

Submission to Treasury by ***Fix the Tax Treaty!***
8 April 2024

Introduction

We are pleased to provide this submission to Treasury recommending updates to the Australia-US tax treaty. These updates are aligned with the plans Treasury has been implementing over the past 3 years to expand and update Australia's tax treaty network.

Targeted Australia–US tax treaty reform will enhance labour mobility between our countries, preserve Australian sovereignty and intent over domestic policies, minimise unwarranted tax leakage and, most importantly, provide the same fair go for all Australians.

Australia has long employed a tax treaty framework with the US, underpinning important economic, taxation, and business aspects of our relationship with our third largest trading partner and key ally. However, the current Australia-US tax treaty was first negotiated in the 1980s with minor updates in 2001 and fails to appropriately address the taxation of superannuation or take account of the modern investment environment with structures such as managed funds and exchange traded funds. The present invitation to consider issues relating to Australia's tax treaty network provides an important opportunity to modernise and improve the tax treaty framework between our two countries.

Although treaty modernisation and update will no doubt enhance foreign investment and trade opportunities, the focus of this submission is on much-needed improvements which will positively impact individuals, specifically taxpayers with tax obligations in both countries. The United States' unique practice of citizenship-based taxation means that reforming the Australia-US tax treaty is particularly important to individual taxpayers – including dual Australian-US citizens living in Australia.

The current tax treaty (last amended in 2001) has numerous gaps and anomalies resulting in punitive and double taxation. For brevity's sake, this submission focuses on a few of the most critical issues, some of which would be effectively addressed by updating the treaty to incorporate the current OECD and US model tax treaty framework. Please see the Appendix to this submission for a table detailing a more extensive improvement opportunity list. These issues are also widely discussed on the Fix the Tax Treaty! website.[1]

Let's Fix the Tax Treaty! (FTT) is an Australian focused advocacy group representing individuals, including dual Australian-US citizens, who are adversely impacted by inadequate tax treaty protection for Australian-sourced income under the current Australia-US tax treaty. We advocate for changes to the Treaty to seek relief from the considerable cost of compliance complexity, as well as penalties and discrimination against a subclass of Australian citizens and tax residents while also reducing the resulting negative impacts and costs to the Australian economy and therefore to all Australians.

FTT currently has over 2,300 directly affiliated members with our efforts undertaken on behalf of a large and diverse stakeholder group of impacted Australians, estimated to be in excess of 400,000 persons, including dual citizens, permanent residents and their dependants living in both countries.

Why the Australia US Tax Treaty needs to be updated

Tax treaties are intended to prevent double taxation, improve cross-border tax efficiencies and eliminate tax evasion. Many of the failings of the current treaty are due to the unique[2] US practice of taxing on the basis of citizenship, rather than country of residence, which is the accepted convention by the rest of the world. This leads to instances of double taxation, considerable compliance complexity and material financial risks that directly impact most dual-country taxpayers. In fact, the current treaty *guarantees* unfair taxation by the US

[1] www.fixthetaxtreaty.org
[2] Some would cite Eritrea as also practicing citizenship-based taxation. However, unlike the US, Eritrea does not impose its full domestic tax code on its diaspora as if they were resident in Eritrea.

of some Australian source income, including superannuation. The excessive compliance burden is felt particularly by low- and middle-income individuals who are less able to afford the cost of both tax preparation and the sophisticated financial planning required to effectively save for retirement while simultaneously subject to two different tax systems.

This submission focuses on four material areas requiring reform: 1) The inclusion of a "saving clause" in the treaty which guarantees the ability of the US to collect US tax on the Australian income of Australian residents; 2) Retirement savings, most importantly US tax treatment of superannuation; 3) US tax treatment of Australian domiciled managed fund investments; and 4) non-alignment of capital gains taxation on the sale of a personal residence. Improvement opportunities are identified in this discussion and summarised again in the recommendations.

Key Reform Issues

Saving Clause

All US tax treaties contain some form of "saving clause" that guarantees the right of the US to tax its citizens as if the treaty did not exist.[3] In the current Australia-US Tax Treaty, the Saving Clause is found in Article 1 paragraph 3, with a limited list of exceptions in Article 1 paragraph 4. As we have noted, no other developed country asserts tax jurisdiction based on citizenship alone. The Saving Clause allows the US to reach into the Australian tax base and tax the Australian source income of Australian resident taxpayers. This erodes the ability of the affected US Persons (who are also Australian citizens and residents) to take advantage of Australian public policy and legislated tax advantages designed to encourage retirement savings and local investment.

The Saving Clause, and the US practice of CBT more generally, frustrates Australian domestic policy by allowing a foreign government to apply its own idiosyncratic tax rules to income earned on Australian soil by Australian residents. This disadvantages the affected US Persons and increases the likelihood that they will require Australian government assistance in the form of the Age Pension and other Australian social safety net programs.

It is a matter for the US Government to determine its own domestic laws, and it is unlikely that the US will completely remove the Saving Clause from an amended treaty. However, Australia should insist that the Australian tax base be respected under the treaty. The Australian source income of Australian residents should be taxable *only* by Australia.

Retirement Savings

Labour mobility is impeded when the destination country can tax funds that are invested in source country retirement savings that are not currently accessible due to preservation requirements. The current OECD and US model tax treaties address this problem, both during the accumulation phase and the drawdown (post-retirement) phase. Essentially, the treaty should require each country to respect the tax-deferred accounts available in the other country, align taxation of retirement savings and defer any individual taxation until funds are withdrawn. Pragmatically, it is in neither country's interest to permit inter-country tax leakage from key retirement saving programs.

For internationally mobile workers, the current tax treaty framework discourages use of tax advantaged retirement savings schemes as the promised tax benefits may not be available once they have moved to a different country. Guaranteeing that these workers will receive the tax benefits promised will better incentivise prudent retirement planning and reduce reliance on government funded programs such as the Age Pension.

Superannuation

The 2001 Australia-US Tax Treaty does not even mention superannuation, despite it being widely mandated in Australia since 1992. As superannuation is not addressed in the existing tax treaty, nor has either country issued any formal taxation guidance, there has been, and continues to be, much uncertainty about the "correct" way to include superannuation on a US tax return, even among IRS agents.[4]

[3] The Saving Clause is explained in detail in this blog post: http://fixthetaxtreaty.org/2017/01/12/explaining-the-saving-clause-i/

[4] Internal IRS correspondence obtained under Freedom of Information is available at https://www.bragertaxlaw.com/files/lbi_responsive_docs.pdf.

This uncertainty affects not only US citizens and green-card holders living in Australia, but also any Australian citizen or former resident currently living in the US who accumulated superannuation while resident in Australia, thereby discouraging labour mobility. Retirement savings taxation is recognised in more contemporary treaties; with the more recent US Tax Treaties containing provisions that respect the tax deferral of "foreign" retirement plans. See, for example, Articles 17 and 18 of the 2016 US Model Tax Treaty. With regard to retirement plans, both the UK and Canada have more favourable US tax treaties than Australia.

In the case of Australian residents, US tax on Australian superannuation of Australian residents is contrary to the interests of Australia as it reduces the ability of Australians to save to fund their retirement and increases the probability that the affected Australian citizens will be reliant on the Australian government for Age Pension once they retire. The US should have no claim on super – especially of Australian residents.

Given the lack of tax treaty clarity or IRS guidance on the taxation treatment of superannuation, it has been left to the individual taxpayers and the compliance industry to classify superannuation based on the US foreign entity classification regulations for federal tax purposes. This complex task is made even more difficult by the range of permitted superannuation types, including industry, retail, public sector (including defined benefit plans) and self-managed super funds (SMSFs).

While most US tax professionals include superannuation contributions in the US taxable income of the individual recipient, there is uncertainty around whether contribution taxes paid by the fund are available as foreign tax credits to offset US tax on the contributions. As well, certain types of superannuation arrangements require extensive information reporting to the IRS because they are treated by the US as "foreign" grantor trusts. There are also a small number of US tax professionals who argue that Superannuation is equivalent to US Social Security,[5] and therefore some or all of the contributions and subsequent withdrawals are excluded from US taxation under Article 18 paragraph 2 of the tax treaty. Finally, since superannuation is not a qualified US retirement plan, any movement of super balances between funds is treated as a taxable distribution. This includes consolidation of fund balances or rollovers when changing employment, all of which are tax free transactions under Australian tax law.

Any US tax owing on superannuation contributions, earnings, rollovers, or distributions will not be offset by a tax credit for Australian tax paid because these are either tax-free transactions in Australia (for transactions arising from an account in pension mode), or any tax on investment income or realised gains has been paid directly by the superannuation fund and not by the individual. Thus, US taxpayers with superannuation accounts are guaranteed to pay double tax on those accounts – once for income taxed inside their superannuation fund and once by the US.

Arguably, the major frustration of US taxpayers currently or previously resident in Australia is the uncertainty of the US tax treatment of superannuation. It would be preferable for this uncertainty to be resolved even before a new treaty is negotiated. As the competent authority with respect to the current treaty, the ATO should be actively lobbying the IRS to agree that the superannuation guarantee (at a minimum) is exempt from US tax under Article 18 paragraph 2 of the current treaty. Given the pension provisions in the current US model treaty, Australia should adopt a strong position that Australian superannuation not be subject to tax by the US.

In summary, the tax treaty should clarify the treatment of Superannuation commensurate with Australian domestic public policy and not selectively disadvantage those Australians who are also US taxpayers by denying the full benefit of funding their retirement through the superannuation system, as provided by Australian domestic tax law.

US retirement accounts

For Australians who spend some time working in the US, the opposite situation also poses tax problems which can discourage labour mobility. For lower income workers, the US has created what are known as "Roth" accounts (available both as Individual Retirement Accounts and in a 401(k) account). Taxpayers deposit after-tax funds into the Roth account with the promise that withdrawals in retirement will be tax free. This contrasts with "Traditional" retirement accounts where funds are deposited tax free (either exempt from taxation or deducted from taxable income) while withdrawals in retirement are included in taxable income.

[5] http://fixthetaxtreaty.org/2016/09/10/is-super-equiv-to-social-security/

Australian tax rules, however, do not recognise the difference between the Roth and Traditional variants of US retirement accounts, treating both as foreign trusts where the originally deposited funds are withdrawn tax free, but the appreciation earned since that initial deposit is taxed as current income. This treatment makes US Roth retirement accounts toxic for returning Australians who must either pay an early withdrawal penalty to wind up the Roth account prior to moving back to Australia or pay Australian tax on what they had thought was a tax-free investment. Incorporation of the retirement provisions in the OECD and US model treaties will go a long way towards fixing this problem. The treaty should also address the specific types of retirement accounts available in each country and ensure that the tax benefits promised when and where the accounts were established will be available to those who move between the US and Australia.

Managed Fund Investments: Passive Foreign Investment Companies

For middle class savers, the most efficient savings vehicle is often a managed fund or exchange traded fund. For internationally mobile individuals and those Australian residents taxed by the US, the US tax treatment of certain types of Australian domiciled investments is exceptionally punitive. The US Internal Revenue Code generally treats many "foreign" investments as if their only purpose were to avoid or defer US tax, with no ownership distinction made between US and overseas residents. One example of this is the Passive Foreign Investment Company (PFIC) legislation. PFICs are defined in Section 1297[6] of the Internal Revenue Code as any foreign (non-US) corporation with either more than 75% passive income or holding more than 50% of assets for the production of passive income. This is a broad definition and encompasses most managed funds, exchange traded funds (ETFs), real estate investment trusts and listed investment companies. Start-up companies with little revenue and large cash holdings can also be classified as PFICs.

Once a company has been classified as a PFIC, the tax consequences for US taxpayers are punitive. The US-taxpayer shareholder of a PFIC can elect to be taxed annually on any unrealised gain from their investment, essentially marking the investment to market on an annual basis. This unrealised gain is taxed as ordinary income, no capital gain concession is allowed. If this election is not made in the first year that the investment is classified as a PFIC, or the year the investment is purchased by the taxpayer, then a more complex set of rules applies. Under these rules, not only are capital gains concessions denied on the investment, but any realised gain is allocated pro-rata over the entire holding period and taxed at the highest available marginal rate applicable in the year the gain is allocated to (even if the taxpayer's actual marginal tax rate in that year was much lower). While foreign tax credit is allowed against this tax, due to the combination of phantom exchange rate gains and the use of the highest possible US tax rate, foreign tax credit may offset only a small portion of the gain. On top of this, daily compound interest is computed on this deemed "deferral" over the whole holding period of the investment. All these gain computations are done in US dollars adding exchange rate risk. Furthermore, any distributions in excess of 125% of the 3-year rolling average are treated as excess distributions subject to the same imputation of deferred tax and daily compound interest. No surprise that many tax professionals describe the PFIC regime as "confiscatory in nature".

Clearly, it is not tax-effective for a US taxpayer to own a PFIC. However, while the PFIC rules have been in the Internal Revenue Code since 1986, they were obscure, and anecdotal evidence suggests that PFIC rules have only been regularly applied to non-US domiciled public managed fund investments since around 2009. This means that many long-term US expats have been caught with Australian managed investments purchased years or decades before this new interpretation took hold, leaving them unable to exit their investments without punitive US taxes being applied. The US tax reporting form for PFICs is also notoriously complex and time-consuming, adding greatly to compliance costs.

One of the policy objectives of the PFIC provisions was to prevent deferral of US tax through investment in foreign entities that were not subject to the same rules as US managed funds regarding the distribution of current income. Clearly this is not a problem with any Australian managed fund that is available to retail investors.

We suggest adding to the Non-Discrimination article in any new treaty a clause that prohibits discrimination against investments available to retail investors in the other country. This clause would not override securities law regarding marketing of investments but would provide relief to a mobile workforce who may have assets in place in one country when they move to the other.

Alternatively, the treaty should include a clause in Article 10, Dividends, that states that Australian investment structures that are sold to retail investors are not to be considered "foreign corporations" under the PFIC rules.

[6] https://www.law.cornell.edu/uscode/text/26/1297

That is, the treaty should stipulate that retail investments domiciled in one country should not be more punitively taxed by the other country than their own similar domestic investments.

Gain on sale of personal residence

For individuals in Australia with US tax obligations, capital gain on the sale of a personal residence is taxable in the US (with a US$250,000 exemption per person). This gain is computed as if the purchase and sale were in US dollars, potentially leading to currency "phantom gains". In addition, since US tax rules assume that the US dollar is the functional currency of all individual taxpayers, discharge of an AUD denominated mortgage can result in taxable foreign currency gains. When exchange rates have changed since home purchase, individuals selling a home with a mortgage will have taxable currency related gains on either the home itself, or the mortgage with an offsetting currency loss on the other side of the transaction. Furthermore, since the residence is a personal use asset, losses are not allowed, so only the gain side of the currency transaction will be recognised and taxed.

These rules are particularly problematic for US citizens and green card holders residing in Australia, where no capital gains tax is paid on the sale of a primary personal residence. Allowing the US to tax capital gains on Australian real estate owned by Australian residents is contrary to the economic interests of Australia.

The Tax Treaty should:

- seek to align treatment of the sale of a personal residence with Australian taxation policy, particularly as extremely high housing costs in Australia force many to tie up a large proportion of their net assets in their primary residence; and
- stipulate that real property located in one country and owned by a resident of that country cannot be taxed by the other country. This provision should be included in the list of savings clause exemptions in Article 1 paragraph 4 of the treaty.

Summary

There are many other taxation areas that should be addressed, such as taxation of Australian benefits and issues with business legal structures. These areas are listed in the Appendix to this submission.

The exceptional US practice of citizenship-based taxation mandates tax reporting and compliance from all US Persons within Australia, of which many are dual citizen, long-term Australian residents of only modest means. Citizenship-based taxation exposes them, unlike any citizens of any other developed country in the world, to the Sisyphean task of reconciling two complex and disparate domestic tax systems, frequently leading to instances of double taxation, high compliance costs and increasingly unreasonable penalties and fines. These are exactly the sorts of issues that a well-crafted tax treaty can help mitigate and an important driver as to why the Australia-US tax treaty should be prioritised by Treasury and the Morrison Government for reform and update.

Key Recommendations

To summarise, we believe that the Australia-US tax treaty is in urgent need of updating and improvement and that the current program of tax treaty negotiations provides an important opportunity to positively address a number of significant issues.

We propose the following key recommendations:

1. The treaty should specify that the Australian source income of Australian residents is taxable *only* by Australia.
2. The treaty should be updated to reflect the retirement account provisions in the current OECD and US model treaties. Each country should recognise the tax deferred nature of retirement accounts and ensure that moving between countries does not materially alter the tax benefits promised when and where the accounts were established. Contributions to and benefits from any form of pension or retirement plan should be exempt from the saving clause. At a minimum, SG contributions made on behalf of Australian residents should be taxable *only* by Australia and excluded from US taxation.
3. The treaty should stipulate that retail investments in one country should not be more punitively taxed in the other country than their own similar domestic investments.

4. The treaty should include a provision that real property located in one country and owned by a resident of that country cannot be taxed by the other country.

We appreciate the opportunity to address the areas in which the US-Australia tax treaty can be modernised and updated to provide more certainty and reduce double taxation for individual taxpayers subject to tax by both countries. The US practice of taxing based on citizenship rather than residence is particularly harmful to Australian residents with US citizenship, most of whom are Australian citizens.

Respectfully submitted on behalf of Fix the Tax Treaty! by

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Appendix – Comprehensive Improvement Opportunity List

The following table provides comprehensive detail on identified Tax Treaty issues, listing the specific items that require change, including associated priorities.

Issue	Detailed Description	Importance (H/M/L)
Superannuation	Taxation treatment of Superannuation is unclear and not addressed in the current tax treaty or in formal IRS rulings. There are a variety of ways that Superannuation can be reported on a US tax return. These range from completely tax free (as the equivalent of Social Security) to fully taxable including appreciation inside the fund (as a foreign grantor trust). Indications are that the IRS is currently pushing the unfavourable grantor trust interpretation, at least in some circumstances. The Treaty should clarify the treatment of Superannuation commensurate with Australian domestic public policy and not selectively disadvantage those Australians who are also US taxpayers by denying the full benefit of funding their retirement through the superannuation system, as provided by Australian domestic tax law.	High
Retirement Account Portability	Labour mobility is impeded when the destination country can tax funds that are invested in source country retirement savings that are not currently accessible. The current OECD and US model tax treaties contain articles that address this problem, both during the accumulation phase and the drawdown (post-retirement) phase. Essentially, the treaty should require each country to respect the tax-deferred accounts available in the other country and defer any individual taxation until funds are withdrawn. Further simplicity can be attained by assigning sole taxing rights to the source country with a provision that non-residents are taxed no more punitively than residents.	High
Sale of principal residence	Capital gain on the sale of a personal residence is taxable in the US (with a US$250,000 exemption per person). This gain is computed as if the purchase and sale were in US dollars, potentially leading to currency "phantom gains". In addition, the US will tax any US$ gain on the discharge of a mortgage on the property. Note that, since the residence is a personal use asset, losses are not allowed. The Tax Treaty should seek to align treatment of the sale of a personal residence with Australian taxation policy, particularly as the high housing cost in Australia forces many to tie up a large proportion of their net assets in their primary residence.	High

Issue	Detailed Description	Importance (H/M/L)
PFICs	Australian managed funds, listed investment companies (LICs), real estate investment companies (A-REITs), and exchange traded funds (ETFs) are all treated as Passive Foreign Investment Companies (PFICs) for US taxpayers. PFIC treatment results in punitive taxation of these investment vehicles, up to the point of being confiscatory in application. PFIC legislation was enacted prior to the huge growth in managed funds both in the US and worldwide. Part of the rationale behind this punitive treatment was to prevent US resident taxpayers from using poorly regulated "foreign" investments to defer taxable income. But any of these investments that is registered for sale to retail investors will be required by Australian law to distribute all income and realised gains currently, just like the American equivalent. The treaty should include a clause that states that Australian investment structures that are sold to retail investors are not to be considered "foreign corporations" under the PFIC rules. Furthermore, the treaty should stipulate that retail investments in one country should not be more punitively taxed in another country than their own similar domestic investments.	High
Saving Clause	The saving clause allows the US government to impose direct taxation on some Australian citizens and residents. It denies those who are US citizens the use of the majority of treaty provisions except for a limited set of specified provisions. Due to the action of the saving clause, an individual can be taxed under resident tax rules by both the US and Australia.	High
Transition Tax and GILTI	The 2017 US tax reform bill (Tax Cuts and Jobs Act, Pub. Law 115-97) imposed a one-time transition tax on the retained earnings of foreign corporations owned by US Persons. While Congress never considered the impact of this tax on tax-residents of other countries, the compliance industry is busy looking for victims. See this video for an explanation of the transition tax. Tax reform also imposed an ongoing tax (starting in 2018) on Global Intangible Low Taxed Income (GILTI). The way GILTI has been defined, most controlled foreign corporations will find that some of their active Australian-source business income has now been re-defined as US-source income, immediately taxable in the US whether distributed to shareholders or not. While Australia's high corporate tax rate may insulate affected Australian corporations somewhat, the complexity of the associated foreign tax credit rules could create a US tax liability on top of Australian taxes paid. Where the US taxes undistributed income of Australian corporations, they are draining capital from Australia due to the resulting double taxation. Note that small Australian businesses owned by Australian-resident US taxpayers are often treated under the US tax code as controlled foreign corporations subject to these provisions. The treaty should specify that the undistributed income of Australian corporations cannot be deemed distributed to US shareholders and that this provision will not be invalidated by the saving clause.	High

Issue	Detailed Description	Importance (H/M/L)
Effective nationality / Accidental Americans	There is a principle under international law that dual citizens have an "effective nationality." Where a dual citizen has closer ties to Australia than the US, this principle should limit the extraterritorial reach of US tax law. The case of Accidental Americans illustrates this principle in the extreme. Accidental Americans were born in the US to Australian parents and returned to Australia as young children, or were born in Australia with at least one US citizen parent. They have no ties to the US; they may not even have a US passport or social security number. Yet, due to their place of birth, the US insists on the right to tax them for the rest of their life or until they pay US$2,350 to renounce their US citizenship (the highest fee for renunciation by any country by a factor of six) and to pay an exit tax in some circumstances. When an exit tax is imposed, it will include taxation of the individuals entire superannuation balance as if distributed before renunciation.	Medium
Impediments to using Australian legal structures (trusts and companies)	SMSFs, Family trusts, Australian Corporations and other legitimate Australian legal structures require complex and extensive disclosure under US tax law, with punitive penalties (generally starting at US$10,000) for failure to file information forms. Furthermore, structures that are effective for Australian tax planning may be disregarded for US tax. The Tax Treaty should provide for "effective nationality" and limit the US tax treatment of these structures for Australian nationals.	Medium
Unemployment and other Government benefits	The US taxes Australian unemployment benefits, redundancy and other Centrelink benefits (except the Age Pension and Disability Pension) as ordinary income. The Tax Treaty should seek exemptions to US taxation of Australian domestic social welfare and support payments.	Low
NIIT (Net Investment Income Tax)	Enacted as part of Obamacare, NIIT is a flat 3.8% tax on investment income for US taxpayers whose income exceeds a threshold determined by filing status. NIIT applies to all investment income, regardless of source, and cannot be offset by foreign tax credits. For those affected (generally high-income earners), this is a clear case of double taxation. The treaty should seek a claw-back provision.	Low
Gift and Inheritance Tax	While Australia currently has no inheritance or gift taxes, the US does. For US citizens, worldwide wealth is taxed on death (with an exclusion of about US$5.5million). For estate tax purposes, it does not matter where in the world the asset is located, or whether it was owned prior to becoming a US taxpayer. Tax is based on the value of all assets at death. While the current exclusion for US citizens is quite high, this could change. For US citizens residing in Australia, the estate tax will be levied on Australian assets as well as US assets (even if the decedent has not lived in the US for decades). For non-US citizens holding US assets at death, the exclusion is only US$60,000, though there is a 1954 US-Australia Estate and Gift Tax Treaty that increases the exclusion for US-situs property from US$60,000 to a pro-rata share of the US$11.5million available to US citizens. For non-US citizens with more than US$60,000 in US-situs assets, the compliance cost of preparing a US estate tax return to show zero balance due could be excessive.	Low