8 August 2014

Mr. Greg Wood
Manager
International Tax Treaties Unit
Corporate and International Tax Division
The Treasury
Langton Crescent
Parks ACT 2600
(taxtreatiesunit_consultation@treasury.gov.au)

RE: Submission to Australia's Tax Treaty Negotiation Program

Dear Mr Wood,

In response to Treasury's call for submissions to Australia's future tax treaty negotiation program, the American Chamber of Commerce in Australia ("AmCham") is pleased to present our considered views. In sum, as we stated last week when you kindly received an AmCham delegation in your offices, we believe that it is vitally important to give the United States, Australia's most important economic partner, the highest possible priority as Treasury sets its future agenda for tax treaty negotiations.

The US-Australia Tax treaty has not been revised since 2001, and as a result contains outdated and obsolete provisions that impede trade, investment, and commerce between Australia and the U.S. In particular, the ongoing U.S. taxation of Australian Superannuation is an avoidable barrier and additional cost to bilateral trade and investment which is frequently brought to our attention by AmCham members and others outside our Chamber. We welcome this opportunity to bring their views to your consideration.

As background, AmCham is Australia's largest international Chamber of Commerce and premier international business organisation. Since our founding in 1961, we have helped to promote and encourage the two-way flow of trade and investment between the United States and Australia. We have a consistent track record of constructive engagement in consultations such as this one, including 15 years ago when the 2001 "Protocols" were being negotiated and ten years ago during the successful negotiation of the Australia-US Free Trade Agreement (AUSFTA).

AmCham is considered the voice of U.S. business in Australia, and the voice of Australian business in the United States. With offices in Sydney, Melbourne, Brisbane, Adelaide and Perth and some 1,000 corporate members, AmCham represents key U.S. corporations and investors in Australia, as well as many Australian companies with an interest and/or presence in the U.S.

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The major area of concern for our members – both American and Australian -- is the high cost of doing business in Australia. We are therefore committed to doing everything possible to promote positive change to reduce that high cost of doing business here. One contributor to the high cost of doing business here is the U.S. taxation of Australian Superannuation. This cost is borne not just by individuals, but also by the organisations that employ them. This is an issue not just for citizens and taxpayers of both countries, but for general business and commerce as well. It impacts on trade and investment and it is a barrier to the cross-border movement of talent and capital.

Also, the Treaty, as it stands, is not in line with the Organisation for Economic Cooperation and Development (OECD) Model Tax Convention on Income and on Capital, nor is it in line with the United States' own Model Income Tax Convention provisions (which exempt approved overseas pension plans from taxation).

United States: the most desirable candidate to update the Double Taxation Taxes on Income Treaty:

Without a doubt, the United States remains Australia's greatest strategic, commercial and economic partner. Therefore, we believe that it is the most desirable country with which to update the existing Tax Treaty provisions, to bring them in line with similar treaties with other advanced economies. We would thereby help fulfil the shared aspiration that all economic treaty provisions between Australia and the United States – those covering free trade, investment protection, and double taxation -- be set and maintained at the highest possible levels in what should be an overall model framework between two closely allied nations.

Australian Foreign Minister Julie Bishop is unequivocal: "the United States is – and I suggest is likely to remain – Australia's single most important economic partner, taking into account investment stocks worth over one trillion dollars, plus our two-way trade."[1]

Australian Minister for Trade and Investment Andrew Robb states: "...the USA is the largest investor in Australia, and Australia is the twelfth largest provider of foreign direct investment in the United States. The United States is one of the top five source countries for visitors to Australia in terms of numbers and expenditure.... Right back almost as far as the earliest days of European settlement of Australia, Americans have been involved in the economic development of Australia."[2]

Indeed, the economic argument for prioritizing a renegotiated tax treaty with the United States is unquestionable. The total United States foreign direct investment in Australia is **$149 billion**.[3] Total Australian foreign direct investment in the U.S. is **$122 billion**. When two-way portfolio investment is added to those sums, total two-way investment between the two countries exceeds **one trillion dollars** – by far the largest such figure for any of Australia's leading economic partners. As examples, Chevron's Gorgon and Wheatstone LNG projects total **$70 billion**. These constitute the largest-ever U.S. investments in Australia. These projects will add **24 million tons of LNG** per year in exports to the Asia-Pacific market.[4] They, along with other such

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[1] Address to the G'Day USA Australian Outlook Luncheon, The Harvard Club, New York, 24 January 2014

[2] Address to the Alliance 21 Conference, U.S. – Australia: The Alliance in an Emerging Asia, U.S. Studies Centre, Canberra, 18 June 2014

[3] Department of Foreign Affairs and Trade, USA Economy Fact Sheet: http://www.dfat.gov.au/geo/fs/usa.pdf

[4] Ambassador John Berry, Remarks at the American Chamber of Commerce Luncheon, Sydney, 28 May 2014

LNG projects such as Conoco-Phillips' APLNG project in Queensland, are slated to transform Australia into the world's leading LNG exporter before 2020. Other countries and companies are part of this transformation, but the lead, in terms of capital, technology, and talent, is clearly coming from the U.S.

Importantly, American investments in Australia employ hundreds of thousands of Australians in extremely high-quality jobs. Equally, Australian investment in the U.S. has also created huge employment opportunities for Americans, and for Australians who benefit from such unique provisions as the U.S. "E-3" specialised occupation visa (which is available only to Australian citizens, with an annual cap set at 10,500 visas). AmCham estimates that some 200,000 Americans (many of whom are dual nationals) reside temporarily or permanently in Australia, while perhaps 50 percent of Australia's one-million-strong overseas diaspora reside in the U.S. These are the people who are paying the price and bearing the burden of the obsolescence of the current tax treaty arrangements between the U.S. and Australia. These people communicate frequently with us to express their deep concern about current tax arrangements and their strong support for modernizing them.

To expand on Minister Robb's comment about the importance of American visitors to Australia, I would note that almost 500,000 Americans visit Australia annually. The flow of travellers in the other direction is even more striking, as the U.S. has become the single most important destination for Australians travelling abroad. Over 1.2 million Australians will visit the U.S. this year alone, an annual figure that is rising steadily as investment in aviation capacity continues to expand between the U.S. and Australia. Whereas ten years ago only two airlines served US-Australia routes, there are now no fewer than six airlines competing in this market. The intensity of these contacts will lead to greater commerce and trade, and therefore to greater pressure to improve tax provisions between the two countries.

In terms of trade, the United States remains one of Australia's top three trading partners. Australia is the United States **37th** largest principal import source and the U.S. is Australia's **15th** largest principal export destination.[5] Since implementation of the Australia-U.S. Free Trade Agreement, bilateral goods trade has doubled to over **$35 billion**.[6] Unlike many of Australia's leading export markets which essentially buy raw minerals like coal and iron ore, Australian exports to the U.S. are highly diversified and include a high component of value-added products including Australian advanced manufactured goods. As an example, Boeing's largest overseas employment footprint is here in Australia, where high-tech and high-value products like the leading edges for the Boeing-787 "Dreamliner" are manufactured.

Looking forward, Australia and the United States are partners in the ongoing Trans-Pacific Partnership (TPP) negotiations. Both the Australian and U.S. Governments are seeking to develop a high-standard 21st century regional trade agreement. AmCham believes that all aspects of the bi-lateral relationship should be at the highest standard. This should be a model relationship. Unfortunately, the outdated tax treaty is an impediment to that aspiration.

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[5] Department of Foreign Affairs and Trade, USA Economy Fact Sheet: http://www.dfat.gov.au/geo/fs/usa.pdf

[6] Ambassador John Berry, Remarks at the American Chamber of Commerce Luncheon, Sydney, 28 May 2014

US Taxation of Australian Superannuation:

- Australian Superannuation plans are treated as Funded & Vested non-qualified retirement plans for U.S. tax purposes.
- A U.S. citizen or resident participating in an Australian Superannuation fund is subject to U.S. tax on the Employer Contributions to the fund. This can also apply to an Australian working temporarily in the U.S.
- U.S. citizens and Australian Green card holders remain subject to U.S. taxation on their worldwide income and where these individuals are residing in Australia (as Australian tax residents), their Australian Superannuation fund is subject to the U.S. tax rules and reporting.
- Where the individual is "Highly Compensated" the Vested Accrued Benefit (i.e. growth in the fund) is subject to U.S. tax.
- Australian citizens and permanent residents can only withdraw amounts from their Superannuation funds upon retirement.
- Currently the U.S. - Australia Tax Treaty does not provide any relief to delay the taxation until actual withdrawal (unlike the agreement with the U.K. and similar treaties).
- Superannuation funds pay a 15% contribution tax (on receiving employer contributions) and up to a 15% earnings tax (on the fund earnings) which are taken out of the individual's funds. Under U.S. rules, the individual is not entitled to receive a credit for this tax.
- There are various types of Superannuation funds in Australia, such Employers funds, Industry funds, Retails funds, Self-Managed Superannuation Funds etc., that are genuine Superannuation funds and the U.S. tax rules in each of these funds may vary (some with more added complexity).

Proposed Amendments to the US-Australia tax treaty to address the adverse impact of US taxation of Australian Superannuation

- A new tax treaty article should be introduced in the U.S.-Australia Tax Treaty as per the 2006 U.S. Model Income Tax Convention (Article 18 – Pension Funds). An extract of the article is attached.
- Article 1(4)(a) of the U.S.-Australia Tax Treaty should and amended to include Article 18 (1) to provide relief to U.S. citizens

  "(4) The provisions of paragraph (3) shall not affect:

  (a) the benefits conferred by a Contracting State under paragraph (2) of Article 9 (Associated Enterprises), paragraph **(1) or** (2) or (6) of Article 18 (Pension, Annuities, Alimony and Child Support)....."

In conclusion, AmCham deeply appreciates Treasury's call for submissions to inform its ongoing review of bilateral tax treaty arrangements under consideration for renegotiation. As stated, we believe there is no better candidate for such renegotiation than the United States, in terms of the broad scope of trade, investment, commerce, and employment impacts that can be achieved in one single negotiation.

While in this submission we have highlighted the issue of U.S. taxation of Australian Superannuation, if desired, we will be pleased to provide further insights into other provisions of the existing arrangements that should be addressed if indeed Treasury seek to renegotiate tax treaty arrangements with the United States.

Sincerely,

R. Niels Marquardt
United States Ambassador (ret.)
CEO
American Chamber of Commerce in Australia

Encl. U.S. Model Income Tax Convention (2006), Article 18 Pension Funds

Article 18

PENSION FUNDS

1. Where an individual who is a resident of one of the States is a member or beneficiary of, or participant in, a pension fund that is a resident of the other State, income earned by the pension fund may be taxed as income of that individual only when, and, subject to the provisions of paragraph 1 of Article 17 (Pensions, Social Security, Annuities, Alimony and Child Support), to the extent that, it is paid to, or for the benefit of, that individual from the pension fund (and not transferred to another pension fund in that other State).

2. Where an individual who is a member or beneficiary of, or participant in, a pension fund that is a resident of one of the States exercises an employment or self-employment in the other State:

a) contributions paid by or on behalf of that individual to the pension fund during the period that he exercises an employment or self-employment in the other State shall be deductible (or excludible) in computing his taxable income in that other State; and

b) any benefits accrued under the pension fund, or contributions made to the pension fund by or on behalf of the individual's employer, during that period shall not be treated as part of the employee's taxable income and any such contributions shall be allowed as a deduction in computing the taxable income of his employer in that other State.

The relief available under this paragraph shall not exceed the relief that would be allowed by the other State to residents of that State for contributions to, or benefits accrued under, a pension plan established in that State.

3. The provisions of paragraph 2 of this Article shall not apply unless:

a) contributions by or on behalf of the individual, or by or on behalf of the individual's employer, to the pension fund (or to another similar pension fund for which the first-mentioned pension fund was substituted) were made before the individual began to exercise an employment or self-employment in the other State; and

b) the competent authority of the other State has agreed that the pension fund generally corresponds to a pension fund established in that other State.

4. a) Where a citizen of the United States who is a resident of ------ exercises an employment in ------- the income from which is taxable in -------, the contribution is borne by an employer who is a resident of ------- or by a permanent establishment situated in -----, and the individual is a member or beneficiary of, or participant in, a pension plan established in ------,

i) contributions paid by or on behalf of that individual to the pension fund during the period that he exercises the employment in --------, and that are attributable to the employment, shall be deductible (or excludible) in computing his taxable income in the United States; and

ii) any benefits accrued under the pension fund, or contributions made to the pension fund by or on behalf of the individual's employer, during that period, and that are attributable to the employment, shall not be treated as part of the employee's taxable income in computing his taxable income in the United States.

b) The relief available under this paragraph shall not exceed the lesser of:

i) the relief that would be allowed by the United States to its residents for contributions to, or benefits accrued under, a generally corresponding pension plan established in the United States; and

ii) the amount of contributions or benefits that qualify for tax relief in --------.

c) For purposes of determining an individual's eligibility to participate in and receive tax benefits with respect to a pension plan established in the United States, contributions made to, or benefits accrued under, a pension plan established in ------ shall be treated as contributions or benefits under a generally corresponding pension plan established in the United States to the extent relief is available to the individual under this paragraph.

d) This paragraph shall not apply unless the competent authority of the United States has agreed that the pension plan generally corresponds to a pension plan established in the United States.