



30 May 2014

Committee Secretary
Joint Standing Committee on Treaties
PO Box 6021
Parliament House
CANBERRA ACT 2600

Email: jsct@aph.gov.au

Dear Sir/Madam

RE : AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA TO IMPROVE INTERNATIONAL TAX COMPLIANCE AND TO IMPLEMENT FATCA

Thank you for the opportunity to make a submission to the Joint Standing Committee on Treaties (JSCOT) regarding the Australia-United States FATCA Intergovernmental Agreement (FATCA IGA).

The Financial Services Council (FSC) represents Australia's retail and wholesale funds management businesses, superannuation funds, life insurers, financial advisory networks, trustee companies and public trustees. The Council has over 125 members who are responsible for investing more than \$2.2 trillion on behalf of 11 million Australians. The pool of funds under management is larger than Australia's GDP and the capitalisation of the Australian Securities Exchange and is the third largest pool of managed funds in the world. The FSC promotes best practice for the financial services industry by setting mandatory Standards for its members and providing Guidance Notes to assist in operational efficiency.

The FSC has been a strong advocate for Australia entering into an intergovernmental agreement with the United States on FATCA.

FSC supports Australia entering an IGA

The FSC fully supports the Australian Government entering into an IGA with the U.S. in relation to FATCA and we fully support the IGA's ratification. The agreement which has been negotiated with the United States has significant advantages when compared to the thousands of individual agreements which would otherwise be required between Australian Financial Institutions (FI's) and the U.S. Internal Revenue Service (IRS).

We see the main benefits of the IGA as:

- decreasing the cost of complying with FATCA for Australian FI's;
- eliminating the need for withholding on FI's in Australia; and
- ensuring a level playing field between Australia and its trading partners in other FATCA partner countries.

An IGA will lead to a significant reduction in the overall cost of complying with FATCA for Australian FI's, which in turn will mean that Australian consumers will not be burdened with unnecessary increases in the costs of wealth management products and services. Decreasing

the compliance burden of FATCA will also allow our members to better focus on the core business of servicing clients.

Details of the advantages of an IGA

We have outlined further details on the advantages of the IGA in Appendix A.

Should you wish to discuss this submission further please do not hesitate to contact me on (02) 9299 3022.

Yours sincerely

CARLA HOORWEG
Senior Policy Manager – Investment, Global Markets & Tax

Appendix A – Comments

Ability to exempt retirement plans

Industry is of the strong view Australian superannuation schemes and retirement products were not clearly exempted under the final FATCA Regulations, despite a stated intention by the U.S. Treasury not to capture them.

This is a significant risk as many superannuation schemes are unable to fully comply with FATCA under the requirements outlined in the Regulations, due to an inability to track down and identify the owners of some super accounts who have not their updated address or other contact details with their providers. Under the Regulations these superannuation schemes will be withheld against under the penalty withholding provisions.

The IGA provides the ability to exempt complying¹ superannuation entities and products, including self-managed superannuation funds, through Article 4, paragraph 3 and the Annex II. In comparison to the Regulations this is a significant benefit as it largely removes the need for superannuation entities to comply with FATCA.

Further, the FSC sees advantages in superannuation being treated consistently across jurisdictions. From our discussions with U.S. Treasury we understood that it would be difficult to for them to draft final Regulations with the necessary specificity to provide for the exemption of Australian retirement plans, due to the nuances of our system.

The mechanism for exemption provided through the IGA is the only effective way to ensure that Australian superannuation schemes and retirement products are exempted from FATCA.

Importantly, the structure of Annex II in the Model 1 – Reciprocal IGA allows for retirement plans to be carved out of FATCA at three levels, namely Exempt Beneficial Owner, Deemed Compliant and Exempt Product.

Ability to exempt other “low risk” products

The IGA provides the ability to exempt other entities and products that present a low risk of tax evasion through Annex II. As more countries sign up to partner with the U.S. through IGAs the FSC believes it will become even more important for Australian investment products to be treated comparably under FATCA on a global basis.

Allowing “low risk” products to be exempt through Annex II reduces the compliance costs for Australian FI's and means that consumers will not be burdened with unnecessary increases in costs. The inclusion of specific rules in the IGA for certain life insurance products and employee share schemes are two examples.

Overcomes domestic legal impediments

The IGA requires the Australian Government to ensure that Australian FI's do not suffer domestic legal impediments.

There are significant privacy and disclosure impediments to Australian FI's complying with the FATCA Regulations. Without resolution of these issues it will be difficult and costly for Australian FI's to comply.

Existing impediments include:

¹ Where complying means “complying with Australian law”

- Inability of Australian FI's to close accounts of recalcitrant account holders due to conflicts with existing account documentation (including services agreements and constitutions, trust deeds etc)
 - the IGA relieves Australian FI's of the requirement to close recalcitrant accounts under Article 4, paragraph 2;
- Breaches of Australian privacy laws through the reporting of client data without consent
 - Australian privacy rights are not infringed under the IGA as compliance with the IGA relies on ratified tax treaties already established for the purpose of tax transparency, and
 - Australian enabling legislation will provide Australian FI's with the relevant legal authority to perform their FATCA obligations;
- Inability of some Australian FI's to enter into legally binding individual agreements with the IRS due to their non-legal entity structure (for example managed investment trusts)
 - an IGA alleviates Australian FI's of the need to enter into individual agreements.

Reduces compliance burden for Australian FI's and consumers

The compliance requirements for customer identification under the IGA are considerably less onerous than those required under the FATCA Regulations.

In particular:

- Initial customer identification procedures are more efficient and allow for self-certification;
- Reliance on information held in the public domain or in the possession of an Reporting FI as the basis of determining the "FATCA status" of a customer;
- Onerous customer re-identification procedures is removed;
- Reporting via the ATO already occurs through the AIR process, by using an established reporting process it will be less costly to implement than new systems for reporting to the IRS;
- Individual agreements with the IRS are not required, thus reducing internal legal costs associated with assessing terms and conditions of these agreements, and with developing internal compliance procedures to ensure adherence to these terms and conditions (the FSC estimates that without an IGA at least 55,000 entity agreements across the Australian financial industry will need to be entered into directly with the IRS);
- Reduced withholding obligations, as under the IGA Australian FIs will generally not be subject to FATCA withholding and are not required to withhold on recalcitrant accounts and Non Participating Foreign Financial Institutions (Article 4).

Whilst there will be some costs associated with implementing the IGA we believe the costs of implementing the FATCA Regulations are far greater. Overall, we expect that the costs savings which result from the advantages of the IGA over the Regulations will far outweigh the implementation costs under an IGA.

Leverages existing Anti-Money Laundering/Counter Terrorism Laws (AML-CTF) laws

The IGA will allow the industry to leverage Australia's Anti-Money Laundering and Counter Terrorism Laws (AML/CTF) without additional requirements that are inconsistent with the

existing AML/CTF regime. This will reduce the cost of compliance and unnecessary impacts on customers that are not likely to be subject to FATCA requirements.

Improves tax information exchange with the U.S. and other countries

The Australian Government will receive additional information on Australian Taxpayers under the IGA.

Further, as a FATCA Partner country, Australia is likely to be involved in future developments for reporting and due diligence standards for FI's. By participating in FATCA through an IGA Australia will be part of a global network committed to combating tax evasion which would enable Australia to be involved in future discussions with the U.S., and other OECD countries, in the development of future automatic information exchange frameworks and joint efforts in combating tax evasion.

Other advantages

Quarantining Mechanism

Under the FATCA Regulations, in order for an Expanded Affiliated Group (EAG) to be characterised as "Participating" it is necessary that all branches or entities within the group are also participating.

Given the multitude of jurisdictions in which Australian-headquartered financial institutions operate, and the different legal and regulatory regimes that operate in these jurisdictions, it is the FSC's expectation that achieving participating status in many jurisdictions will not be possible within the two year time frame, if ever. Accordingly, the financial institution may be required to either close operations in the non-compliant jurisdictions or assume non-participating status for FATCA, neither of which may be palatable.

The IGA addresses this concern by allowing a financial institution to quarantine a non-participating branch on an enduring basis without affecting the status of entities within the EAG, subject to the adherence to certain conditions. This allows a financial institution to participate with FATCA to the extent possible with comfort that its participating status will not be tainted.

Development of a Workable Passthru Mechanism

There is an intention from the United States for "passthru withholding" to commence in 2017. Broadly stated, passthru withholding will require a financial institution that holds financial accounts for recalcitrant account holders or non-participating financial institutions to determine their proportion of U.S. income to total income and apply this percentage to withhold on all payments to such account holders.

The passthru withholding rules have the potential to impose significantly onerous administrative burdens on Australian financial institutions.

Under Article 6(2) of IGA, the U.S. and the FATCA Partner are committed to work together to "develop a practical and effective alternative approach to achieve the policy objectives of foreign passthru payment...that minimizes burden." Hence, entry into an IGA gives Australia a "seat at the table" in terms of the formulation of the passthru withholding rules to ensure that they are drafted in a way that mitigates the impact on Australian financial institutions.

Ensures compliance by smaller entities

Many smaller Australian FI's may not be aware of FATCA, or may be intending not to comply with the obligations by not entering a separate FFI agreement with the IRS. However, we believe that once FATCA commences, even smaller organisations would eventually need to participate in FATCA because of the globalised nature of the financial services and the multiple dealings which will occur between smaller FI's and FATCA compliant FI's.

Entering an IGA removes the option for Australian FIs to participate in FATCA. Accordingly, the IGA is advantageous for Australian industry as it ensures that all financial services organisations will be implementing and participating in FATCA at the same time. This removes uncertainty within industry as it results in more consistent application of FATCA across Australia.