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The Hon Dr Andrew Leigh MP
Assistant Minister for Competition, Charities and Treasury
c/- Corporate and International Tax Division
The Treasury
Langton Crescent
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Dear Minister

Submission: Expansion of Australia's Tax Treaty Network (Update to Treaty with New Zealand)

I am a senior academic at The University of Melbourne and a prize-winning researcher on tax treaties.

I write to make a submission on the negotiations that the government is entering into with New Zealand as part of Australia's expansion of its tax treaty network.

As the government is also entering into negotiations with Brazil, South Korea, Sweden and Ukraine for this purpose, why a submission singling out New Zealand?

New Zealand is the only one of these countries to have an expansive tax non-discrimination clause (ie one that extends beyond income tax and fringe benefits tax) in its current double-tax agreement with Australia.

Article 24 of the *Convention between Australia and New Zealand for the Avoidance of Double Taxation with Respect to Taxes on Income and Fringe Benefits and the Prevention of Fiscal Evasion*, signed 26 June 2009, [2010] ATS 10 (entered into force 19 March 2010) provides as follows:

> (1) Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected. This provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the Contracting States.

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> (7) The provisions of this Article shall, *notwithstanding the provisions of Article 2, apply to taxes of every kind and description imposed on behalf of the Contracting States, or their political subdivisions*. (Emphasis added)

As this article is given the force of federal law in Australia pursuant to section 5(1) of the *International Tax Agreements Act 1953* (Cth), the upshot of this is that — as pointed out in the paper titled 'Is Fiscal "Fortress Australia" a Legal Sandcastle? The Emperors' (and Empress') New Taxes on Aliens' (which was awarded the prize for the Best Tax Research Paper at this year's Australasian Tax Teachers Association Conference, and which is publicly available at Papers - Google Drive <https://drive.google.com/drive/folders/1edeEsLBDwi0SdrYO5eGf64IzdcjoZEUB> from the 'Papers' link at ATTA Annual Conference - Melbourne 2024 — AUSTRALASIAN TAX TEACHERS ASSOCIATION <https://www.atta.network/2024-melbourne>) — state (and territory) surcharge property taxes on New Zealand citizens who are also residents of Australia for tax purposes have, because of the invalidating operation of section 109 of the *Constitution*, been without legal effect since their introduction from 2015 onwards. For the reasons explained in the paper, these (purported) taxes are also inoperative in relation to *all other foreign nationals*, not just New Zealand citizens or other treaty-protected persons.

After this prize-winning research was highlighted to the media (see, eg, Media Release: State and territory foreigner property tax laws unconstitutional, urgent redrafts needed (unimelb.edu.au) <https://fbe.unimelb.edu.au/newsroom/media-release-state-and-territory-foreigner-property-tax-laws-unconstitutional-urgent-redrafts-needed>), Parliament passed the *Treasury Laws Amendment (Foreign Investment) Act 2024* (Cth) in an attempt to address the issue. The Act provides in schedule 1 that (with retrospective effect from 1 January 2018):

> The operation of a provision of an agreement provided for by subsection (1) [of section 5 of the *International Tax Agreements Act 1953* (Cth)] is subject to anything inconsistent with the provision contained in a law of the Commonwealth, or of a State or Territory, that imposes a tax other than Australian tax [ie a tax other than income tax or fringe benefits tax], unless expressly provided otherwise in that law.

However, for the reasons publicly highlighted at 'Fair(ness) Go(ne)'? Foreigner Surcharge Taxes and Tax Non-Discrimination - Austaxpolicy: The Tax and Transfer Policy Blog <https://www.austaxpolicy.com/fairness-gone-foreigner-surchage-taxes-and-tax-non-discrimination/> (on the entry dated 15 February and, most recently, on 11 April), the Act itself is likely unconstitutional.

This would, therefore, leave the unsatisfactory status quo, already described above, relevantly unchanged.

Conversely, if the Act is, in fact, effective, it would give rise to sovereign risk by putting Australia in breach of its obligations to New

Zealand under the clear terms of article 24 of the current *Australia–New Zealand Double-Tax Agreement*. (It is well known that a national government is liable under international law for the conduct of its constituent territorial units.) At present, there arguably is no breach because the offending state and territory taxes have no legal force as a result of, amongst others, section 109.

The clear way out of this apparent catch-22 would be to renegotiate the existing *Australia–New Zealand Double-Tax Agreement* to remove article 24(7), although it should be noted that this expansive tax non-discrimination clause largely reflects the tax non-discrimination clause in the Organisation for Economic Co-operation and Development's *Model Tax Convention on Income and on Capital*.

Australia has, with seven other countries, double-tax agreements that also contain expansive tax non-discrimination clauses along the lines of article 24, but the government has not, at the present time, indicated publicly any intention to renegotiate these double-tax agreements.

It should, further, be remembered that even if the Act is effective or article 24(7) is removed (or both), the potential risk that is created under section 10 of the *Racial Discrimination Act 1975* (Cth) by the way in which the relevant taxes operate in practice, which is discussed in Are various state and territory property taxes on foreigners constitutionally unsafe? (liv.asn.au) <https://www.liv.asn.au/Web/Law_Institute_Journal_and_News/Web/LIJ/Year/2023/08August/Are_various_state_and_territory_property_taxes_on_foreigners_constitutionally_unsafe.aspx?WebsiteKey=379de5d4-8ebb-4b68-9c16-57da01ce5b3f> (and expanded upon in 'Is Fiscal "Fortress Australia" a Legal Sandcastle? The Emperors' (and Empress') New Taxes on Aliens', publicly available at Papers - Google Drive <https://drive.google.com/drive/folders/1edeEsLBDwi0SdrYO5eGf64IzdcjoZEUB> from the 'Papers' link at ATTA Annual Conference - Melbourne 2024 — AUSTRALASIAN TAX TEACHERS ASSOCIATION <https://www.atta.network/2024-melbourne>), remains unaddressed.

I am at your disposal in relation to any questions that you might have.

Yours sincerely

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