INSURANCE COUNCIL OF AUSTRALIA

Mr Greg Wood
Manager, Base Erosion and Profit Shifting Unit
Corporate and international Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

**Email**: BEPS@treasury.gov.au

8 February 2017

Dear Mr Wood

## AUSTRALIA'S ADOPTION OF THE BEPS CONVENTION (MULTILATERAL INSTRUMENT)

The Insurance Council of Australia[1] (the Insurance Council) welcomes the opportunity to provide its views on the Treasury's consultation paper concerning Australia's adoption of the BEPS Convention (the Consultation Paper), which seeks stakeholder input on the impacts of Australia signing and ratifying the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (the Multilateral Instrument).

This submission focuses on the Consultation Paper's proposed initial approaches to adoption of the Multilateral Instrument articles concerning the lowering of the permanent establishment (PE) taxable presence threshold (articles 12 to14) and implementation of a binding Mutual Agreement Procedure (MAP) arbitration framework (articles 18 to 26).

### Permanent Establishment Threshold

The Insurance Council submits that the proposed lowering of Australia's treaty PE threshold, through adopting Multilateral Instrument articles 12 to 14, would result in increased compliance burden and taxation uncertainty around potential deemed profits.

A PE threshold would generally be triggered where a non-resident of a country had intermediaries (e.g. employees or agents) in the source country who would habitually exercise their authority to *conclude* contracts on behalf of the non-resident.  Adopting Multilateral Instrument articles 12 to 14 would significantly change this.

---

[1] The Insurance Council of Australia is the representative body of the general insurance industry in Australia.  Our members represent more than 90 percent of total premium income written by private sector general insurers.  Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system.  September 2016 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of $44.1 billion per annum and has total assets of $120.5 billion.  The industry employs approximately 60,000 people and on average pays out about $124.6 million in claims each working day.

Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

Article 12, for instance, would lower Australia's treaty PE threshold by shifting the test from an intermediary 'concluding contracts' to a test of where an intermediary "*habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise*"[2].

If a decision is made to lower Australia's treaty PE threshold, we submit that the negative impact of this should be recognised and addressed by the Government, through the adoption of the OECD's 'functionally separate entity approach'[3] (FSE Approach) to the determination of profits attributable to a PE, as provided in the OECD's 2010 *Report on the Attribution of Profits to Permanent Establishments*[4]. Adopting the OECD's FSE Approach would help facilitate a consistent approach to the attribution of profits to PEs between other jurisdictions.

The Insurance Council considers that this would be an appropriate 'quid pro quo' with respect to the increased compliance burden and uncertainty that would result from any lowering of Australia's treaty PE threshold.

As the Treasury will appreciate, there is a significant level of support for Australia to adopt the OECD's FSE Approach. All of the submissions[5] to the Board of Taxation's 2012 *Review tax arrangements applying to permanent establishments* supported Australia's adoption of the FSE Approach. Ernst and Young, for instance, explained that adoption would provide greater certainty to Australian taxpayers; reduce administrative and compliance costs; and enhance Australia's attractiveness as a financial services centre[6].

Additionally, we note that the United Kingdom has chosen not to adopt those Multilateral Instrument articles that would lower PE thresholds[7]. The industry's understanding is that the United Kingdom's HM Treasury considers the marginal PE tax that may not be collected under current treaties (in conjunction with domestic legislation) to be insufficient to justify the significant increase in compliance burden on taxpayers.

### Binding Mutual Agreement Procedure Arbitration Framework

The Consultation Paper notes that Australia's proposed initial approach to the Multilateral Instrument articles 18 to 26 could[8] include adopting Article 19(12), which would exclude from arbitration any cases that have already had court decisions. However, the Insurance Council is strongly of the view that court decisions should not be excluded from subsequent arbitration. The industry understands that this view is also consistent with the United Kingdom's position.

---

[2] OECD Multilateral Instrument Part IV, Article 12. Page 19 refers.

[3] The OECD's FSE Approach hypothesises the PE as a separate enterprise engaged in the same or similar activities under the same or similar conditions, taking into account functions performed, assets used and risks assumed by the PE. Board of Taxation, 2012 Discussion Paper Review of Tax Arrangements Applying to Permanent Establishments. Pages 15-16.

[4] OECD Report on the Attribution of Profits to Permanent Establishments.

[5] Board of Taxation, all 6 submissions to the *Review of Tax Arrangements Applying to Permanent Establishments*.

[6] Ernst & Young submission to the *Review of Tax Arrangements Applying to Permanent Establishments.* Pages 26-27 refer.

[7] KPMG December 2016, '*HM Treasury and HMRC set out how the UK plans to respond to changes to bilateral tax treaties proposed by the BEPS Multilateral Instrument*', Insights Article.

[8] "… *possibly enter the reservations permitted by Article 19(12)",* the Treasury's consultation paper, *Australia's adoption of the BEPS Convention (Multilateral Instrument)*. Page 31 refers.

If you have any questions or comments in relation to our submission, please contact John Anning, the Insurance Council's General Manager Policy, Regulation Directorate, on (02) 9253 5121 or janning@insurancecouncil.com.au.

Yours sincerely

Robert Whelan
Executive Director and CEO