

# Report 99

## **Treaties tabled on 3 December 2008 and 3 February 2009**

Optional Protocol to the Convention on the Rights of Persons with Disabilities,  
New York, 13 December 2006

Agreement between the Government of Australia and the Government of the  
British Virgin Islands for the Exchange of Information Relating to Taxes  
(London, 27 October 2008)

Agreement between the Government of Australia and the Government of the  
British Virgin Islands for the Allocation of Taxing Rights with Respect to Certain  
Income of Individuals (London, 27 October 2008)

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## Membership of the Committee

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	Mr Chris Trevor MP (until 5/2/09)	
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# Resolution of Appointment

The Resolution of Appointment of the Joint Standing Committee on Treaties allows it to inquire into and report on:

- a) matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament;
- b) any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
  - (i) either House of the Parliament, or
  - (ii) a Minister; and

such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.



## List of abbreviations

AFDO	Australian Federation of Disability Organisations
ATO	Australian Taxation Office
AUSTRAC	Australian Transaction Reports and Analysis Centre
BVI	British Virgin Islands
CRPD	Convention on the Rights of Persons with Disabilities
NIA	National Interest Analysis
OECD	Organisation for Economic Co-operation and Development
OIL	Office of International Law
TIEA	Tax Information Exchange Agreement
UN	United Nations





## List of recommendations

### 2 Optional Protocol to the Convention on the Rights of Persons with Disabilities

#### Recommendation 1

The Committee recommends that the Australian Government makes advice available via the Attorney-General's Department website and/or other fora as to:

- when all domestic avenues of complaint under Australia's anti-discrimination regime would be considered to be exhausted; and
- the process a complainant would need to undertake in order to lodge a complaint with the *United Nations Committee on the Rights of Persons with Disabilities*.

#### Recommendation 2

The Committee supports the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* and recommends that binding treaty action be taken.

### 3 Two taxation agreements with the British Virgin Islands

#### Recommendation 3

The Committee supports the *Agreement between the Government of Australia and the Government of the British Virgin Islands for the Exchange of Information Relating to Taxes* and recommends that binding treaty action be taken.

#### Recommendation 4

The Committee supports the *Agreement between the Government of Australia and the Government of the British Virgin Islands for the Allocation of Taxing Rights with Respect to Certain Income of Individuals* and recommends that binding treaty action be taken.



## Introduction

### Purpose of the Report

- 1.1 This report contains advice to Parliament on the review by the Joint Standing Committee on Treaties of three treaty actions tabled in Parliament on 3 December 2008 and 3 February 2009. These treaty actions are:
- *Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities (New York, 13 December 2006)*<sup>1</sup>
  - *Agreement between the Government of Australia and the Government of the British Virgin Islands for the Exchange of Information Relating to Taxes (London, 27 October 2008)*
  - *Agreement between the Government of Australia and the Government of the British Virgin Islands for the Allocation of Taxing Rights with Respect to Certain Income of Individuals (London, 27 October 2008)*<sup>2</sup>.
- 1.2 The Report refers frequently to the National Interest Analysis (NIA) prepared for each proposed treaty action. This document is prepared by the Government agency (or agencies) responsible for the administration of Australia's responsibilities under each treaty.

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1 Australia, House of Representatives 2008, *Votes and Proceedings*, No. 68, p. 784; Australia, Senate 2008, *Journal*, No. 51, p. 1389.

2 Australia, House of Representatives 2008-09, *Votes and Proceedings*, No. 70, p. 811; Australia, Senate 2008-09, *Journal*, No. 53, p. 1480.

Copies of each NIA may be obtained from the Committee Secretariat or accessed through the Committee's website at:

[www.aph.gov.au/house/committee/jsct/3december2008/tor.htm](http://www.aph.gov.au/house/committee/jsct/3december2008/tor.htm)

[www.aph.gov.au/house/committee/jsct/3february2009/tor.htm](http://www.aph.gov.au/house/committee/jsct/3february2009/tor.htm)

- 1.3 Copies of each treaty action and NIA may also be obtained from the Australian Treaties Library maintained on the internet by the Department of Foreign Affairs and Trade. The Australian Treaties Library is accessible through the Committee's website or directly at:

[www.austlii.edu.au/au/other/dfat/](http://www.austlii.edu.au/au/other/dfat/)

## Conduct of the Committee's Review

- 1.4 The reviews contained in this report were advertised in the national press and on the Committee's website.<sup>3</sup> Invitations to lodge submissions were also sent to all State Premiers, Chief Ministers, Presiding Officers of parliaments and to individuals who have expressed an interest in being kept informed of proposed treaty actions. Submissions received and their authors are listed at Appendix A and Exhibits received are listed at Appendix B.
- 1.5 The Committee also received evidence at a public hearing on 23 February 2009 in Canberra. A list of witnesses who appeared at the public hearing is at Appendix C. Transcripts of evidence from public hearings may be obtained from the Committee Secretariat or accessed through the Committee's website at:

[www.aph.gov.au/house/committee/jsct/3february2009/hearings.htm](http://www.aph.gov.au/house/committee/jsct/3february2009/hearings.htm)

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3 The Committee's review of the proposed treaty actions was advertised in *The Australian* on 18 February 2009. Members of the public were advised on how to obtain relevant information both in the advertisement and via the Committee's website, and invited to submit their views to the Committee.

## Optional Protocol to the Convention on the Rights of Persons with Disabilities

### Background

- 2.1 The proposed treaty action is accession to the *Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities*.
- 2.2 The United Nations Convention on the Rights of Persons with Disabilities (CRPD) entered into force for Australia on 16 August 2008 (see JSCOT Reports 92 and 95). Parties to the CRPD are obliged to ensure and promote recognition of the economic, social and cultural rights of people living with disabilities.<sup>1</sup> As a Party to the CRPD Australia can now accede to the Optional Protocol to the CRPD.<sup>2</sup>
- 2.3 The Committee was informed that there are essentially two aspects to the Optional Protocol. First, it enables individuals living with disabilities within Australia to lodge unresolved complaints with the United Nations Committee on the Rights of Persons with Disabilities (the Disability Committee) once all domestic remedies have been exhausted. Second, it permits the Disability Committee to initiate and conduct its own inquiries where it suspects a grave or systemic breach of the CRPD is taking place.<sup>3</sup>

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1 NIA on the United Nations Convention on the Rights of Persons with Disabilities, p. 3.

2 NIA, paras 1& 2.

3 Mr Peter Arnaudo, *Transcript of Evidence*, 23 February 2009, p. 7.

- 2.4 The Disability Committee consists of 12 independent experts elected by State Parties to the CRPD. Currently an Australian, Professor Ronald McCallum AO, is an elected member of the Disability Committee.<sup>4</sup>
- 2.5 As at February 2009, there are 137 State Parties to the CRPD and 28 State Parties to the Optional Protocol.<sup>5</sup>

## Obligations

- 2.6 The primary obligations of State Parties to the Optional Protocol are to recognise the Disability Committee's competence, assist in its inquiries and to provide written responses to the Disability Committee's communications and recommendations.
- 2.7 Article 1 provides that parties to the Optional Protocol recognise the ability of the Disability Committee to receive and consider communications from individuals subject to its jurisdiction. These communications may be received by the Disability Committee only after all domestic remedies for the complaint have been exhausted, and only in relation to events occurring after the Optional Protocol enters into force for the relevant State Party. The Disability Committee will then consider whether to accept the communication as admissible (Article 2).<sup>6</sup>
- 2.8 Any communications submitted to the Disability Committee are confidentially brought to the attention of the State Party. The State Party is then required to provide a written response, within six months, to the Disability Committee clarifying the matter and any solution that may have been implemented (Article 3).
- 2.9 The Disability Committee, at any time after receiving a communication and before determining its admissibility, may make a non-binding request to the State Party that urgent interim action be taken to avoid possible irreparable damage to the victim (Article 4).
- 2.10 The Disability Committee will then consider the communication and forward its suggestions and recommendations, if any, to the State

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4 NIA, para 9.

5 Office of the United Nations High Commissioner for Human Rights 2009, OHCHR, Geneva, viewed 12 February 2009  
<<http://www2.ohchr.org/english/bodies/crpd/index.htm>>

6 NIA, paras 4 & 15.

Party and the complainant. All communications and meetings are in-confidence (Article 5).<sup>7</sup>

- 2.11 Articles 6(1) and 6(2) of the Optional Protocol set out that, following receipt of reliable evidence indicating a grave and systemic breach, the Disability Committee will invite the State Party concerned to cooperate in the examination of the information and submit observations. The Disability Committee may then designate one or more of its members to conduct an inquiry and to report back urgently. Where warranted, and with the consent of the State Party concerned, the inquiry may include a visit to the territory of the State Party. All inquiries are conducted in cooperation with the State Party and are in-confidence.<sup>8</sup>
- 2.12 Once the Disability Committee has completed its inquiry, it will convey its conclusions, comments and recommendations to the State Party concerned. The State Party will then have six months in which to respond by submitting its observations to the Disability Committee (Articles 6(3) and 6(4)). The Disability Committee's findings and recommendations are not legally binding on State Parties.<sup>9</sup>
- 2.13 Whilst recommendations made by the Disability Committee are not binding, one submission to the inquiry pointed out that the obligations of the CRPD itself are binding. The submitter argued that if the Disability Committee finds that a systemic violation is taking place and makes a recommendation via the mechanisms provided by the Optional Protocol, the State Party may be obliged to take action to remedy this violation to ensure it is abiding by its obligations under the CRPD.<sup>10</sup>
- 2.14 The Attorney-General's Department also suggested that, whilst the recommendations are not binding, they may be a very persuasive moral force which governments will need to take seriously.<sup>11</sup>

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7 NIA, para 17.

8 NIA, para 18.

9 NIA, para 4 & 19.

10 Regulatory Institutions Network, *Submission No. 11*, p. 2.

11 Mr Peter Arnaudo, *Transcript of Evidence*, 23 February 2009, p. 9.



## Reasons for Australia to take treaty action

- 2.15 The Committee received a number of submissions supporting accession to the Optional Protocol. Many of the submitters considered that accession to the Optional Protocol would promote the inclusion and participation of people living with disabilities in all aspects of life and the law within Australia.<sup>12</sup>
- 2.16 Additionally, a representative from the Australian Federation of Disability Organisations (AFDO) suggested that accession to the Optional Protocol would raise public awareness of the barriers faced by people with disabilities and how the public can be a part of the solution.<sup>13</sup>
- 2.17 The Attorney-General's Department considered that accession to the Optional Protocol would provide an extra layer of accountability to Australia's antidiscrimination measures.<sup>14</sup>
- 2.18 A number of submitters to the inquiry were also of the view that participation in the Optional Protocol would demonstrate to the international community Australia's confidence in its human rights record and its willingness to be open and accountable when it comes to human rights. Some submitters also suggested that accession to the Optional Protocol would promote the rights of people with disabilities within our region and on the international stage.<sup>15</sup>
- 2.19 The Government considered that accession to the Optional Protocol would reinforce the Australian Government's commitment to membership of the United Nations (UN) as one of the three pillars underpinning its approach to foreign policy.<sup>16</sup> This view was further advocated in a range of submissions to the inquiry.<sup>17</sup>

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12 Regulatory Institutions Network, *Submission No. 11*, p. 2; NSW Disability Discrimination Legal Centre, *Submission No. 5*, p. 2; Blind Citizens Australia, *Submission No. 7*, p.1; Public Interest Advocacy Centre, *Submission No. 8*, p. 1; Australian Association for Families of Children with a Disability, *Submission No. 12*, p. 2.

13 Mr Frank Hall-Bentick, *Transcript of Evidence*, 23 February 2009, p. 16.

14 Mr Peter Arnaudo, *Transcript of Evidence*, 23 February 2009, p. 9.

15 Regulatory Institutions Network, *Submission No. 11*, p. 2; NSW Disability Discrimination Legal Centre, *Submission No. 5*, p. 2; Blind Citizens Australia, *Submission No. 7*, p.1; Public Interest Advocacy Centre, *Submission No. 8*, p. 1; Mr Stephen Brown, *Submission No. 4*, p. 1; Dr Ben Saul, *Submission No. 10*, p. 1; NSW Young Lawyers, *Submission No. 13*, p. 3.

16 NIA, para 7.

17 Regulatory Institutions Network, *Submission No. 11*, p. 2; Mr Stephen Brown, *Submission No. 4*, p. 1; Human Rights Law Resource Centre, *Submission No. 6* p. 10.

- 2.20 Australia is a party to four other treaties that provide for similar external appeal mechanisms. These treaties are:
- First Optional Protocol to the International Covenant on Civil and Political Rights;
  - Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment;
  - Convention on the Elimination of all Forms of Racial Discrimination; and
  - Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women.<sup>18</sup>
- 2.21 A number of submissions to the inquiry argued that, in light of Australia's accession to the above-mentioned treaties, accession to the Optional Protocol to the CRPD is imperative to ensure that the rights of people with disabilities are on an equal footing with the rights ensured by these other treaties.<sup>19</sup>
- 2.22 The Attorney-Generals Department considered that the number of communications made under the Optional Protocol is likely to be relatively few, given that Australia is in compliance with the immediately applicable obligations outlined in the CRPD.<sup>20</sup> A number of submissions to the inquiry supported the view that accession to the Optional Protocol is unlikely to prompt a large number of communications to the Disability Committee.<sup>21</sup> However, one submitter to the inquiry stated their intention, upon Australia's accession to the Optional Protocol, to appeal to the Disabilities Committee about alleged on-going breaches of the CRPD.<sup>22</sup>
- 2.23 Submitters also suggested that accession to Optional Protocol would help to give effect to the CRPD by helping to identify and ensure compliance with Australia's obligations under the CRPD. It was also considered that the recommendations of the Disability Committee

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18 NIA, para 11.

19 Regulatory Institutions Network, *Submission No. 11*, p. 2; Australian Federation of Disability Organisations, *Submission No. 3*, p. 3; NSW Young Lawyers, *Submission No. 13*, p. 4.

20 NIA, para 13.

21 Regulatory Institutions Network, *Submission No. 11*, p. 2; Mr Stephen Brown, *Submission No. 4*, p. 4; NSW Disability Discrimination Legal Centre, *Submission No. 5*, p. 4; Human Rights Law Resource Centre, *Submission No. 6* p. 13.

22 Mr Stephen Kilkeary, *Submission No. 9*, p. 2.

would benefit Australia's pursuit of human rights as they would be made by informed independent experts with a wide range of experience in disability rights issues.<sup>23</sup>

2.24 One submitter argued that:

the Disability Committee ... would be able to consider whether or not Australian laws, policies and procedures are compliant with and are being interpreted and applied consistent with the Convention rights and State Party obligations. Where the Disability Committee determines they are not, their reasoning will provide important guidance on the challenged law or policy and how it can and should be modified to ensure Convention rights are protected and obligations are fulfilled.<sup>24</sup>

## Opposition to Optional Protocol

2.25 The Committee received one submission from FamilyVoice Australia opposing Australia's accession to the Optional Protocol.<sup>25</sup>

2.26 The key issues raised were:

- allowing complaints to be considered by a UN Committee could undermine Australian domestic law and legal sovereignty at both the federal and state/territory level;
- the Optional Protocol could lead to increased liberalisation of Australian laws; and
- the Disability Committee lacks neutrality and has a particular ideological focus.

2.27 FamilyVoice Australia argued:

The fundamental notion of Australia as a sovereign nation is compromised by allowing a committee of foreigners, appointed by the nations which have ratified the Convention,

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23 Regulatory Institutions Network, *Submission No. 11*, p. 2; NSW Disability Discrimination Legal Centre, *Submission No. 5*, p. 2; Human Rights Law Resource Centre, *Submission No. 6* p. 7; Blind Citizens Australia, *Submission No. 7*, p.1; Public Interest Advocacy Centre, *Submission No. 8*, p. 2; Dr Ben Saul, *Submission No. 10*, p. 1; Australian Association for Families of Children with a Disability, *Submission No. 12*, p. 2.

24 Public Interest Advocacy Centre, *Submission No. 8*, p. 2

25 FamilyVoice Australia, *Submission No. 2*.

to second guess the outcome of domestic judicial proceedings or the validity of laws passed by our parliaments.<sup>26</sup>

- 2.28 Representatives from the Attorney-General's Department outlined the department's position on these issues. First, the recommendations made by the Disability Committee, whilst persuasive, are non-binding. Thus the Australian Government will maintain sovereign control over its own affairs including its antidiscrimination and human rights laws.<sup>27</sup> Secondly, members of the Disability Committee are independent human rights experts elected by the will of all of the countries who are party to the CRPD. These members do not serve on the Disability Committee as representatives of their respective governments but rather as independent experts in the field of protecting the rights of people with disability.<sup>28</sup>

## Implementation

- 2.29 The Optional Protocol will not require changes to current Commonwealth, State and Territory legislation, policies or programs.
- 2.30 Australia will need to submit a written response to any communications from the Disability Committee. Australia will be expected to cooperate with the Disability Committee and may be requested to permit the Disability Committee to visit Australia in the course of its inquiries. No legislative or procedural changes are required in order for Australia to recognise the competence of the Disability Committee to receive and inquire into complaints in this manner.
- 2.31 The Office of International Law (OIL), within the Attorney-General's Department, will be responsible for drafting all reports and submissions to the Disability Committee. In preparing submissions, OIL will consult with the Australian Government department with portfolio responsibility for the issue raised, as well as any State or Territory Governments whose policies may be affected.
- 2.32 A number of submissions to the inquiry suggested mechanisms for considering any recommendations or views of the Disability
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26 FamilyVoice Australia, *Submission No. 2*, p. 1.

27 Mr Peter Arnaudo, *Transcript of Evidence*, 23 February 2009, p. 9.

28 Mr Peter Arnaudo, *Transcript of Evidence*, 23 February 2009, p. 14.

Committee. One submission suggested that the Government should table any views and observations of the Disability Committee in all Commonwealth, State and Territory legislatures and adopt the practices of referring any recommendations to the relevant parliamentary committees.<sup>29</sup> Submissions further argued that any recommendations of the Disability Committee should be the subject of consultations with the disability sector.<sup>30</sup>

## Access to appeal mechanisms

- 2.33 A representative from the Attorney-General's Department described the current domestic complaint mechanisms available to Australians living with disabilities. At the state and territory level there are antidiscrimination laws which permit complaints to be heard by various state and territory-level human rights commissions and courts. At the federal level, people are protected by the *Disability Discrimination Act 1992*. According to the Act, complaints can be made to the Human Rights and Equal Opportunity Commission. The Commission will then try to resolve the complaint. If the complaint remains unresolved, a person can take action in the Federal Court or the Federal Magistrates Court. The court then orders which measures should be taken, including compensation, apology or restricting the complainant from pursuing the matter further.<sup>31</sup>
- 2.34 If a complainant is still not satisfied with the ruling of the Federal Court, a communication could then be lodged with the Disability Committee. This communication would most likely take the form of a written letter which would have to demonstrate that all domestic remedies have been exhausted. If the communication is accepted by the Disability Committee, it would then conduct its inquiry in consultation with the Australian Government, relevant State/Territory governments and interested non-governmental organisations.<sup>32</sup>
- 2.35 A representative from the AFDO suggested that it is not clear when all domestic remedies would be exhausted and when an appeal could

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29 Regulatory Institutions Network, *Submission No. 11*, p. 3

30 Mr Stephen Brown, *Submission No. 4*, p. 3; Public Interest Advocacy Centre, *Submission No. 8*, p. 2.

31 Mr Peter Arnaudo, *Transcript of Evidence*, 23 February 2009, p. 8.

32 Mr Peter Arnaudo, *Transcript of Evidence*, 23 February 2009, p. 11.

be made to the Disability Committee. The representative expressed the need for the Government to make clear to complainants the pathway they would have to follow in order to make an appeal to the Disability Committee.<sup>33</sup>

## Costs

- 2.36 The costs of preparing and submitting written explanations or statements to the Disability Committee are expected to be absorbed within the usual budget of the Attorney-General's Department. Any costs associated with visits by the Disability Committee would also be absorbed within the usual budget of the Departments involved.<sup>34</sup>

## Future treaty action

- 2.37 Article 15 provides that any State Party may propose an amendment to the present Optional Protocol. Amendments will only be binding on those State Parties that have accepted the amendment.<sup>35</sup>
- 2.38 Article 16 provides that a State Party may denounce the Optional Protocol by written notification to the Secretary-General of the UN. A denunciation becomes effective one year after receipt of notification.<sup>36</sup>

## Consultation

- 2.39 Relevant Commonwealth Ministers and agencies and State and Territory Governments were consulted about the Optional Protocol and have provided support for accession.
- 2.40 Consultation on the Optional Protocol was undertaken with the disability sector during Australia's initial accession to the CRPD. These consultations were undertaken by the AFDO, the National Association of Community Legal Centres, People With Disabilities

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33 Mr Frank-Hall Bentick, *Transcript of Evidence*, 23 February 2009, p. 17.

34 NIA, para 26.

35 NIA, paras 28 to 30.

36 NIA, para 31.

and the State and Territory Disability Advisory Councils. All consultations strongly supported Australia's accession to both the CRPD and its Optional Protocol.

- 2.41 The Attorney-General's Department also sought submissions specifically on the implementation, and obligations under, the Optional Protocol. A range of disability and other organisations responded to this request. The large majority of submissions urged Australia to become a Party to the Optional Protocol.<sup>37</sup>

## Conclusions and recommendations

- 2.42 The Committee notes the concern put forward by the AFDO that the means by which a complainant can determine that all domestic avenues have been exhausted, and thus that a complaint can be made to the Disability Committee, are not clear. The Committee therefore considers that as part of the implementation of the Optional Protocol every effort should be made by the Australian Government to clearly identify for potential complainants when all domestic avenues would be considered to be exhausted, and how to lodge a communication with the Disability Committee.
- 2.43 The Committee is of the view that the Optional Protocol will provide an additional mechanism to protect and promote the rights of persons with disabilities. The Committee considers that accession to the Optional Protocol will demonstrate Australia's commitment to human rights and allow international scrutiny of this commitment to take place. It therefore supports binding treaty action being taken.

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<sup>37</sup> Mr Peter Arnaudo, *Transcript of Evidence*, 23 February 2009, p. 8; NIA, Attachment on consultation, para 40.

### **Recommendation 1**

The Committee recommends that the Australian Government makes advice available via the Attorney-General's Department website and/or other fora as to:

- when all domestic avenues of complaint under Australia's anti-discrimination regime would be considered to be exhausted; and
- the process a complainant would need to undertake in order to lodge a complaint with the *United Nations Committee on the Rights of Persons with Disabilities*.

### **Recommendation 2**

The Committee supports the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* and recommends that binding treaty action be taken.





## Two taxation agreements with the British Virgin Islands

### Introduction

3.1 This chapter considers two treaties:

- *Agreement between the Government of Australia and the Government of the British Virgin Islands for the Exchange of Information Relating to Taxes; and*
- *Agreement between the Government of Australia and the Government of the British Virgin Islands for the Allocation of Taxing Rights with Respect to Certain Income of Individuals.*

3.2 The purpose of the first agreement, commonly referred to as a Tax Information Exchange Agreement or TIEA, is to establish a legal basis for the exchange of tax information between Australia and the British Virgin Islands (BVI).

3.3 The second agreement is part of a package of benefits that is being offered to the BVI to encourage it to conclude the TIEA.<sup>1</sup> The agreement will relieve double taxation of certain cross-border income derived by the residents of both countries.<sup>2</sup>

3.4 The BVI is a self-governing crown colony of the United Kingdom, located in the north-eastern Caribbean Sea. It has a low-tax structure and is known internationally as a centre for incorporating 'offshore companies'. Low-tax jurisdictions can be used in arrangements designed to avoid paying tax

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1 Allocation of Taxation Rights Agreement NIA, para 7.

2 Mr Mike Rawstron, *Transcript of Evidence*, 23 February 2009, p. 19.

elsewhere. In particular, assets and income that are subject to Australian tax can be concealed by their secrecy laws.<sup>3</sup>

- 3.5 The level and type of economic activity between Australia and the BVI is not fully known, however data held by the Australian Transaction Reports and Analysis Centre (AUSTRAC) indicates a relatively high flow of funds between the two countries.<sup>4</sup>

## Reasons to take treaty action

- 3.6 The TIEA is the fifth agreement of this kind for Australia. Other agreements have been signed with Bermuda, Antigua and Barbuda, the Netherlands Antilles and the Isle of Man, and negotiations are underway for a further six agreements with Aruba, Granada, Guernsey, Jersey, Nauru and the Marshall Islands.<sup>5</sup>
- 3.7 The TIEA is considered an important component in efforts to combat offshore tax evasion. It will broaden the effectiveness of Australia's ability to administer and enforce its domestic tax laws, by making it harder for taxpayers to avoid or evade Australian tax. It will also discourage taxpayers from participating in abusive tax arrangements by increasing the probability of detection.<sup>6</sup> Representatives of the Australian Taxation Office informed the Committee that these agreements are useful in obtaining information where a taxpayer or transaction of interest has been identified.<sup>7</sup>
- 3.8 Both agreements are considered important elements of Australia's ongoing commitment to the OECD's efforts to curb tax avoidance and evasion through international cooperation.<sup>8</sup> The BVI is one of 35 countries working with the OECD under the auspices of the Global Forum on Taxation to develop international standards of transparency and effective information exchange to eliminate harmful tax practices.<sup>9</sup>
- 3.9 Treasury considered that the BVI is interested in concluding the proposed agreements because:

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3 TIEA NIA, paras 4, 12.

4 TIEA NIA, para 12.

5 Mr Malcolm Allen, *Transcript of Evidence*, 23 February 2009, pp. 20, 21.

6 TIEA NIA, para 14.

7 Mr Malcolm Allen, *Transcript of Evidence*, 23 February 2009, p. 21.

8 Mr Mike Rawstron, *Transcript of Evidence*, 23 February 2009, p. 19.

9 TIEA NIA, para 10.

The reputation issue is important for them. They do not want to be identified as a tax haven which is implicated in hiding fraudulent or criminal activity.<sup>10</sup>

- 3.10 In addition, Treasury identified the work being undertaken by the G20 on the extent to which tax havens have contributed to the global financial crisis through a lack of transparency, particularly in the financial system, as well as measures in the United States and Europe to counter tax havens, as contributing to the BVI's willingness to conclude the agreement.<sup>11</sup>
- 3.11 The Committee received a submission from the Victorian and Tasmanian Synod of the United Church of Australia supporting Australia's entry into these agreements. The Synod emphasised to the Committee the importance of global efforts to combat corruption facilitated by the harmful tax practices of tax havens.<sup>12</sup>

## Taxation Information Exchange Agreement (TIEA)

- 3.12 This agreement will help Australia to protect its revenue base and improve the integrity of the Australian taxation system by allowing the Commissioner for Taxation to request and receive certain information held in the BVI.<sup>13</sup>
- 3.13 Article 1 obliges both parties to exchange information where the information is relevant to the administration and enforcement of the parties' domestic tax laws, including the collection of taxes and the investigation and prosecution of tax matters.
- 3.14 The parties are obliged to provide such information when requested to do so in writing (Article 5(1)). There is no provision in the agreement to authorise voluntary or unsolicited exchange of information between the parties.<sup>14</sup>
- 3.15 Where the Commissioner of Taxation does not hold the information necessary to comply with the request, Australia must use all relevant information gathering measures to provide the requested information even if not required for domestic tax purposes (Article 5(2)).

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10 Mr Mike Rawstron, *Transcript of Evidence*, 23 February 2009, p. 23.

11 Mr Mike Rawstron, *Transcript of Evidence*, 23 February 2009, p. 23.

12 Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission No. 2*.

13 TIEA National Interest Analysis (NIA), paras 4, 6.

14 TIEA NIA, para 16.

- 3.16 Information must be provided as promptly as possible (Article 5(6)) and must be kept confidential (Article 8).
- 3.17 Under Article 11, both countries are obliged not to apply prejudicial or restrictive measures based on harmful tax practices to residents or nationals of either country while the agreement is in force. This means that once the mechanisms are in place to exchange information, Australia agrees not to take further defensive measures against the BVI.<sup>15</sup> Treasury indicated that in addition to protecting their reputation, countries such as the BVI that enter into a TIEA want assurance that Australia is not going to take action against them even though they have entered into an agreement.<sup>16</sup>

### Implementation and costs

- 3.18 No further legislation is required to implement the agreement.
- 3.19 The agreement will have a small administrative and financial impact on the Australian Taxation Office (ATO) as it is likely that most requests for information will originate from Australia. A Memorandum of Understanding will be concluded between the two countries to clarify costs that will be borne by the ATO.<sup>17</sup>
- 3.20 The Committee also notes that the package of additional benefits that Australia is offering to countries concluding a TIEA includes technical assistance in establishing the processes they will need to be able to exchange information with Australia. The costs associated with this are just over \$100,000 per year.<sup>18</sup>

### Agreement for the allocation of taxing rights with respect to certain individuals

- 3.21 This agreement is the first of its kind for Australia but its operative provisions are consistent with provisions contained in Australia's more comprehensive bilateral tax treaties.<sup>19</sup>

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15 Mr Mike Rawstron, *Transcript of Evidence*, 23 February 2009, p. 23.

16 Mr Mike Rawstron, *Transcript of Evidence*, 23 February 2009, p. 24.

17 TIEA NIA, paras 24 and 25.

18 Mr Mike Rawstron, *Transcript of Evidence*, 23 February 2008, p. 22.

19 Allocation of Taxing Rights Agreement NIA, para 4.

- 3.22 The Agreement provides for the allocation of taxing rights over certain income of certain individuals. It only applies to persons who are residents for taxation purposes of Australia or the BVI.
- 3.23 Australia is obliged to forego its taxing rights over certain income derived by government employees and students who are residents of the BVI:
- Under Article 5, Australia cannot tax the salaries of government employees of the BVI working in Australia in government service for non-commercial purposes. Australia and the BVI will therefore have sole taxing rights over the salaries that they pay to individuals undertaking government functions.<sup>20</sup>
  - Under Article 6, Australia cannot tax maintenance, education or training payments received by students or business apprentices from the BVI who are temporarily studying in Australia, where those payments are made from outside Australia. Other income will remain liable to Australian tax.<sup>21</sup>

## Implementation and costs

- 3.24 Minor amendments will be required to the *International Tax Agreements Act 1953* to give effect to the agreement. Treasury has indicated this legislation is expected to be introduced into Parliament in March 2009.<sup>22</sup>
- 3.25 The agreement will have a financial impact on the ATO, however this is expected to be minimal given the small number of taxpayers likely to be affected by the Agreement.<sup>23</sup>

## Consultation

- 3.26 Relevant Commonwealth Ministers, the Australian Taxation Office and State and Territory Governments were consulted in development of the both agreements. Public consultation was not undertaken.<sup>24</sup>

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20 Allocation of Taxing Rights Agreement NIA, para 12.

21 Allocation of Taxing Rights Agreement NIA, para 13.

22 Allocation of Taxing Rights Agreement NIA, para 14.

23 Mr Mike Rawstron, *Transcript of Evidence*, 23 February 2009, p. 19.

24 NIAs, Consultation Attachment.

## Conclusion and recommendations

- 3.27 The Committee recognises the importance of international efforts to combat offshore tax evasion and to establish consistent standards of tax governance between Australia and countries such as the British Virgin Islands. The Committee also recognises the domestic tax benefits arising from taxation agreements that discourage the use of certain countries as tax havens. The Committee therefore supports binding treaty action being taken.

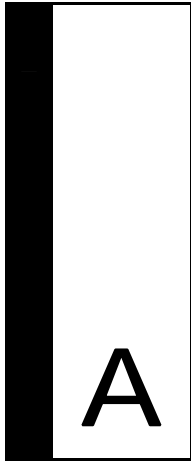
### Recommendation 3

**The Committee supports the *Agreement between the Government of Australia and the Government of the British Virgin Islands for the Exchange of Information Relating to Taxes* and recommends that binding treaty action be taken.**

### Recommendation 4

**The Committee supports the *Agreement between the Government of Australia and the Government of the British Virgin Islands for the Allocation of Taxing Rights with Respect to Certain Income of Individuals* and recommends that binding treaty action be taken.**

**Kelvin Thomson MP**  
Chair



## Appendix A - Submissions

### Treaty tabled on 3 December 2008

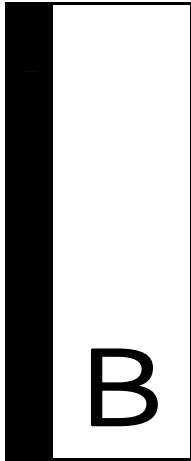
- 1 Australian Patriot Movement
- 2 Family Voice Australia
- 3 Australian Federation of Disability Organisations
- 4 Mr Stephen Graham Brown
- 5 NSW Disability Discrimination Legal Centre Inc
- 6 Human Rights Law Resource Centre Ltd
- 7 Blind Citizens Australia
- 8 Public Interest Advocacy Centre Ltd
- 9 Mr Stephen Kilkeary
- 10 Dr Ben Saul
- 11 Regulatory Institutions Network (RegNet)
- 12 Australian Association for Families of Children with a Disability
- 13 NSW Young Lawyers

### Treaties tabled on 3 February 2009

- 1.2 Australian Patriot Movement
- 2 The Uniting Church in Australia





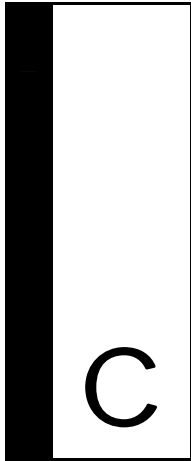


## Appendix B - Exhibits

Treaty tabled on 3 December 2008

1 CONFIDENTIAL





## Appendix C - Witnesses

**Monday, 23 February 2009 - Canberra**

### **Attorney-General's Department**

Ms Rachel Antone, Senior Legal Officer, Disability Discrimination  
Section, Human Rights Branch

Mr Peter Arnaudo, Assistant Secretary, Human Rights Branch

Mr Stephen Fox, Principal Legal Officer, Disability Discrimination  
Section, Human Rights Branch

Ms Sarah McCosker, Senior Legal Officer, Office of International Law

### **Australian Federation of Disability Organisations**

Mr Frank Hall-Bentick, AFDO Board International Portfolio

### **Australian Taxation Office**

Mr Malcolm Allen, Assistant Commissioner, International Relations

Mr Neil Cossins

### **Department of Foreign Affairs and Trade**

Mr David Mason, Executive Director, Treaties Secretariat,  
International Legal Branch

### Human Rights and Equal Opportunity Commission

Mr Graeme Innes, Human Rights Commissioner and Disability  
Discrimination Commissioner

### The Treasury

Mr Michael Rawstron, General Manager, International Tax and  
Treaties Division

Mr Gregory Wood, Policy Advisor, International Tax and Treaties  
Division