

Documents tabled on 11 March 2009:

National Interest Analysis [2009] ATNIA 7

with attachment on consultation

**Agreement between the Government of Australia and the Government of
the Isle of Man on the Exchange of Information with Respect to Taxes,
done at London on 29 January 2009 ([2009] ATNIF 5)**

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

Agreement between the Government of Australia and the Government of the Isle of Man on the Exchange of Information with Respect to Taxes, done at London on 29 January 2009 ([2009] ATNIF 5)

Nature and timing of proposed treaty action

1. The proposed treaty action is to bring the Agreement between the Government of Australia and the Government of the Isle of Man on the Exchange of Information with Respect to Taxes (the Agreement) into force. Pursuant to Article 12(1), the Agreement will enter into force when both Australia and the Isle of Man (IoM) have notified each other in writing through diplomatic channels that the constitutional and legal procedures for the entry into force of this Agreement have been completed.
2. The Agreement will then have effect:
 - From that date, with respect to criminal tax matters; and
 - From that date, with respect to civil tax matters relating to taxable periods beginning on or after that date or charges to tax arising on or after that date.
3. In relation to Australian external territories, the Agreement only applies to the external territories specifically listed in Article 4(1)(a).

Overview and national interest summary

4. The key objective of the Agreement is to establish a legal basis for the exchange of tax information relating to certain persons between the Governments of Australia and the IoM. The IoM is a self-governing dependent territory of the British Crown, located in the Irish Sea. It is not part of the United Kingdom. It has a low-tax structure and is an internationally recognised offshore financial centre.
5. Detailed information on the level and type of economic activity between Australia and the IoM is not available. However, as discussed in paragraph 12, a significant amount of funds flow between Australia and the IoM.
6. The Agreement, commonly referred to as a Tax Information Exchange Agreement (TIEA), will help Australia protect its revenue base by allowing the Commissioner of Taxation to request and receive certain information held in the IoM, and will help improve the integrity of the tax system by discouraging tax evasion by certain individuals and businesses. The Agreement provides for exchange of information on criminal and civil tax matters between Australia and the IoM. It also incorporates a number of important safeguards to protect the legitimate interests of taxpayers, including to protect confidentiality, legal privilege and to limit disclosure to relevant information that the country requesting the information would be able to obtain under its own laws.
7. This Agreement is the fifth of its kind for Australia. The first was signed with Bermuda on 10 November 2005, the second with Antigua and Barbuda on 30 January 2007, the third with the Netherlands Antilles on 1 March 2007 and the fourth with the British Virgin Islands on 27 October 2008. It is an important part of Australia's efforts to conclude TIEAs with jurisdictions that have committed to work with Organisation for Economic Cooperation and Development (OECD) member countries under the auspices of the OECD Global Forum on Taxation (Global Forum) to improve transparency and establish effective exchange of information for tax purposes.

Reasons for Australia to take the proposed treaty action

8. This Agreement, alongside TIEAs with other countries, is an important tool in Australia's efforts to combat offshore tax evasion. The Agreement provides for the effective exchange of information between Australia and the IoM, which will promote fairness and enhance Australia's ability to administer and enforce its domestic tax laws.

9. The Agreement is part of Australia's ongoing commitment to implement OECD standards on eliminating harmful tax practices that contribute to international tax avoidance and evasion. Australia has taken a leadership role in this work and hosted the Global Forum in Melbourne in November 2005, which was attended by 55 OECD member countries and non-OECD jurisdictions.

10. Since 2002, 35 low-tax jurisdictions, including the IoM, have publicly committed to the elimination of harmful tax practices. These jurisdictions have worked together under the auspices of the Global Forum to develop international standards of transparency and effective exchange of information for tax purposes that, when implemented, ensure the availability of information needed by tax authorities to determine a taxpayer's correct tax liability. TIEAs are the key bilateral means that facilitate the provision of such information by low-tax jurisdictions.

11. In April 2002, the OECD released a model TIEA to facilitate negotiations between OECD member countries and committed jurisdictions. In October 2003, the Australian Treasurer approved an Australian model TIEA which is closely aligned to the OECD model. This Agreement with the IoM essentially follows the format of the Australian model TIEA.

12. Data held by the Australian Transaction Reports and Analysis Centre indicates a significant flow of funds between Australia and the IoM. While most financial flows to and from low tax jurisdictions are legitimate, the legal frameworks and systems that make low tax jurisdictions attractive for legitimate purposes may also be used in arrangements designed to evade paying tax elsewhere. In particular, the use of secrecy laws to conceal assets and income that are subject to Australian tax is of concern to Australia.

13. In 2006, the Australian government established Project Wickenby to investigate internationally promoted tax avoidance or evasion arrangements. Project Wickenby is a multi-agency taskforce comprising the Australian Taxation Office (ATO), the Australian Crime Commission, the Australian Federal Police, the Australian Securities and Investments Commission and the Commonwealth Director of Public Prosecutions, with the support of the Australian Transaction Reports and Analysis Centre, the Attorney-General's Department, the Australian Government Solicitor and the NSW Crime Commission. Concluding a TIEA with the IoM is consistent with the objectives of Project Wickenby, as it will establish a legal basis to obtain relevant information from the IoM to support investigations.

14. It is in Australia's interest to develop a network of TIEAs with low-tax jurisdictions. This Agreement, along with future TIEAs, will make it harder for taxpayers to avoid or evade Australian tax and discourage those taxpayers from participating in illegitimate tax arrangements by increasing the probability of detection. This will help Australia protect its revenue base and improve the integrity of the tax system while enhancing the IoM's reputation as a location for legitimate business activity.

15. The IoM's commitment to implement this Agreement for the effective exchange of information is a positive step in its relationship with Australia and will also be seen by the

international community as a step towards good governance. A media release issued by the OECD on 29 September 2008 noted that the IoM ‘is a significant financial centre and was one of the first jurisdictions to engage constructively with OECD countries in efforts to address the abuse by companies and individuals of offshore centres to evade their tax obligations.’

Obligations

16. Article 1 of the Agreement requires the competent authorities of the Parties to provide assistance, through exchange of information that is foreseeably relevant to the administration and enforcement of the Parties’ domestic tax laws, including the collection of taxes and the investigation or prosecution of tax matters. Article 5(1) requires Parties to provide such information when requested to do so in writing by the other Party. This obligation applies irrespective of whether the conduct being investigated would constitute a crime under the domestic law of the Requested Party if it occurred in the territory of that Party. There is no provision in the Agreement that authorises voluntary or unsolicited exchange of information between the two Parties.

17. In response to a valid written request from the IoM Government, Australia will be obliged to obtain and supply information that is held by the Commissioner of Taxation, as the Australian competent authority, or is obtainable under the Commissioner’s access and information gathering powers under domestic law. Article 5(3) provides that if requested to do so, Australia must also provide information in the form of depositions of witnesses and authenticated copies of original records, to the extent allowable under domestic law. Article 5(4) requires Parties to ensure their competent authority has the authority to obtain and provide information held by banks, other financial institutions and any person acting in an agency or fiduciary capacity, as well as information regarding the legal and beneficial ownership of companies, partnerships and other persons in an ownership chain. The Commissioner of Taxation already has the necessary legal authority to meet Australia’s obligations under Article 5(4). All obligations apply similarly to the IoM in situations where Australia makes a request for information.

18. Pursuant to Article 5(6), the Commissioner of Taxation must provide specified details to the IoM when making a request for information to demonstrate that the request falls within the scope of the Agreement.

19. Where the information in the possession of the Commissioner of Taxation is insufficient to enable compliance with a request from the Isle of Man, Australia must, pursuant to Article 5(2), use all relevant information gathering measures to provide the requested information to the IoM, even if it is not needed for domestic tax purposes. This is consistent with Article 26 (Exchange of Information) of the OECD *Model Convention with Respect to Taxes on Income and on Capital*, which has been incorporated into Australian tax treaty policy.

20. Article 5(7) requires that the information requested be provided with the least possible delay. When Australia receives a request for information, it must acknowledge receipt within 60 days and advise of any unexpected delays in obtaining the requested information within 90 days. Article 7 provides various grounds for the refusal of requests, including where requests are not in conformity with the Agreement or if the government requesting the information would be unable to obtain that information under its own laws in similar circumstances.

21. Article 8 imposes an obligation on Australia and the IoM to keep information provided and received confidential. Such information may be revealed only to persons or authorities officially concerned with the taxation covered by the Agreement. These persons or authorities shall use the information only for such purposes, or for oversight purposes, including in public court or judicial proceedings. The express written consent of the competent authority of the Party that provided the information is required for any disclosure to a person or authority not authorised by this Article. Under Article 13(3), both Parties will remain bound by the confidentiality provisions of the Agreement even after its termination. This ensures the permanent protection of information exchanged between the two Parties.

22. Article 11 provides that the competent authorities of the two Parties shall endeavour to resolve any difficulties or doubts that may arise concerning the application or interpretation of the Agreement. The Parties may also agree on other forms of dispute resolution.

Implementation

23. Australia's is able to fulfil its obligations under the Agreement are under existing legislation, specifically section 23 of the *International Tax Agreements Act 1953*. No further legislation or regulation is required in order to implement the Agreement.

Costs

24. The Agreement will have a small administrative and financial impact on the ATO. As the IoM does not have a fully comparable income tax system and is unlikely to routinely need Australian information for its own tax purposes, it is likely that most requests for information will originate from Australia. However, some additional resources may be required to deal with the anticipated complexities of obtaining information from the IoM. That is, the ATO may need to provide technical assistance to the IoM in relation to operational exchange of information procedures, given the IoM's relative inexperience in this area. Actual impacts are difficult to estimate, however, and will depend on the development of effective administrative arrangements between the ATO and the revenue authorities in the IoM.

25. The ATO and the Treasury of the IoM will conclude a Memorandum of Understanding, under which certain costs associated with Australian requests for information will be borne by the ATO. Examples of such costs, classified as extraordinary costs, include:

- reasonable fees charged by third parties for carrying out research;
- reasonable fees charged by third parties for copying documents;
- reasonable costs of engaging experts, interpreters or translators;
- reasonable costs of conveying documents to Australia;
- reasonable litigation costs of the IoM; and
- reasonable costs of obtaining depositions or testimony.

26. Australian residents are unlikely to incur any significant compliance costs in relation to the Agreement. It is unlikely Australia will receive many requests for information from the IoM and therefore be required to collect information from Australian residents.

27. Overall, it is estimated that the administrative and financial impact of concluding this Agreement will be absorbed by the ATO's existing exchange of information programme, which currently administers similar arrangements with more than 40 countries. On a broader level, as the Agreement is intended to help reduce tax avoidance and evasion by Australian taxpayers, its general impact could be revenue positive for Australia.

Regulation Impact Statement

28. The Treasury has assessed the implementation of the treaty against criteria in the Best Practice Regulation Handbook. This regulatory option has no/low impact on businesses and individuals or on the economy and a Regulation Impact Statement is not required.

Future treaty action

29. The Agreement does not provide for the negotiation of future legally binding instruments, amendments or appendices to the existing Agreement. However, this does not preclude the two Parties from agreeing in the future to amend the existing Agreement. The Agreement does not have an amendment clause, but Article 39 of the *Vienna Convention on the Law of Treaties 1969* provides that a treaty may be amended by agreement between the Parties. Any such agreement would be subject to the normal treaty process, including tabling and consideration by the Joint Standing Committee on Treaties (JSCOT). Any amendments to the Agreement may be considered in the future in line with Australian policy for TIEA negotiations current at that time.

Withdrawal or denunciation

30. Article 13(1) provides that the Agreement shall remain in force until terminated by either Party.

31. Article 13(2) provides that either Party may terminate the Agreement by giving written notice of termination. Such termination would take effect on the first day of the month following the expiration of six months after the date of receipt of the notice of termination by the other Party. However, both Parties would remain bound by the confidentiality obligations contained in Article 8.

32. Termination by Australia would be subject to the normal treaty process, including tabling and consideration by JSCOT.

Contact details

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Attachment on Consultation

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CONSULTATION

33. The negotiation of this Agreement with the IoM was not conducted in the public domain and, consequently, no public consultation was undertaken.

34. The ATO was consulted in the development of the Australian model TIEA and ATO officials negotiated the text of this Agreement with the IoM. The ATO will administer the Agreement once it is implemented.

35. The State and Territory Governments have been consulted through the Commonwealth-State/Territory Standing Committee on Treaties. Information on the negotiation of this treaty has been included in the six-monthly schedules of treaties to State and Territory representatives.

36. In addition to the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, the Minister for Foreign Affairs, the Minister for Trade and the Prime Minister agreed to this treaty.

