International Tax Agreements Amendment Bill 2012

Introduced into the House of Representatives on 29 November 2012; passed both Houses on 28 February 2013
Portfolio: Families, Housing, Community Services and Indigenous Affairs
PJCHR comments: Report 1/13, tabled on 6 February 2013
Response received: 13 March 2013

Summary of committee view

3.1 The committee thanks the Assistant Treasurer for his response and notes that the bill has already been passed by the Parliament.

3.2 The committee considers that the response has addressed some of the committee's concerns and notes that it would have been helpful for this information to have been included in the statement of compatibility. However, the committee remains concerned as to the lack of an explicit requirement in international agreements to ensure that the law and practice of the other country are consistent with the right to privacy under article 17 of the International Covenant on Civil and Political Rights (ICCPR) in relation to the information that may be provided to the authorities of that country.

Background

3.3 The bill gives effect to three international taxation agreements with India, the Marshall Islands and Mauritius, relating to double taxation arrangements, cooperation between the tax authorities of the countries involved and other matters.

3.4 The statement of compatibility accompanying the bill stated that the bill did not engage any human rights.

3.5 The committee noted that the tax agreements provided for cooperation between the tax authorities of Australia and their foreign counterparts, in particular in relation to the provision of information requested by the other party. As such, they appeared to engage the right to privacy in article 17 of the International Covenant on Civil and Political Rights insofar as they may involve the obligation to provide personal information to the tax authorities of another country. The committee sought further information as to how obligations to provide information under the tax agreements might affect the right to privacy and what remedies are available for privacy breaches.

Committee's response

3.6 The Assistant Treasurer's response refers to the various safeguards provided for under the three treaties and under Australian law. For example, article 25(2) of the agreement with Malaysia provides:

> Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.

3.7 The committee considers that as a matter of international law, this and the corresponding provisions in the other treaties, provide a significant level of protection. However, the committee's inquiry about available protections also related to the protections available under the domestic law of the state to which the information is to be provided (India, the Maldives or Malaysia). It would be helpful to know whether the Australian government assures itself that a similar level of protection for personal taxation information exists under the law of the other country to that available under Australian law, and whether any remedies would be available for disclosure contrary to the treaty or article 17 of the ICCPR. The Assistant Treasurer refers to the fact that a person may complain about a breach of privacy to the Australian Information Commissioner, but the powers of that office only extend to the actions of Australian agencies.

3.8 The Assistant Treasurer also refers to the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (commencing 12 March 2014) to support the conclusion that the provision of information under the agreements is consistent with article 17 of the ICCPR. He refers to the fact that this Act permits an agency to disclose information to an overseas recipient if disclosure is required under an international agreement relating to information sharing to which Australia is a party. This Act includes the Australian Privacy Principles, which include the following:

> 8.1 Before an APP entity discloses personal information about an individual to a person (the overseas recipient):
>
> (a) who is not in Australia or an external Territory; and
>
> (b) who is not the entity or the individual;

> the entity must take such steps as are reasonable in the circumstances to ensure that the overseas recipient does not breach the Australian Privacy Principles (other than Australian Privacy Principle 1) in relation to the information.
>
> 8.2 Subclause 8.1 does not apply to the disclosure of personal information about an individual by an APP entity to the overseas recipient if:
>
> (a) the entity reasonably believes that:
>
> (i) the recipient of the information is subject to a law, or binding scheme, that has the effect of protecting the information in a way that, overall, is at least substantially similar to the way in which the Australian Privacy Principles protect the information; and
>
> (ii) there are mechanisms that the individual can access to take action to enforce that protection of the law or binding scheme; or …
>
> (e) the entity is an agency and the disclosure of the information is required or authorised by or under an international agreement relating to information sharing to which Australia is a party; …

3.9 The committee notes that there where disclosure is required or authorised under an international agreement, the privacy principles do not apply. However, there appears to be no requirement that the international agreement in question include protections consistent with article 17 of the ICCPR or that the law and practice of the other country are in conformity with article 17 standards before such an agreement is concluded.

3.10 In light of the information provided, the committee accepts that the information-sharing provisions in the tax agreements pursue a legitimate objective (namely, to eliminate double taxation) and that the accompanying safeguards outlined in the response are likely to be sufficient to ensure that any limitation on the right to privacy may be regarded as reasonable, necessary and proportionate to achieve a legitimate objective.

3.11 Nonetheless, the committee remains concerned that it does not appear that the question of whether levels of protection consistent with article 17 of the ICCPR are available under the domestic law of the other countries is a matter required to be taken into account in the agreements. The committee is further concerned that the effect of the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* is that Privacy Principle 8 is excluded in the case of an international agreement to share information, without any requirement that such an agreement ensure that article 17 rights are respected under the domestic law and practice of the other party to the agreement.

3.12 The committee notes that the bill has already been passed by the Parliament.

The Hon David Bradbury MP
Assistant Treasurer
Minister Assisting for Deregulation

The Hon Harry Jenkins MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
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Dear Mr Jenkins Harry,

I am writing in response to your letter dated 6 February 2013 concerning the Parliamentary Joint Committee on Human Rights' recent examination of the *International Tax Agreements Amendment Bill 2012* (the Bill). I apologise for the delay in responding to your letter.

In particular you sought clarification of the extent to which obligations to provide information under the tax agreements contained in the Bill may affect the right to privacy in respect of personal tax information, and the remedies available in the case of any infringements of this right.

As you are aware, the Bill will give effect to three bilateral taxation agreements; with India, the Marshall Islands and Mauritius. Among other things, these agreements will provide a legal basis for the bilateral exchange of taxpayer information, under certain circumstances, between the Commissioner of Taxation and the revenue authorities of those jurisdictions. In the absence of these agreements, the disclosure of relevant information by the Commissioner would be prohibited by Australia's tax secrecy laws.

Broadly speaking, Australia's tax treaties permit the exchange of taxpayer information for two fundamental purposes: (i) the elimination of double taxation; and (ii) the prevention of fiscal evasion. The Indian agreement will permit information exchange for both of these purposes but the agreements with the Marshall Islands and Mauritius will essentially only permit information exchange for the first-mentioned purpose (Australia has concluded separate bilateral tax information exchange agreements with the Marshall Islands and Mauritius which are used for the prevention of fiscal evasion).

In my view, the exchange of information provisions contained in the Bill will not infringe on persons' enjoyment of the right to privacy in respect of personal tax information. They will operate in a manner that is consistent with both Article 17 of the *International Covenant on Civil and Political Rights* and Australian privacy law.

In particular, I note that under the recently enacted *Privacy Amendment (Enhancing Privacy Protection) Act 2012*, which amends the *Privacy Act 1988* and which commences on 12 March 2014, an agency can disclose personal information about an individual to an overseas recipient if the disclosure of the information is required under an international agreement relating to information sharing to which Australia is a party.

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Further, the provision of information pursuant to the agreements would be neither arbitrary nor unlawful; for the following reasons:

- The standard of 'foreseeably relevant' contained in the 'exchange of information' articles in each of the agreements will limit the provision of information to that which is required for legitimate tax purposes. The requesting country is obliged to demonstrate such relevance in respect of every information request it makes and, in the event of its failure to do so, the requested country may decline to provide the information. This would prevent a country from seeking information that is not relevant to a legitimate tax enquiry or investigation.

- The information exchanged will be subject to strict treaty confidentiality rules which are consistent with Australia's domestic tax secrecy rules. That is, any information provided by the Commissioner can only be used by the other jurisdiction for the purposes permitted by the treaty. In general, this means the information can only be used for tax administration purposes (or for other law enforcement purposes in the case of the Indian agreement, where both competent authorities agree).

- The requested country is not required to carry out any measures that are not permitted by the domestic laws of either country, or to supply information that is not obtainable under the laws or administrative practices of either country. This means that collection of information in Australia remains subject to the Commissioner's domestic information gathering powers. The agreements with India, the Marshall Islands and Mauritius will not extend or alter those powers or the way in which they may be exercised.

- The provision of taxpayer information by the Commissioner is explicitly authorised by section 355-50 of the *Taxation Administration Act 1953*. That section provides an exception to the general rules that prohibit the disclosure of taxpayer information by Australian tax officials.

It is also worth noting that the existing Australia-India tax treaty, which was signed in 1991, already permits the exchange of taxpayer information. The amending protocol contained in the Bill will extend the range of taxes covered for such purposes and clarify that domestic bank secrecy rules or domestic tax interest requirements, if any, will not impede the exchange of information.

Under Australian privacy law, a person can make a complaint about the handling of their personal information by Australian, ACT and Norfolk Island government agencies and private sector organisations covered by the *Privacy Act 1988*.

The Office of the Australian Information Commissioner is responsible for the enforcement of Australia's privacy law, and the Commissioner has the power to investigate instances of non-compliance by agencies and organisations and to prescribe remedies to redress non-compliance. Depending on the particular complaint, some possible resolutions could include compensation for financial or non-financial loss, or a change to the respondent's practices. Further information can be found at http://www.oaic.gov.au/privacy-portal/complaints_privacy.html.

I trust this information is of assistance to the Committee.

Yours sincerely

DAVID BRADBURY

12 MAR 2013