

## **Tax Laws Amendment (Implementation of the FATCA Agreement) Bill 2014**

*Portfolio: Treasury*

*Introduced: House of Representatives, 29 May 2014*

### **Purpose**

1.116 The bill would amend Schedule 1 of the Taxation Administration Act 1953 (TAA 1953) to require Australian financial institutions to collect information about their customers that are likely to be taxpayers in the United States of America (US) and to provide that information to the Commissioner of Taxation (Commissioner) who will, in turn, provide that information to the US Internal Revenue Service (IRS).

1.117 These amendments give effect to the Australian Government's commitments as set out in the Agreement between the Government of Australia and the Government of the United States of America to Improve International Tax Compliance and to Implement FATCA (the FATCA Agreement). The agreement was signed by the Treasurer on 28 April 2014.

1.118 The Foreign Account Tax Compliance Act (FATCA) is a unilateral anti-tax evasion regime. FATCA aims to detect US taxpayers who use accounts with offshore financial institutions to conceal income and assets from the IRS. From 1 July 2014, FATCA will require all non-US financial institutions to conclude individual agreements with the IRS under which they will periodically report certain information about their account holders who are US citizens or US resident individuals. Financial institutions that do not comply with FATCA will be subject to a 30 per cent US withholding tax on their US source income.

1.119 A broad range of Australian financial institutions, including banks, some building societies, some credit unions, specified life insurance companies, private equity funds, managed funds, exchange traded funds and some brokers will be subject to FATCA. As most major Australian financial institutions operate or otherwise invest in the US, the US withholding tax creates a strong commercial incentive for these entities to comply with FATCA. However, Australian privacy laws generally prevent compliance with these US-based obligations and some Australian State and Territory anti-discrimination laws could also prevent the interrogation of customer accounts based on US citizenship.

### **Committee view on compatibility**

#### ***Right to Privacy***

1.120 Article 17 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary or unlawful interferences with an individual's privacy, family, correspondence or home.

1.121 However, this right may be subject to permissible limitations which are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must seek to achieve a legitimate objective and be reasonable, necessary and proportionate to achieving that disclosure of information.

*Protections on personal information once in the hands of the IRS*

1.122 The statement of compatibility notes that the bill engages the right to privacy as the bill 'will interfere with the privacy of individuals'.<sup>1</sup> The bill will require Reporting Australian Financial Institutions to report customer information to the Commissioner of Taxation for on forwarding to the IRS in the US. The bill will also require those entities to conduct certain due diligence procedures on their financial accounts in order to identify those account holders that are likely to be US citizens or US taxpayers. This will result in Reporting Australian Financial Institutions collecting certain personal information (such as a person's name, address, U.S. Tax Identification Number, the account number, the income credited to the account and the account balance) and providing the information to the Commissioner for forwarding to the IRIS

1.123 The statement of compatibility notes the safeguards for the protection of disclosed personal information under Australian domestic law including obligations upon the Commissioner to protect personal information. The statement of compatibility also notes that under Australia's privacy law, a person can make a complaint about the handling of their personal information by Australian government agencies. In addition, the Australian Information Commissioner has the power to investigate instances of non-compliance by agencies and organisations and to prescribe remedies to redress non-compliance.

1.124 The committee notes that the bill will create a process whereby certain personal information will be collected and disclosed by Reporting Australian Financial Institutions to the Commissioner, which will then be forwarded to the IRS in the US. The statement of compatibility does not set out the safeguards and protections that will be afforded to personal information once it has been given to the IRS in the US. Accordingly, while the statement of compatibility notes that Australian privacy laws apply to any use made by an authorised officer of such information, it is not clear whether the same or equivalent safeguards apply once the information is held by the IRS in the US. Such safeguards are an integral component of assessing whether the appropriate safeguards are in place for consistency with the right to privacy.

**1.125 The committee therefore seeks the Treasurer's advice as to whether the safeguards in the bill for the protection of personal information are consistent with the right to privacy, and particularly whether the limitation is reasonable and proportionate measure for the achievement of that objective.**

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1 Explanatory Memorandum, (EM), p. 22.

**1.126 Specifically, the committee seeks the Treasurer's advice as to:**

- **the privacy safeguards that will apply under US law in relation to personal information provided to US authorities pursuant to the FATCA Agreements; and**
- **whether these safeguards can be said to be provided by 'law' insofar as they do not appear and are not identified in the bill**