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International Tax Agreements Amendment Bill (No. 2) 2008

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Contents

Glossary

Abbreviation	*Definition*
Agreements Act 1953	*International Tax Agreements Act 1953*
ATO	Australian Taxation Office
Commissioner	Commissioner of Taxation
GATS	*General Agreement on Trade in Services*
GST	goods and services tax
ITAA 1936	*Income Tax Assessment Act 1936*
MFN	most favoured nation
OECD	Organisation for Economic Co-operation and Development
OECD Model	OECD *Model Tax Convention on Income and on Capital*
OECD Model Commentary	the Commentaries on the Articles of the OECD Model Tax Convention
South African Agreement (SAA)	*Agreement between the Government of Australia and the Government of the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* and its Protocol (both signed on 1 July 1999)
South African Protocol (SAP)	*Protocol amending the Agreement between the Government of Australia and the Government of the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (signed on 31 March 2008)
UK	United Kingdom of Great Britain and Northern Ireland

International Tax Agreements Amendment Bill (No. 2) 2008

Date introduced: 17 September 2008

House: House of Representatives

Portfolio: Treasury

Commencement: The Act commences on Royal Assent. (The application of the 2008 South African convention is dealt with in the Main provisions section of the Bills Digest).

Links: The relevant links to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at http://www.aph.gov.au/bills/. When Bills have been passed they can be found at ComLaw, which is at http://www.comlaw.gov.au/.

Purpose

To amend the Commonwealth *International Tax Agreements Act 1953* (the Agreements Act 1953) to incorporate into Australian law the South African Protocol (SAP) signed on 31 March 2008 between Australia and South Africa in order to modernise the tax treaty to meet Australia's most favoured nation obligation and the proposed changes to South Africa's domestic taxation of corporate profits.

Background

Australia modernises tax treaty with South Africa

On 1 April 2008, the Hon Chris Bowen MP, the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, announced that Australia and South Africa had signed a new Protocol to revise the tax treaty between the two countries which was signed in 1999.

The Australia-South Africa relationship[1]

Australia and South Africa have a friendly relationship with shared interests in international issues. Multilateral and bilateral ties span a vast range of issues. These include:

- **Membership of and cooperation** in various bodies, notably the World Trade Organisation, the Cairns Group on Agriculture, the Commonwealth, the New World Wine Producers Group, the Commission for the Conservation of Antarctic Marine Living Resources and the Kimberly Process on conflict diamonds
- **Bilateral agreements** in force cover areas such as air services, extradition, defence information, double taxation and science and technology. The two countries collaborate on various projects relating to climate change under the Australia-South Africa Climate Change Partnership

According to the Department of Foreign Affairs and Trade South Africa Country/Economy Fact Sheet, South Africa is Australia's largest trading partner in Africa, its 21st largest merchandise trading partner and 16th largest merchandise export market. In 2007, Australian exports to South Africa were valued at $2.53 billion (mainly medicaments, coal, meat and civil engineering equipment). Australian imports from South Africa were $1.35 billion and included passenger motor vehicles (mainly BMW Series 3 vehicles) worth $663 million, transport vehicles as well as motor vehicle parts and pig iron. Two-way merchandise trade in 2007 was valued at $3.88 billion.

By the end of 2007, investment from South Africa amounted to $1.2 billion while Australian investment in South Africa stood at $893 million. Australia's investment in South Africa's mining sector is steadily increasing. Agriculture, infrastructure and services are other sectors attracting Australian investment.

South Africa is the only African member of the Cairns Group, which is chaired by Australia.

Since 1994, following the end of apartheid and South Africa's fully democratic elections, Australia has contributed over $120 million in development assistance.

Some 115,000 South African expatriates live in Australia and around 7,500 Australians reside in South Africa.

The Department of Foreign Affairs and Trade South Africa Country/Economy Fact Sheet can be accessed here.

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1. Based on Department of Foreign Affairs and Trade, South Africa Country Brief, accessed on 22 September 2008.

How tax treaties operate

Tax treaties generally serve three main functions:

(1) They reduce or eliminate double taxation which arises by two jurisdictions imposing tax on the basis of source of income and residence of the recipient of income when that income flows across borders.
(2) They set out the means of resolving transfer pricing issues by setting out an agreed basis for allocating profits within a multinational company operating in both jurisdictions.
(3) They provide provisions for the exchange of information between the revenue authorities of two jurisdictions and in consequence would assist in preventing fiscal evasion.

What is the model of bilateral tax treaties generally followed by Australia?

Australia generally follows the Organisation for Economic Co-operation and Development (OECD) *Model Tax Convention on Income and on Capital* (OECD Model) in negotiating bilateral tax treaties. The OECD Model generally favours the residence approach to the allocation of taxing rights, although there are instances where Australia has adopted the source country taxing rights approach.

The reasons for Australia to take treaty action

The Joint Standing Committee on Treaties (JSCOT) in Chapter 4, paragraph 4.6 of Report 93, on treaties tabled on 12 March 2008 and 14 May 2008, set out the reasons from the National Interest Analysis (NIA) as to why it was necessary for Australia to take treaty action, namely, to:

> (i) meet Australia's most favoured nation (MFN) obligations with South Africa under the existing Agreement; (ii) promote closer economic cooperation between Australia and South Africa; and (iii) upgrade the framework through which the tax administrations of Australia and South Africa can prevent international fiscal evasion.

The protocol to the existing South Africa agreement (SAA) entered into in 1999 provides an MFN obligation with South Africa. Paragraph 1 of the 1999 protocol provides that if Australia enters into an agreement for the avoidance of double taxation with a third State, and there is included in that agreement a Non-discrimination Article, Australia shall immediately inform the Government of South Africa and shall enter into negotiations to provide comparable treatment for South Africa. This obligation was triggered by the entry into force in 2003 of the renegotiated United Kingdom tax treaty which included Article 25 on Non-discrimination. The United Kingdom tax treaty is Schedule 1 to the Tax Agreements Act 1953.

Paragraphs 4.6 to 4.14 of the JSCOT Report 93 set out further details of the reasons why it was necessary for Australia to take treaty action. For ease of reference the contents of these paragraphs are set out in Attachment A.

Financial implications

According to the Explanatory Memorandum, Treasury has estimated the impact of the first round of effects on forward estimates as negligible.

However, the JSCOT report at paragraph 4.17 adds that Australian revenue would be reduced due to the reductions in Australian withholding tax (WHT) on dividends, interest and royalties indicated in the Main provisions section of this Bills Digest, whilst adding that the overall impact will be negligible.

> 4.17 Australian revenue would be reduced to the extent that Australian WHT is decreased and additional foreign tax credits in respect of South African dividend withholding tax (when introduced) exceed the reductions in foreign tax credits for South African withholding tax on interest and royalties. However, the cost to revenue arising from the Protocol is expected to be negligible. The closer alignment with international treaty practice would generally be expected to reduce compliance costs.

Main provisions

Structure of legislation to give effect to tax treaties

The Agreements Act 1953 gives the force of law to all the tax treaties entered into between Australia and other countries and which are listed in various Schedules to that Act. Schedule 42 sets out the terms of the 1999 SAA.

Section 4 of the Agreements Act 1953 incorporates the *Income Tax Assessment Act 1936* (ITAA 1936) and the *Income Tax Assessment Act 1997* (the ITAA 1997). Section 4AA of the Agreements Act 1953 incorporates the *Fringe Benefits Tax Assessment Act 1986* (the FBTAA 1986). Sections 4 and 4AA both provide that these Acts are to be read as one with the Agreements Act 1953, and that the Agreements Act 1953 takes precedence over these other Acts except for the anti-avoidance provisions in Part IVA of the ITAA 1936 and in section 67 of the FBTAA 1986.

Measures to incorporate changes by the South African protocol into domestic law

Item 2 of **Schedule 1** amends subsection 3(1) of the Agreements Act 1953 to insert the definition of the South African protocol:

> ***the South African protocol*** means the Protocol amending the Agreement between the Government of Australia and the Government of the Republic of South Africa for the

avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. A copy of the protocol is set out in Schedule 42A.

Schedule 42 of the Agreements Act deals with the South African Agreement (SAA). Item **4** of **Schedule 1** inserts **Schedule 42A —South African protocol** (SAP) after Schedule 42 to amend the SAA.

Key changes made by the South African protocol

It is not within the scope of this Bills Digest to cover all the Articles of the SAP which amend the SAA. However, brief comments will be made on certain key changes made by the SAP. The Explanatory Memorandum to the Bill (pages 14 to 17) sets out in a table a summary of key features of the new law and the current law. For ease of reference this table is included in Attachment B to this Bills Digest.

Amendments by the South African protocol to cover taxes for various purposes

Article 1 of the SAP omits existing Article 2 of the SAA and substitutes a **new Article 2** to the SAA.

The **new Article 2** states the range of taxes that the SAA will cover for the following purposes:

- the taxes covered for relief from double taxation,
- the taxes covered by the **new Article 23A** of the SAA dealing with non-discrimination,
- the taxes covered by **new Article 25** for exchange of information purposes, and
- the taxes covered by **new Article 25A** for assistance in the collection of taxes.

Taxes covered by the Agreement for relief from double taxation

Paragraph 1 of **Article 2** of the SAP omits existing Article 2 of the SAA and substitutes a **new Article 2** to cover the following taxes in Australia and South Africa to which the SAA shall apply.

(a) in the case of Australia:

the income tax, including the resource rent tax in respect of offshore projects relating to exploration for or exploitation of petroleum resources, imposed under the federal law of Australia;

(b) in the case of South Africa:

(i) the normal tax;

(ii) the secondary tax on companies; and

(iii) the withholding tax on royalties.

The existing Article 2 of the SAA does not cover the South African withholding tax on royalties.

Limits to dividend withholding tax under new Article 10

Article 5 of the SAP omits Article 10 of the SAA and substitutes **new Article 10** to deal with dividends.

Paragraph 1 of **new Article 10** provides that dividends paid by a company which is a resident of a Contracting State for the purposes of its tax, being dividends beneficially owned by a resident of the other Contracting State, may be taxed in that other State.

Paragraph 2 of **new Article 10**, provides that those dividends may be taxed in the Contracting State of which the company paying the dividend is a resident, but the tax so charged shall not exceed:

(a) dividends is a company which owns directly shares representing at least 10 per 5 percent of the gross amount of the dividends if the beneficial owner of cent of the voting power of the company paying the dividends (**paragraph 2(a)** of **Article 10**), and
(b) 15 per cent of the gross amount of the dividends in all other cases.

Under the existing SAA, the tax on inter-corporate dividends is limited to 10 per cent and the rate of dividend withholding tax is limited to 15 per cent in all other cases.

Limits to interest withholding tax under new Article 11

Article 6 of the SAP omits Article 11 of the SAA and substitutes **new Article 11** to deal with interest.

Paragraph 2 of **new Article 11** reduces the rate of interest withholding tax to a maximum of 10 per cent.

However, **paragraph 3** of **Article 11** provides that the rate of interest withholding tax shall be zero where interest is paid to:

(a) government bodies and central banks, or
(b) financial institutions.

There is no equivalent in the existing Article 11 of the SAA.

Limits to royalty withholding tax under Article 12

Article 7 of the SAP omits Article 12 of the SAA and substitutes **new Article 12** to deal with royalties.

Paragraph 2 of **Article 12** reduces the rate of royalty withholding tax to a maximum of 5 per cent of the gross amount of royalties.

Under the existing SAA, the rate of royalty withholding tax is limited to 10 per cent of the gross amount of royalties.

Preventing discrimination in relation to taxation laws

Article 9 of the SAP inserts **new Article 23A** into the SAA to prevent tax discrimination on the grounds of nationality. **Paragraph 1** of **Article 23A** provides that nationals of one country may not be less favourably treated than nationals of the other country in the same circumstances.

Paragraph 1.133 on page 45 of the Explanatory Memorandum to the Bill explains the need for this non-discriminatory provision:

> The Australian tax system is generally non-discriminatory. However, for clarity this Article provides that certain features of the Australian tax system should not be seen as coming within the Article's terms. The measures identified can be characterised as being an integral part of the administration of Australia's economic and tax policy and the collection of its taxes.

It will be noted that **Article 12** of the SAP removes paragraph 1 of the existing protocol of the SAA, which as pointed out earlier imposes MFN obligations on Australia with respect to the inclusion of non-discrimination rules. As **new Article 23A** will now provide for non-discrimination, there is no need for paragraph 1 of the existing protocol. The Explanatory Memorandum to the Bill in paragraph 1.202 confirms the reason for its removal:

> This reflects the fact that Australia's MFN obligations have been met by the inclusion of a Non-Discrimination Article (Article 23A) in the Agreement by Article 9 of this Protocol.

It must also be noted that **paragraph 3** of **new Article 2** provides that for the purposes of **new Article 23A**, the taxes to which the SAA shall apply are taxes of every kind and description imposed on behalf of the Contracting States, or their political subdivisions or local authorities. In the case of Australia, this will include State and Territory as well as local government taxes.

However **paragraph 5** of **new Article 23A** provides that the rule against non-discrimination does not preclude either Contracting State from applying its anti-avoidance or anti-evasion rules, rebates or credits for dividends paid by resident companies, research and development concessions, consolidation rules or capital gains deferral rules. **Paragraph 6** of **new Article 23A** provides that provisions of the laws of a contracting State to prevent avoidance or evasion of taxes include measures to address thin capitalisation, dividend stripping, transfer pricing and controlled foreign company measures.

Coverage for the exchange of information aligned with the 2005 OECD standard

Article 10 of the SAP omits Article 25 of the SAA and substitutes **new Article 25** to deal with exchange of information. The Explanatory Memorandum to the Bill in paragraph 1.167 on page 51 states that the provisions of **new Article 25** align the information exchange provisions to the 2005 OECD standard.

Paragraph 1 of **new Article 25** provides that the competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of the SAA or to the administration or enforcement of the domestic law concerning taxes referred to in Article 2.

Paragraph 4 of **new Article 2** gives an extensive coverage to the taxes that may be subject to exchange of information under **new Article 25**. **Subparagraph 4(a)** of **new Article 2** states that in the case of Australia, **new Article 25** shall apply to taxes of every kind and description imposed under the federal tax laws administered by the Commissioner of Taxation. Further, **paragraph 1** of **new Article 25** adds that the exchange of information is not restricted by Article 1 of the SAA. Article 1 of the SAA deals with the personal scope of the SAA and states that the SAA shall apply to persons who are resident of one or both of the Contracting States. Thus the provision for the exchange of information under **new Article 25** may cover persons who are not residents of Australia or South Africa.

Use of exchanged information

Paragraph 2 of **new Article 25** provides that the exchanged information must be treated as secret in the same manner as information obtained under the domestic law of the State that receives the information. Further, it provides that such information shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution of, the determination of appeals in relation to taxes referred to in **paragraph 4** of **new Article 2.**

It must be noted that **paragraph 4** of **new Article 2** of the SAP, in the case of Australia, covers taxes of every kind and description imposed under federal tax laws administered by the Commissioner of Taxation. In the case of South Africa, it covers taxes of every kind and description imposed under the tax laws administered by the Commissioner for the South African Revenue Service.

Assistance in the Collection of Taxes

Article 11 of the SAP inserts **new Article 25A** into the SAA to provide for assistance in the collection of revenue claims. As in the case of exchange of information, **paragraph 1** of **new Article 25A** provides that assistance in the collection of revenue claims is not restricted by the personal scope measure in Article 1 of the SAA. Thus the provision for the assistance in the collection of revenue claims under **new Article 25A** may cover collection of revenue claims from persons who are not residents of Australia or South Africa.

Further, **paragraph 1** of **new Article 25A** provides that the competent authorities of the Contracting States may by mutual agreement settle the mode of application of this Article in relation to collection of taxes.

Paragraph 4 of **new Article 2** gives an extensive coverage to the taxes that may be subject to the collection of taxes measures in **new Article 25A**. **Subparagraph 4(a)** of **new Article 2** states that in the case of Australia, **new Article 25A** shall apply to taxes of every kind and description imposed under the federal tax laws administered by the Commissioner of Taxation.

Paragraph 2 of **new Article 25A** defines a revenue claim to mean an amount owed in respect of taxes referred to in Article 2 of the SAA as well as interest, administrative penalties and costs of collection and conservancy related to such amount.

Paragraph 3 of **new Article 25A** provides that where a revenue claim of a Contracting State is enforceable under the laws of that State and the debtor has exhausted all rights to prevent its collection in that Contracting State, that revenue claim shall at the request of the competent authority of that Contracting State be accepted for purposes of collection by the competent authority of the other Contracting State.

Paragraph 4 of **new Article 25A** provides that Australia or South Africa may request the other Contracting State to take measures of conservancy where the revenue claim is not yet enforceable or where the debtor has not exhausted all rights to prevent its collection. The Explanatory Memorandum to the Bill in paragraph 1.186 on page 55 states that although Australia does not have specific conservancy measures, the Commissioner may apply for a *Mareva* injunction, to prevent the taxpayer and the taxpayer’s associates from dealing with certain assets.

Commencement and Application

Clause 2 of the Bill provides that the proposed Act commences on the day on which it receives Royal Assent.

Item 3 of **Schedule 1** inserts **proposed section 11ZGA** into the Agreements Act 1953 to provide that subject to this Act, on or after the date of entry into force of the South African protocol, the provisions of the protocol have the force of law according to their tenor.

Paragraph 1 of **Article 13** of the SAP provides that the Government of Australia and the Government of the Republic of South Africa shall notify each other in writing through the diplomatic channel of the completion of their domestic requirements for the entry into force of the SAP.

In the case of Australia, the enactment of this Bill and the tabling of the SAP in Parliament are prerequisites to the exchange of diplomatic notes under **Article 13** of the SAP.

Paragraph 2 of **Article 13** of the SAP, which shall form an integral part of the SAA, shall enter into force on the date of the last notification.

The SAP shall have effect for Australia and South Africa as follows.

Application in Australia

Paragraph 2(a) of **Article 13** provides that the SAP shall have effect as follows:

(i) with regard to withholding tax on income that is derived by a non-resident, in respect of income derived on or after the first day of the second month following the date on which the Protocol enters into force;

(ii) with regard to other Australian taxes, in respect of income, profits or gains of any year of income beginning on or after 1 July in the calendar year next following the date on which the Protocol enters into force.

Application in South Africa

Paragraph 2(b) of **Article 13** provides that the SAP shall have effect as follows:

(i) with regard to taxes withheld at source, in respect of amounts paid or credited from the day after the date von which the Protocol enters into force;

(ii) with regard to other South African tax, in respect of years of assessment beginning on or after 1 January next following the date on which the Protocol enters into force.

Application of exchange of information provisions

Paragraph 2(c) of **Article 13** provides that the provisions for exchange of information in **new Article 25** take effect from the date on which the SAP enters into force.

Application of exchange of collection of taxes provisions

Paragraph 2(d) of **Article 13** provides that the provisions for the collection of taxes in **new Article 25A** take effect from a date to be agreed in an Exchange of Notes through the diplomatic channel.

Concluding comments

Difficulties in quantifying the revenue impacts of tax treaties

It was noted in the section on 'Financial implications' in this Bills Digest that Treasury has estimated the impact of the first round effects on forward estimates as negligible.

The Regulation Impact Statement (RIS) in paragraph 2.19 and 2.20 on page 101 of the Explanatory Memorandum to the International Tax Agreements Amendment Bill (No. 1) 2008 (the Bill incorporating the 2008 Japanese Convention into Australian law) succinctly highlights the difficulties of estimating, which includes the estimation of cross-border behavioural responses to concessions in a tax treaty.

> 2.19 Only a partial analysis of costs and benefits can be provided because all the impacts of tax treaties cannot be quantified. While the direct cost to Australian revenue of withholding tax changes can be quantified relatively easily, other cost impacts such as compliance costs are inherently difficult to quantify. There are also efficiency and growth gains and losses to Australia that provide estimation problems. Analysis has been conducted to establish plausible impacts on Australian economic activity and consequent tax revenue flowing from implementation of the tax treaty. The tax revenue estimates are subject to more uncertainty than the estimates of costs but are best estimates given the technology of estimation, the availability of estimates of behavioural responses, and data.
>
> 2.20 Benefits that flow to business are generally equally difficult to quantify. The evidence from international consideration (eg, the OECD) and from consultation with business strongly indicates, however, that while the quantum of benefits is very difficult to assess, a modern tax treaty provides a clear positive benefit to trade and investment relationships. Tax treaties provide increased certainty and reduce complexity and compliance costs for business.

No RIS was prepared on the SAP as indicated by the comment "Regulation Impact Statement: Not Applicable" on information in relation to the SAP in the JSCOT website. The JSCOT comments on costs which were included in the 'Financial implications' section of this Bills Digest indicates that the reduction in withholding tax rates on dividends, interest and royalties will be at a net cost to Australian revenue. However, it concludes that the overall costs arising from all the measures in the SAP will be negligible. This highlights the difficulty of quantifying the revenue impacts of tax treaties.

Attachment A

Reasons for Australia to take treaty action

(extract from Report 93 of the Joint Standing Committee on Treaties)

4.6 According to the NIA the key objectives of the Protocol are to: (i) meet Australia's most favoured nation (MFN) obligations with South Africa under the existing Agreement; (ii) promote closer economic cooperation between Australia and South Africa; and (iii) upgrade the framework through which the tax administrations of Australia and South Africa can prevent international fiscal evasion. The protocol…

> is expected to reduce barriers to bilateral trade and investment, as lowered withholding tax rates on interest and royalties is expected to reduce costs for Australian businesses. I can provide the committee members with more details of any of these if they like. We therefore recommend that members of the committee support the treaty action as proposed.

4.7 The Department of the Treasury stated that the entry into force in 2003 of the Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains:

> … triggered a total of eight clauses in other treaties, and we were aware of that when we entered into it.

4.8 The Agreement requires Australia to enter into negotiations with South Africa with a view to establishing rules to protect nationals and businesses of one country from tax discrimination in the other country. Australia's MFN obligations will be met when the Protocol enters into force.

4.9 The Protocol aligns withholding tax (WHT) rates on dividends, interest and royalties and capital gains tax treatment more closely with broad practice among Organisation for Economic Co-operation and Development (OECD) members and improves integrity measures within the Agreement. In particular, by extending the scope of information exchange provisions and introducing provisions for cross-border collection of tax debts.

4.10 The Protocol is expected to reduce barriers to bilateral trade and investment caused by overlapping taxing jurisdictions. Reduced WHT rates on interest and royalty payments will make it cheaper for Australian businesses to obtain business loans and intellectual property from South Africa.

4.11 The existing Agreement provides for a dividend WHT rate of zero for non-portfolio inter-corporate dividends that are paid out of profits that have borne the normal rate of company tax and a rate of 15 per cent for all other dividends. Significantly, the secondary tax on companies (STC), as a tax borne by resident South African companies, has not been subject to treaty limitations.

4.12 The South African Government announced in its 2007/08 Budget that the STC will be phased out and replaced by a dividend tax on shareholders, which will be subject to treaty limitations. This is subject to the renegotiation of several tax treaties, including its tax treaty with Australia. To facilitate South Africa's domestic law changes the Protocol provides for dividend WHT at a rate of 5 per cent for non-portfolio inter-corporate dividends and 15 per cent for all other dividends, consistent with the OECD Model Tax Convention.

4.13 South Africa's proposed domestic law changes, combined with limitations on dividend WHT in the new Protocol, should benefit Australian investors. According to the NIA, in the case of non-portfolio inter-corporate dividends, Australian shareholder companies should benefit from a reduction in total South African tax on the corporate profit since the South African dividend WHT is limited to 5 per cent under the Protocol. In the case of all other dividends, the overall South African tax rate would be the same, however, Australian investors would benefit from being able to claim a foreign tax credit in Australia for the dividend WHT. This will reduce their overall tax burden.

4.14 The Protocol enhances the existing framework of the Agreement by updating the exchange of information rules to match the 2005 OECD standard and inserting assistance in collection provisions to help in the recovery of tax debts from those Australian taxpayers who move to South Africa. On being questioned about whether there were any problems with the implementation of the agreement, the Department of the Treasury stated:

> No. The revised protocol has updated our exchange of information arrangements and in that regard it provides a wider range of taxes that allows us to exchange information. It also requires that bank secrecy is not a blocker to providing information. The new protocol also contains an assistance in collection provision that allows Australia to collect tax debts on behalf of South Africa and vice-versa.

Attachment B

Comparison of key features of the new and current law

(Extract from the Explanatory Memorandum pages 14 to 17.)

New law	***Current law***
Updates certain Articles of the Agreement, having regard to Australian, South African and OECD tax treaty developments since the existing Agreement was entered into.	Not applicable.
Updates the list of taxes to which the new treaty arrangements apply. In the case of South Africa these taxes now include: • the withholding tax on royalties. However, a broader range of taxes apply to certain Articles. In the case of Australia, the taxes are: • taxes of every kind and description for Article 23A (*Non-Discrimination*); and • taxes of every kind and description imposed under the federal law of Australia and administered by the Commissioner for Article 25 (*Exchange of Information*) and Article 25A (*Assistance in the Collection of Taxes*). In the case of South Africa, the taxes are: • taxes of every kind and description for Article 23A (*Non-Discrimination*); and • taxes of every kind and description imposed under the tax laws administered by the Commissioner for the South African Revenue Service for Article 25 (*Exchange of Information*) and Article 25A (*Assistance in the Collection of Taxes*).	No equivalent.

The residency definition in the Agreement has been supplemented. In particular, the Protocol: • includes additional tie-breaker rules for allocating individual residency between the two countries.	Provides for more limited tie-breaker rules for determining how residency shall be allocated.
Limits the treaty benefits that a country is obliged to provide where income, profits or gains of temporary resident individuals are exempted.	No equivalent.
Updates the definition of 'permanent establishment'. In particular, the Protocol provides that a building site or construction or installation project constitutes a permanent establishment where it lasts for more than six months. Furthermore, an enterprise is deemed to have a 'permanent establishment' if: • it carries on supervisory or consultancy activities connected with a building site or construction or installation project for a period or periods exceeding in the aggregate 183 days in any 12-month period; • it carries on activities (including the operation of substantial equipment) in the exploration for or exploitation of natural resources for a period or periods exceeding in the aggregate 90 days in any 12-month period; or • it operates substantial equipment (including in natural resource activities) for a period or periods exceeding in the aggregate 183 days in any 12-month period. Integrity provisions are included to prevent related parties from circumventing the permanent establishment time thresholds by splitting contracts.	A building site or construction, installation or assembly project which exists for more than 12 months is included in the list of examples of a permanent establishment. In addition, an enterprise is deemed to have a permanent establishment if: • it carries on supervisory activities in that State for more than 12 months in connection with a building site, or a construction, installation or assembly project; or • substantial equipment is being used for or under contract with the enterprise.

Dividend withholding tax is limited to: • 5 per cent of the gross amount of the dividends if the beneficial owner of those dividends is a company which holds directly at least 10 per cent of the voting power in the company paying dividends; or • 15 per cent of the gross amount of the dividends in all other cases.	Inter-corporate dividends paid out of profits that have borne the normal rate of company tax (which, in the case of Australia, means that the dividends are fully 'franked') are exempt from dividend withholding tax, where the company that is beneficially entitled to the dividends holds directly at least 10 per cent of the capital of the paying company. The rate of dividend withholding tax is limited to 15 per cent in all other cases.
Reduces the rate of interest withholding tax from a maximum of 10 per cent to zero where certain interest is paid to: • government bodies and central banks; or • financial institutions.	No equivalent.
Reduces the rate of royalty withholding tax from a maximum of 10 per cent to 5 per cent of the gross royalty payment and extends the meaning of royalty to include spectrum licences. Leasing of industrial, commercial or scientific equipment will no longer constitute a royalty.	The rate of royalty withholding tax is limited to 10 per cent of the gross payment. Definition of 'royalties' includes payments for use of industrial, commercial and scientific equipment.
Modifies Article 13 (*Alienation of Property*) to provide that gains of a capital nature from the alienation of property not otherwise dealt with in Article 13 are taxable only in the Contracting State of which the alienator is a resident.	The sweep-up provision enables each country to tax, according to its domestic law, any gains of a capital nature derived by its own residents or by a resident of the other country from the alienation of any property not specified in Article 13.
Inserts a new Article 23A (*Non-Discrimination*) preventing discrimination in relation to tax laws.	No equivalent.
Closely aligns Article 25 (*Exchange of Information*) to the 2005 OECD standard. The effect of the changes is to expand the range of taxes to which the Article applies and to clarify that bank secrecy laws or the requirement of a domestic tax law interest in the information do not limit the exchange of information.	The existing rules apply to a narrower range of taxes.

Inserts a new Article 25A (*Assistance in the Collection of Taxes*) into the Agreement which authorises and requires Australia and South Africa to provide assistance to each other in the collection of cross-border tax debts.	No equivalent.