



International Tax Agreements Amendment Bill (No. 2) 2009

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Law and Bills Digest Section

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International Tax Agreements Amendment Bill (No. 2) 2009

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House: House of Representatives

Portfolio: Treasury

Commencement: Royal Assent

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

The Bill amends the *International Tax Agreements Act 1953* ('the International Tax Agreements Act') and the *Income Tax Assessment Act 1997* ('ITAA 1997') to give domestic legal effect to three treaties (known variously as conventions, agreements and/or protocols) entered into in 2009 by Australia and:

- New Zealand
- Belgium, and
- Jersey.

Background

Basis of policy commitment

Each of the three treaties is intended to avoid the situation where a taxpayer (who resides in Australia or the other contracting state) is taxed on the same income in both Australia and the other state.¹ (This concept of being taxed twice on the same income is referred to as 'double taxation'). The tax treaties also prevent income tax evasion by:

- encouraging cooperation and the sharing of information between contracting states, and
- ensuring that the laws of Australia and the other state are enforced.

1. Parties to a treaty are known as 'contracting states'.

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The treaty with Jersey is a completely new agreement made between the two states on 10 June 2009, whereas the treaty with New Zealand was made on 26 June 2009 to replace earlier tax treaties made between the two nations. In the case of Belgium, the Bill gives effect to a protocol signed on 24 June 2009 which amends an agreement between the two states that was originally entered into in 1977. Further details of these various treaties are provided below.

New Zealand

On 26 June 2009, Australia and New Zealand entered into a treaty known formally as the ‘Convention between Australia and New Zealand for the avoidance of double taxation with respect to taxes on income and fringe benefits and the prevention of fiscal evasion’. It is referred to in the Bill as ‘the 2009 New Zealand convention’ and replaces four earlier tax agreements between Australia and New Zealand that were entered into or amended between 1960 and 2005.

The text of the 2009 New Zealand convention appears in **item 18** of **Schedule 1** to the Bill. Following the passage of the Bill, it will appear as Schedule 4 to the International Tax Agreements Act (in place of existing Schedules 4 and 4A).² While the convention becomes law in Australia on the date of Royal Assent, it does not actually come into force until the date of the last notification by diplomatic channels of each state having completed its domestic processes. Even then, different parts of the convention will apply in Australia from different dates, as follows:³

Type of tax	Application date
Withholding taxes	On income derived on or after the first day of the second month next following the date on which the convention enters into force
Fringe benefits tax	On fringe benefits provided on or after 1 April next following the date on which the convention enters into force
Other Australian taxes	On income, profits or gains of any income year beginning on or after 1 July next following the date on which the convention enters into force

2. The text of current Schedule 4 to the International Tax Agreements Act is available at http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1953299/sch4.html, viewed 14 January 2010, and the text of current Schedule 4A (being the protocol which amended the original New Zealand Agreement) is available at http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1953299/sch4a.html, viewed 14 January 2010.
3. Article 30 (Entry into Force) of the 2009 New Zealand convention (which is found in the Bill at pp. 60–61).

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Also, because New Zealand has slightly different tax classifications to those used in Australia, the convention will apply there on just two different dates:

- *for withholding taxes, on income, profits or gains derived*: on or after the first day of the second month next following the date on which the convention enters into force, or
- *for other New Zealand taxes*: for any income year beginning on or after 1 April following the date on which the convention enters into force.⁴

Belgium

On 13 October 1977, Australia and Belgium entered into a treaty known formally as the ‘Agreement between Australia and the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income’ (‘the Belgian agreement’). The text of that agreement appears as Schedule 13 to the International Tax Agreements Act.⁵ It was amended by a protocol (‘the first Belgian protocol’) signed on 20 March 1984,⁶ and has more recently been amended by another protocol (‘the second Belgian protocol’) signed on 24 June 2009.

The text of the second Belgian protocol appears in **item 19** of **Schedule 1** to the Bill. Following the passage of the Bill, it will appear as Schedule 13B to the International Tax Agreements Act.

The second Belgian protocol enters into force following the last notification through diplomatic channels of the completion of the necessary domestic processes to bring the treaty into force. Its provisions take effect on various dates, depending on the nature of the taxes involved. For most taxes, the protocol will apply on or after 1 January 2010, but the provisions of Article 26 (Exchange of Information) will have effect with respect to criminal tax matters from the date the protocol enters into force, irrespective of the taxable period to which the matter relates.⁷

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4. Ibid. The New Zealand tax year starts on 1 April each year: see New Zealand Government (Inland Revenue), ‘What happens when in the tax year and why?’, *website*, viewed 15 January 2010, <http://www.ird.govt.nz/help/onlineforms/other/taxyear.html>
 5. The text of Schedule 13 is available at http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1953299/sch13.html, viewed 14 January 2010.
 6. The first Belgian protocol appears as Schedule 13A to the International Tax Agreements Act and is available at http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1953299/sch13a.html, viewed 14 January 2010.
 7. Article II of the second Belgian protocol (which is found in the Bill at pp. 66–67).

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Jersey

On 10 June 2009, Australia and Jersey entered into two tax agreements:

- the ‘Agreement for the Exchange of Information with Respect to Taxes’, and
- the ‘Agreement for the Allocation of Taxing Rights with Respect to Certain Individuals and to Establish a Mutual Agreement Procedure in Respect of Transfer Pricing Adjustments’ (‘the Jersey agreement’).

Only the second agreement is mentioned in the Bill. It deals specifically with the allocation of taxing rights in respect to certain cross-border income derived by individuals who are resident in both countries, and also establishes a mutual agreements procedure for resolving transfer pricing disputes.⁸ Both agreements come into force in Australia and Jersey when both nations have completed the necessary domestic requirements. **Item 20 of Schedule 1** to the Bill inserts the text of the Jersey agreement (for the allocation of taxing rights) as Schedule 50 to the International Tax Agreements Act.⁹

The Jersey agreement takes effect for any year of income beginning on or after a specified date in the calendar year next following the date on which the agreement enters into force. In the case of Australia, it will apply from 1 July in the relevant year, but in the case of Jersey, it will apply from 1 January (being the start of the tax year in Jersey).¹⁰

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8. The Australian Taxation Office (ATO) explains the basics of ‘international transfer pricing’ as follows:

Where a tax treaty exists, the Commissioner would usually raise a transfer pricing or profit reallocation adjustment under both Division 13 of the Income Tax Assessment Act 1936 (ITAA 1936) and the Associated Enterprises article (usually Article 9) of the relevant treaty. The Associated Enterprises article contains its own provisions to deal with profit shifting arrangements and also mandates the ‘arm’s length’ principle for international dealings between associated enterprises.

Accordingly, the Commissioner may apply the provisions of Division 13 and/or the Associated Enterprises article when making a transfer adjustment. There should be no fundamental inconsistency between the results under Division 13 and the Associated Enterprises article of the treaty since both are based on the arm’s length principle, though due regard should be given to the precise wording of the treaty being applied. In the event of any inconsistency, the treaty provisions will prevail unless the treaty itself gives precedence to the domestic law (see Section 4(1) of the IT(IA)A).

For further details, see ATO, ‘Transfer pricing’, *ATO website*, viewed 14 January 2010, <http://www.ato.gov.au/businesses/content.asp?doc=/content/54621.htm&sf=1>

9. The agreements and associated documents are available on the Treasury website, viewed 13 January 2010, <http://www.treasury.gov.au/contentitem.asp?NavId=055&ContentID=1563>
10. Article 10 (Entry into Force) of the Jersey Agreement (which is found in the Bill at p. 74). Confirmation of the start date for the Jersey tax year is found in PKF International Limited (an association of legally independent member firms), *Jersey Tax Guide 2009*, viewed 15 January 2010, p. 1, <https://www.pkf.com/site/webdav/site/pkf/shared/Intranet/International%20Tax%20other%20attachments/Country%20Tax%20Guides%20in%20PDF/Jersey%20Tax%20Guide%202009.pdf>

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Committee consideration

The three treaties that are the subject of the current Bill were considered by the Joint Standing Committee on Treaties (JSCOT) in late 2009. The committee recommended that binding treaty action be taken in relation to all three agreements.¹¹

Financial implications

The impact of the amendment of section 125–60 of the ITAA 1997 is considered to be unquantifiable but is expected to be minimal.¹²

The impact of the first round effects of the 2009 New Zealand convention on the forward estimates has been estimated as ‘unquantifiable’.¹³ However, the Explanatory Memorandum explains that the costs to revenue (such as those associated with the reduction in the rates of withholding tax and the change in taxing rights over pensions) are expected to be offset by revenue gains (such as those that are expected to flow as a result of reductions in New Zealand withholding tax and reductions in the Foreign Income Tax Offsets that will be able to be claimed).¹⁴

The financial impact of the second Belgian protocol is unquantifiable. However, the fact that the protocol replaces and updates existing Article 26 (Exchange of Information) in the Belgian agreement may ‘improve taxpayer compliance and increase tax revenue’.¹⁵

The financial impact of the Jersey agreement is expected to be negligible.¹⁶

Main provisions

Dual listed company arrangements

Item 1 of Schedule 1 to the Bill amends existing subsection 125–60(4) of the ITAA 1997, which defines the term ‘dual listed company arrangement’. Such an arrangement exists where two publicly listed companies have agreed to maintain their separate legal entity status, shareholdings and listings, but align their strategic directions and economic

11. JSCOT, *Review into treaties tabled on 20 August (2) and 15 September 2009*, Report 107, Parliament of Australia, Canberra, tabled 16 November 2009, viewed 13 January 2010, <http://www.aph.gov.au/house/committee/jsct/20august2009/report2.htm>

12. Explanatory Memorandum, International Tax Agreements Amendment Bill (No. 2) 2009, p. 7.

13. *Ibid.*, p. 10.

14. *Ibid.*

15. *Ibid.*, p. 12.

16. *Ibid.*, p. 14.

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interests. Existing paragraph 125–60(4)(a) sets out one of the ways that a dual listed company arrangement is achieved, being ‘the appointment of common (or almost identical) boards of directors’. **Item 1** brings this attribute into line with the requirements of the 2009 New Zealand convention by limiting the appointment of common boards of directors to situations where the relevant regulatory requirements allow this to occur.¹⁷

Item 2 provides that the amendment contained in **item 1** will apply in relation to capital gains tax (CGT) events happening on or after the commencement of Schedule 1 (being Royal Assent).

Tax treaties

Items 3–13 of **Schedule 1** amend section 3 of the International Tax Agreements Act (being the interpretation section of the Act) as a consequence of entering into the three tax treaties that are the subject of the Bill. Particularly, they amend existing definitions of terms (such as ‘Belgian agreement’) and also insert definitions for new terms (such as ‘the first Belgian protocol’).

Item 14 repeals existing sections 6B and 6C and substitutes new provisions (**proposed sections 6B and 6C**) in their place to:

- state that once a provision of the 2009 New Zealand convention enters into force, the provision has ‘the force of law according to its tenor’
- set out a list of previous New Zealand agreements, and
- state that so far as provisions of those previous agreements affect Australian tax, they continue to have the force of law in respect of income or fringe benefits in relation to which the particular agreement remains effective.

Item 16 inserts **proposed section 11CB**, which provides that on or after the second Belgian protocol enters into force, its provisions have the force of law ‘according to their tenor’. Similarly, **item 17** inserts **proposed section 11ZO**, which provides that on or after a provision of the Jersey agreement enters into force, the provision has the force of law ‘according to its tenor’.

Item 18 repeals existing Schedules 4 and 4A to the International Tax Agreements Act and substitutes **proposed Schedule 4** in their place. **Proposed Schedule 4** sets out the text of the 2009 New Zealand convention.

17. The current text of section 125–60 is available at:
http://www.austlii.edu.au/au/legis/cth/consol_act/itaa1997240/s125.60.html, viewed 13 January 2010.

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Item 19 inserts **proposed Schedule 13B** into the International Tax Agreements Act. It sets out the text of the second Belgian protocol.

Item 20 inserts **proposed Schedule 50** into the International Tax Agreements Act. It sets out the text of the Jersey agreement.

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