DISCUSSION NOTES

AUSTRALIAN MUTUAL ASSISTANCE IN COLLECTION OF FOREIGN TAX

Australia's bilateral double tax treaties with mutual assistance provisions dealing with the collect of each others' tax debts are NZ (Art 27 signed 2005), Finland (Art 26 signed 2006), Norway (Art 27 signed 2006), South Africa (Art 25A signed 2008) and France (Art 26 signed 2006). These followed amendment to the OECD model in 2003.

Mutual assistance in recovery of another countries taxes is to counter the first principle of private international law: *Government of India v Taylor* [1955] AC 491 per Lord Keith of Avonholm:

> "One explanation of the rule thus illustrated may be thought to be that enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one State within the territory of another, … is (treaty or convention apart) contrary to all concepts of independent sovereignties. …
> On either of the explanations which I have just stated I find a solid basis of principle for a rule which has long been recognized and which has been applied by a consistent train of decisions." (underlining added)(the so-called "Revenue Rule")

The decision has been followed by corollary by the High Court of Australian e.g. in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 42. The Revenue Rule was followed by Gzell J in *Jamieson v Commissioner for Internal Revenue* [2007] NSWSC 324.

The Revenue Rule was also referred to recently in the English Court of Appeal decision as Dicey Rule 3, in *Skatteforvaltningen v Solo Capital Partners LLP* [2022] EWCA Civ 234 at [1], viz:

> "This appeal concerns whether the claims made in these proceedings by the claimant, which is the Danish tax authority…, are not admissible before the English courts by reason of Rule 3(1) of *Dicey, Morris & Collins on the Conflict of Laws* 15th edition (to which I will refer as "Dicey Rule 3") which provides:
>
> > "English courts have no jurisdiction to entertain an action:
> > (1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign State;"

All of the above referred to bilateral treaties' collection articles are in OECD model form. The OECD model position broadly follows the position in the European Union, where it has allowed mutual assistance in collection of taxes since at least 1976 (EEC Council Directive 76/308/EEC). It was replaced by EC Council Directive 2008/55/EC, and then by the current provision, EU Council Directive 2010/24/EU (summarised by the EU in Appendix 7 hereto). The whole EU project including mutual assistance in collection of each other's taxes, is a clear ceding of sovereignty in favour of each other and the (some would argue) supernational EU.

The Australia / NZ bilateral treaty provides:

> **"Article 27**
> **ASSISTANCE IN THE COLLECTION OF TAXES**

1. The Contracting States shall lend assistance to each other in the collection of revenue claims. This assistance is not restricted by Articles 1 and 2. The competent authorities of the Contracting States may by mutual agreement settle the mode of application of this Article.

2. The term 'revenue claim' as used in this Article means an amount owed in respect of taxes of every kind and description imposed, in the case of Australia, under the federal tax laws administered by the Commissioner of Taxation, and in the case of New Zealand, under its tax laws, insofar as the taxation thereunder is not contrary to this Convention or any other instrument to which the Contracting States are parties, as well as interest, administrative penalties and costs of collection or conservancy related to such amount.

3. When a revenue claim of a Contracting State is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of collection by the competent authority of the other Contracting State. That revenue claim shall be collected by that other State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other State.

4. When a revenue claim of a Contracting State is a claim in respect of which that State may, under its law, take measures of conservancy with a view to ensure its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of taking measures of conservancy by the competent authority of the other Contracting State. That other State shall take measures of conservancy in respect of that revenue claim in accordance with the provisions of its laws as if the revenue claim were a revenue claim of that other State even if, at the time when such measures are applied, the revenue claim is not enforceable in the first-mentioned State or is owed by a person who has a right to prevent its collection.

5. Notwithstanding the provisions of paragraphs 3 and 4, a revenue claim accepted by a Contracting State for purposes of paragraph 3 or 4 shall not, in that State, be subject to the time limits or accorded any priority applicable to a revenue claim under the laws of that State by reason of its nature as such. In addition, a revenue claim accepted by a Contracting State for the purposes of paragraph 3 or 4 shall not, in that State, have any priority applicable to that revenue claim under the laws of the other Contracting State.

6. Proceedings with respect to the existence, validity or the amount of a revenue claim of a Contracting State shall not be brought before the courts or administrative bodies of the other Contracting State.

7. Where, at any time after a request has been made by a Contracting State under paragraph 3 or 4 and before the other Contracting State has collected and remitted the relevant revenue claim to the first-mentioned State, the relevant revenue claim ceases to be

a) in the case of a request under paragraph 3, a revenue claim of the first-mentioned State that is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, or

b) in the case of a request under paragraph 4, a revenue claim of the first-mentioned State in respect of which that State may, under its laws, take measures of conservancy with a view to ensure its collection the competent authority of the first-mentioned State shall promptly

notify the competent authority of the other State of that fact and, at the option of the other State, the first-mentioned State shall either suspend or withdraw its request.

8. In no case shall the provisions of this Article be construed so as to impose on a Contracting State the obligation:

a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

b) to carry out measures which would be contrary to public policy (ordre public);

c) to provide assistance if the other Contracting State has not pursued all reasonable measures of collection or conservancy, as the case may be, available under its laws or administrative practice;

d) to provide assistance in those cases where the administrative burden for that State is clearly disproportionate to the benefit to be derived by the other Contracting State;

e) to provide assistance if that State considers that the taxes with respect to which assistance is requested are imposed contrary to generally accepted taxation principles." (underlining added)

Para 1 of the Commentary on the OECD model Article 27 makes clear the issues negotiating countries should consider before collecting each other's taxes:

"– the stance taken in national law to providing assistance in the collection of other States' taxes;

– whether and to what extent the tax systems, tax administrations and legal standards of the two States are similar, particularly as concerns the protection of fundamental taxpayers' rights (e.g. timely and adequate notice of claims against the taxpayer, the right to confidentiality of taxpayer information, the right to appeal, the right to be heard and present argument and evidence, the right to be assisted by a counsel of the taxpayer's choice, the right to a fair trial, etc.);

– whether assistance in the collection of taxes will provide balanced and reciprocal benefits to both States;

– whether each State's tax administration will be able to effectively provide such assistance;

– whether trade and investment flows between the two States are sufficient to justify this form of assistance;

– whether for constitutional or other reasons the taxes to which the Article applies should be limited.

The Article should only be included in the Convention where each State concludes that, based on these factors, they can agree to provide assistance in the collection of taxes levied by the other State." (underlining added)

Since the treaties signed in 2006 containing collection of taxes article, there have been a number of bilateral treaties entered into which do not contain a collection of taxes article e.g. Chile (enacted 2011), Israel (enacted 2019), Iceland (not yet in force).

The Australia / United States bilateral double tax treaty Art 25(5) provides for limited recovery of each other's taxes where there has been an incorrect benefit obtained by the treaty. This is specifically referred to in s20 of the International Tax Agreements Act 1953. As with most bilateral double tax treaties, Art 25(1) provides for exchange of information on request.

However, the US FATCA provisions require Australia to automatically provide information to the US, on US persons holding Australian financial accounts without any obligation on the US to automatically provide information on Australians holding US financial accounts. Note, the US is not a signatory to the Common Reporting Standard (CRS) on exchange of information.

The CRS is empowered by s23 of the International Tax Agreements Act. All of Australia's bilateral double tax agreements contain exchange of information articles (usually Art 26, in OECD model form), and more recently, specific bilateral Taxation Information Exchange Agreements (TIEAs) have been signed by countries that are not part of the CRS regime.

As a matter of ceding sovereignty, at least the bilateral treaties with mutual assistance in tax collection provisions are negotiated on a country-by-country basis presumably taking into account the factors referred to in para 1 of the OECD commentary on Art 27, including because those treaty partners have a sufficiently reliable tax system with adequate protection against arbitrary collection of ambit tax claims, and those treaties have been passed by the Australian parliament before becoming legally binding on Australia.

The so-called Multilateral Instrument (MLI) is a multilateral treaty now with some 130 signatories amending bilateral double tax agreements, by Australia having become a party, and then each signatory country which nominates Australia as a corresponding party and both countries then have to nominate which of the clauses of the MLI are to apply on a bilateral basis. It was legislated by being referred to as a "current agreement" in s3AAA of the International Agreements Act.

On the other hand, the Mutual Assistance in Tax Matters multilateral treaty has been signed by Australia in 2012 and allows Australia to assist other signatory countries to request to have their tax debts enforced in Australia even though those other signatory countries may not even allow requests to be made of them to enforce Australian tax debts in their country (because they have expressed that "reservation" in their adoption of the treaty.

The relevant parts of the Mutual Assistance treaty are:

> **Section II - Assistance in recovery**
>
> **Article 11 – Recovery of tax claims**
> 1 At the request of the applicant State, the requested State shall, subject to the provisions of Articles 14 and 15, take the necessary steps to recover tax claims of the first-mentioned State as if they were its own tax claims.
>
> 2 The provision of paragraph 1 shall apply only to tax claims which form the subject of an instrument permitting their enforcement in the applicant State and, unless otherwise agreed between the Parties concerned, which are not contested. However, where the claim is against a person who is not a resident of the applicant State, paragraph 1 shall only apply, unless

otherwise agreed between the Parties concerned, where the claim may no longer be contested.

3 The obligation to provide assistance in the recovery of tax claims concerning a deceased person or his estate, is limited to the value of the estate or of the property acquired by each beneficiary of the estate, according to whether the claim is to be recovered from the estate or from the beneficiaries thereof.

Article 12 – Measures of conservancy

At the request of the applicant State, the requested State shall, with a view to the recovery of an amount of tax, take measures of conservancy even if the claim is contested or is not yet the subject of an instrument permitting enforcement.

Article 13 – Documents accompanying the request

1 The request for administrative assistance under this section shall be accompanied by:

a a declaration that the tax claim concerns a tax covered by the Convention and, in the case of recovery that, subject to paragraph 2 of Article 11, the tax claim is not or may not be contested,

b an official copy of the instrument permitting enforcement in the applicant State, and

c any other document required for recovery or measures of conservancy.

2 The instrument permitting enforcement in the applicant State shall, where appropriate and in accordance with the provisions in force in the requested State, be accepted, recognised, supplemented or replaced as soon as possible after the date of the receipt of the request for assistance, by an instrument permitting enforcement in the latter State.

Article 14 – Time limits

1 Questions concerning any period beyond which a tax claim cannot be enforced shall be governed by the law of the applicant State. The request for assistance shall give particulars concerning that period.

2 Acts of recovery carried out by the requested State in pursuance of a request for assistance, which, according to the laws of that State, would have the effect of suspending or interrupting the period mentioned in paragraph 1, shall also have this effect under the laws of the applicant State. The requested State shall inform the applicant State about such acts.

3 In any case, the requested State is not obliged to comply with a request for assistance which is submitted after a period of 15 years from the date of the original instrument permitting enforcement.

Article 15 – Priority

The tax claim in the recovery of which assistance is provided shall not have in the requested State any priority specially accorded to the tax claims of that State even if the recovery procedure used is the one applicable to its own tax claims.

> **Article 16 – Deferral of payment**
>
> The requested State may allow deferral of payment or payment by instalments if its laws or administrative practice permit it to do so in similar circumstances, but shall first inform the applicant State.

Whilst it is true that Australia may not follow up on another signatory country's request unless that country will agree to enforce Australia's tax debts, the extent to which there is a ceding of sovereignty is concerning due to the lack of formality and public disclosure of what is in fact going on. Interestingly, PS LA 2011/13 is to the effect that Australia will follow the other country's request, the fact is that very few countries who are signatories to the treaty have not made a reservation in relation to collecting taxes due to the other signatory country. Indeed, Australia and the United Kingdom are only a handful of countries that have not made that reservation. The PS LA says that Australia will endeavour to enter into Memoranda of Understanding on the collection of other signatories' taxes. In contrast, basically all signatories agree to exchange information. The only memoranda of understating appearing on the ATO website that I could find relating to the Mutual Assistance treaty, relates to Switzerland, and only deals with exchange of information. Switzerland has reserved on the collection of taxes.

Interestingly, in the recent High Court decision of *Deputy Commissioner of Taxation v Huang* [2021] HCA 43, the Court controversially said that the Federal Court had power to make a freezing order over the world-wide assets of a Chinese national who was formerly a tax resident of Australia, to secure Australian tax debts, notwithstanding that the order was unlikely to be enforced by China (Edelman J dissenting). The plurality said at [14]:

> 'The Deputy Commissioner does not dispute the Full Court's finding that there is presently no realistic possibility that the Deputy Commissioner's judgment would be enforceable in the PRC or Hong Kong. Among other reasons, the PRC and Hong Kong have each entered a reservation to the Convention on Mutual Administrative Assistance in Tax Matters, to the effect that they "shall not provide assistance in the recovery of tax claims, or in conservancy measures, for all taxes".'

The means by which the Mutual Assistance treaty entered into Australian law was via the enactment of a Schedule to the Taxation Administration Act in 2006, without the Mutual Assistance treaty specifically having been passed as an Act of parliament in its own right, or even entered into until 2012. From considering the available materials it is not apparent that the real extent to which this ceding of sovereignty was really understood by the parliament. The recent actions of China and Russia highlights the danger of the way Australia has not made any reservations to the Mutual Assistance treaty.

The Department of Foreign Affairs and Trade says on its website, the scrutiny that an international treaty should be subject to before the parliament:

> **"Step 5: Scrutiny by Parliament**
>
> Following signature, treaties are tabled in both Houses of Parliament for consideration by the Joint Standing Committee on Treaties (JSCOT). Treaties are required to be tabled for 15 or 20 joint sitting days (days on which both Houses of Parliament are in session) depending on the category of the treaty (i.e. whether it is routine in form or not). In calendar days this time period may vary considerably in length depending on the sitting program for any given year and, in particular, when parliamentary recess periods may fall. JSCOT will table its report on

> the treaty within the 15 or 20 joint sitting days. The report will contain JSCOT's recommendation as to whether binding treaty action should be taken. Lead agencies should allow around four to six months for this step.
>
> "If the treaty action does not significantly impact the national interest and will have a negligible effect in Australia (such as technical amendments to an existing multilateral treaty), it may be treated as a minor treaty action and subject to a streamlined Parliamentary scrutiny process. Lead agencies should consult the Treaties Section on a case-by-case basis to determine whether a particular treaty action is likely to be considered a minor treaty action."

The International Tax and Treaties Division of the Department of the Treasury prepared a National Interest Analysis of the Mutual Assistance treaty in 2012, contained in Appendix 1 hereto.

The Joint Standing Committee on Treaties prepared a report in 2012, contained in Appendix 2 hereto. After repeating almost verbatim what the National Interest Analysis said, JSCOT recommended that the treaty be adopted, which as they acknowledged, did not require specific enabling legislation, although it says the treaty was tabled before the parliament.

Neither the National Interest Analysis nor the JSCOT report acknowledged the significant ceding of sovereignty involved in the collection of taxes.

Div 263-A of the Taxation Administration Act 1953 enacted in 2006, dealing with collection of foreign taxes in set out in Appendix 3 hereto. This appears to have been considered necessary due to the several treaties with mutual assistance in collection articles being signed in 2006.

Appendix 4 sets out the UK-Australia Contractors Group submission into the UK – Australia Free Trade Agreement (https://www.dfat.gov.au/sites/default/files/20200409-contractors-group.pdf) and makes complaint about the ATO assistance to UK Revenue & Customs requests for collection of UK taxes in Australia. Although not every assertion in the submission is supportable, it does raise arguments that should be agitated if a taxpayer in Australia is confronted with an attempt by the ATO to recover foreign taxes. The submission does makes excellent points about ceding sovereignty and whether the Mutual Assistance treaty is necessarily in the national interest. In particular, is it in the national interest to collect Chinese and Russian taxes in Australia in the current global political circumstances when those countries have expressed the reservation that they won't collect other counties taxes?

I also note that the submission included a claim as to alleged retrospectivity. This issue has been dealt with concerning the bilateral treaty between the UK and South Africa, in *HMRC v Ben Nevis Holdings Ltd* [2012] EWHC 1807 (Ch). I also note that the Mutual Assistance treaty does not seem to have been invoked by the Danish Tax Authority in the above referred to case of *Solo Capital Partners LLP (see at [105]).*

Appendix 5 sets out the relevant part of the ATO practice statement PS LA 2011/13 concerning assistance in collection of foreign tax debts. This seems to assume that Div 263-A supports the application of the multi-lateral Mutual Assistance treaty in the same way that it supports the application of the relevant provisions of a bilateral treaty.

Appendix 6 sets out the Thomson Reuters 'Australian Tax Handbook' commentary of collection of foreign tax debts and it seems to say that Div 263-A only supports that application of the provisions of the bilateral treaties and somehow is not needed in relation to a multilateral treaty.

Appendix 8 sets out a colleague's (not Terence Dwyer, who I don't know personally) FOI requests of both the ATO and HMRC in relation to the use of the Mutual Assistance treaty in relation to tax collection. By and large, it would have to be said that the whole area is shrouded in secrecy.

Appendix 9 sets out the material on HMRC website about collection under the Mutual Assistance treaty. Interestingly, it says the Mutual Assistance treaty became part of the UK law by virtue of a Statutory Instrument, and that the UK will only collect the other signatories' taxes on a reciprocal basis.

Barrister
C/- Greens List Barristers
Owen Dixon Chambers
205 William Street, Melbourne VIC 3000
9 Oct 2023

These Discussion Notes do not constitute professional advice and should not be relied on as such.

APPENDIX 1

National Interest Analysis [2012] ATNIA 2
with attachment on consultation

Convention on Mutual Administrative Assistance in Tax Matters
done at Strasbourg on 25 January 1988

(Text amended by the provisions of the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters, which entered into force on 1 June 2011)

[2011] ATNIF 28

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

Convention on Mutual Administrative Assistance in Tax Matters
done at Strasbourg on 25 January 1988
(Text amended by the provisions of the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters, which entered into force on 1 June 2011)

Nature and timing of proposed treaty action

1. The proposed treaty action is to ratify the *Convention on Mutual Administrative Assistance in Tax Matters,* done at Strasbourg on 25 January 1988 (text amended by the provisions of the *Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters*) ('the Convention').

2. The 1988 *Convention on Mutual Administrative Assistance in Tax Matters* ('Original Convention') entered into force on 1 April 1995. It was amended by the 2010 *Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters* ('Protocol'), which entered into force on 1 June 2011. The amendments brought the Convention into line with current international standards on transparency and exchange of tax information.

3. Australia signed the Convention on 3 November 2011.The Convention will enter into force in respect of Australia, pursuant to paragraph 3 of its Article 28, on the first day of the month following the expiration of a period of three months after the date of the deposit of Australia's instrument of ratification, acceptance or approval.

4. The provisions of the Convention will take effect for administrative assistance related to taxable periods beginning on or after 1 January of the year following the one in which the Convention enters into force in respect of Australia, in accordance with paragraph 6 of its Article 28. Where there is no taxable period, the Convention shall have effect for administrative assistance related to the imposition of tax arising on or after 1 January of the year following the one in which the Convention enters into force for Australia. In relation to criminal tax matters, however, the Convention will take effect from the date of its entry into force for a Party (Article 28(7)).

5. The Convention is open for signature and ratification by the member States of the Council of Europe and member countries of the Organisation for Economic Cooperation and Development ('OECD'). In addition, other States (not being members of the Council of Europe or the OECD) may request to be invited to sign and ratify the Convention. All G-20 member countries have agreed to sign the Convention and, to date, thirty five countries have signed or ratified either the Original Convention or the Convention:

- Argentina, Australia, Azerbaijan, Belgium, Brazil, Canada, Costa Rica, Denmark, Finland, France, Georgia, Germany, Greece, Iceland, India, Indonesia, Ireland, Italy, Japan, Korea (Republic of), Mexico, Moldova, the Netherlands, Norway, Poland, Portugal, Russia, Slovenia, South Africa, Spain, Sweden, Turkey, Ukraine, the United Kingdom and the United States.

6. Signatories to the Convention may, pursuant to Article 30, declare a reservation at signature, ratification or at any later date. Australia did not declare a reservation at time of signature nor will a reservation be made at the time of ratification.

Overview and national interest summary

7. The key objective of the Convention is to promote international cooperation for a better operation of national tax laws, while respecting the fundamental rights of taxpayers. The Convention provides for the provision of administrative assistance in three areas:

- the exchange of taxpayer information;
- assistance in the recovery of tax debts; and
- assistance in the service of documents.

8. The Convention will help Australia protect its revenue base by providing a legal framework through which the Commissioner of Taxation can seek such administrative assistance from the revenue authorities of the other Parties. This will help improve the integrity of the tax system by discouraging tax avoidance and evasion by individuals and other entities. Conversely, the Convention will also provide reciprocal benefits to the other Parties.

Reasons for Australia to take the proposed treaty action

9. The Convention will complement Australia's network of comprehensive tax treaties and tax information exchange agreements by providing an additional tool for detecting and preventing tax evasion and recovering outstanding tax debts.

10. The 'exchange of information' rules contained in the Convention meet the internationally agreed standard developed by the OECD and endorsed by the G-20 and the United Nations Committee of Experts on International Cooperation in Tax Matters. This framework will support global action on improving information exchange and transparency. Australia, as Chair of the Global Forum on Transparency and Exchange of Information for Tax Purposes ('Global Forum'), is a strong proponent of improved global transparency and exchange of taxation information as a means of preventing tax avoidance and evasion.

11. While Australia has concluded bilateral tax treaties with several Parties to the Convention, the Convention will enhance the ability of the Commissioner of Taxation to seek assistance in respect of a broader range of taxes, namely all federal taxes administered by the Commissioner. In contrast, the scope of the 'exchange of information' provisions in Australia's bilateral tax treaties signed or amended before 2006 is generally limited to income tax. It will now be possible for the Commissioner to use the Convention to obtain information or seek assistance from a Party that he would be unable to obtain under Australia's bilateral tax treaty with that Party.

12. Furthermore, the Convention will explicitly enable the Australian Taxation Office (ATO) to conduct simultaneous tax examinations of taxpayers' affairs with tax officials from the other Parties.

13. The cross-border recovery of tax debts has become progressively more common internationally. The 'assistance in recovery' rules contained in the Convention are consistent with similar rules contained in Australia's recent tax treaties with Finland, France, New Zealand, Norway and South Africa and will discourage taxpayers from concealing assets in foreign jurisdictions in order to avoid settling their Australian tax debts. This mechanism for cross-border assistance in recovery of tax debts will:

- support taxation principles of integrity and fairness;
- help meet the tax collection challenges presented by globalisation; and
- complement the framework of existing international tax legislation, which deals with international transactions and taxation issues of non-residents.

Obligations

14. Article 1 of the Convention sets out the general obligation of Parties to provide administrative assistance to each other in tax matters (comprising exchange of information, assistance in recovery and service of documents). Article 1 also prescribes that such assistance is required regardless of the country of residence of the taxpayer. Article 2 prescribes, in general terms, the taxes covered by the Convention.

15. Articles 4-17of the Convention provide details of the Parties' obligations in respect of the three broad forms of assistance identified in Article 1.

Exchange of information

16. Article 4 of the Convention obliges the Parties to exchange information that is foreseeably relevant to the administration or enforcement of the taxes covered by the Convention. Information exchange can take three forms: on-request (Article 5); automatic (Article 6) and spontaneous (Article 7). This is consistent with Australia's exchange of information practice under its bilateral tax treaties.

17. Article 8 authorises the Parties to consult to determine cases and procedures for simultaneous tax examinations (joint investigations) in relation to the tax affairs of persons or entities in which they have a common or related interest.

18. Article 9 authorises tax examinations abroad, whereby tax officials from one Party may visit another Party for the purpose of participating in an investigation of mutual interest.

19. Article 10 requires Parties to notify each other when information received under the Convention conflicts with information in their possession.

Assistance in recovery of tax debts

20. The broad obligation to provide assistance in the recovery of cross-border tax debts, and the terms under which Parties are required to do so, set out in Articles 11 to16.

21. Article 11 requires each Party to assist other Parties in the recovery of unpaid tax claims upon request. A Party providing assistance should take the necessary steps to recover debts as if the debts were its own outstanding tax claims. In providing such assistance, Article 12 requires the Parties to take measures of conservancy (for example, the seizure or freezing of a taxpayer's assets before final judgement) in relation to other Parties' tax claims if requested, even if the claim is contested or not yet the subject of an instrument permitting enforcement. Article 13 requires the applicant State to provide appropriate documentation supporting the existence of the relevant tax claim.

22. Article 14 sets out the rules concerning the time limits that apply to the provision of assistance in the recovery of tax debts. The laws of the applicant State apply with regard to the period beyond which a tax claim cannot be enforced. This period can be interrupted or suspended in the applicant State if any acts of recovery carried out by the requested State would interrupt or suspend such periods in the requested State. In any case, assistance is not obligatory in cases where the debt is outstanding for fifteen years or more (from the date of the original instrument permitting its enforcement).

23. Article 15 ensures that requests for assistance in debt recovery do not take priority over domestic debt recovery actions in the requested State. The requested State may also allow deferral of payment or accept payment by instalments if its own laws and administrative practices would permit such actions in relation to its own debts (Article 16).

Service of documents

24. Article 17 obliges a Party to provide assistance in the service of tax-related documents, including those relating to judicial decisions, to taxpayers residing in the requested jurisdiction at the request of another Party. Service shall be effected either by a method prescribed by the laws of the requested State or, to the extent possible, by a particular method stipulated by the applicant State.

25. Article 18 stipulates the information to be provided by an applicant State in relation to all forms of assistance. This information includes details of: the initiating authority or agency; the identity and address of the person(s) who are the subject of the request; the form in which the applicant State

requires the information (in the case of exchange of information); the tax claim and the assets from which the claim may be recovered (in the case of recovery of tax claims); the nature and the subject of the document to be served (in the case of service of documents); and whether the request is in conformity with the laws and administrative practices of the applicant State.

26. Articles 20-23 provide other rules relating to all forms of assistance, including rules limiting obligations set out elsewhere in the Convention.

27. Article 21 allows a Party to decline to provide requested assistance on limited grounds, including where to do so would be contrary to the laws or administrative practices of either Party or public policy, or would involve the disclosure of trade or commercial secrets. The provision of assistance may also be declined where: the request relates to taxation contrary to generally accepted taxation principles or provisions contained in bilateral tax treaties; the underlying taxation law discriminates on the basis of nationality; the applicant State has not exhausted all reasonable measures under its own laws and administrative practices; and the provision of assistance by the requested State would be clearly disproportionate to the benefit derived by the applicant State.

28. Article 22 obliges Parties to treat information obtained under the Convention as secret and protected in the same manner as information obtained under its domestic laws. Such information may only be disclosed to persons involved in tax administration or enforcement, including courts and administrative or supervisory bodies. Parties may, however, agree that information may be disclosed to other law enforcement agencies in appropriate circumstances.

Implementation

29. No new legislation is required to implement the obligations that will be imposed on Australia by the proposed treaty action. Australia is able to fulfil its obligations under the Convention under existing legislation, specifically, section 23 of the *International Tax Agreements Act 1953* in respect of exchange of tax information. Similarly, Division 263 of Schedule 1 to the *Taxation Administration Act 1953* applies to any agreement in force between Australia and a foreign country that contains an article relating to assistance in collection of foreign tax debts.

30. No action is required by the States or Territories. There will be no change to the existing roles of the Commonwealth, or the States and Territories, in tax matters as a consequence of implementing the Convention.

Costs

31. Treasury has estimated the revenue impact of the Convention as unquantifiable. However, since the Convention is intended to reduce international fiscal evasion by Australian taxpayers, the proposal is expected to increase taxpayer compliance and therefore tax revenue.

32. There would be a small, unquantifiable cost in administering the changes made by the Convention in dealing with incoming requests for assistance from other countries. However, these costs are expected to be minimal and will continue to be managed within existing agency resources.

33. Article 26 of the Convention sets out that, unless otherwise agreed bilaterally by the Parties concerned, ordinary costs incurred in providing assistance will be borne by the requested Party. Extraordinary costs incurred in providing assistance will be borne by the applicant Party.

34. There are no other foreseeable financial costs to Australia for compliance with the proposed treaty action.

Regulation Impact Statement

35. The Office of Best Practice Regulation, Department of Finance and Deregulation, has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action

36. The Convention does not provide for the negotiation of future legally binding instruments.

37. The Convention does not contain specific amendment procedures. However, pursuant to its Article 24(3), a co-ordinating body composed of representatives of the competent authorities of the Parties may recommend revisions or amendments to the Convention. Australia will be entitled to become a member of the co-ordinating body on ratification of the Convention. Currently, Australia is entitled to act as an observer. Any future revisions or amendments to the Convention would be subject to Australia's domestic treaty-making process.

Withdrawal or denunciation

38. Article 31 provides that a Party may, at any time, denounce the Convention by means of a notification addressed to one of the Depositaries (the Secretary General of the Council of Europe or the Secretary General of the OECD). Denunciation by Australia would be subject to Australia's domestic treaty-making process. Denunciation would become effective from the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Depositary.

39. Article 31(3) provides that any Party which denounces the Convention shall remain bound by the provisions of Article 22 (secrecy provisions) for as long as it retains in its possession any documents or information obtained under the Convention.

Contact details

International Tax and Treaties Division
Department of the Treasury

ATTACHMENT ON CONSULTATION

Convention on Mutual Administrative Assistance in Tax Matters
done at Strasbourg on 25 January 1988
(Text amended by the provisions of the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters, which entered into force on 1 June 2011)

40. The Convention addresses only administrative assistance in tax matters with other Parties to the Convention. Accordingly, the public was not consulted.

41. The ATO has been made aware of the negotiation of the Convention and endorses Australia becoming a Party to the Convention. Given that the Convention aligns with the international standard on exchange of information for tax purposes, the ATO is supportive of Australia becoming a Party to the Convention.

42. In addition to the Assistant Treasurer, the Prime Minister, the Minister for Foreign Affairs and the Minister for Trade have approved the proposed treaty action.

APPENDIX 2

House of Representatives Committees

Joint Standing Committee on Treaties

Chapter 4 Convention on Mutual Administrative Assistance in Tax Matters, done at Strasbourg on 25 January 1988 (Text amended by the provisions of the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters, which entered into force on 1 June 2011)

Introduction

4.1 On 20 March 2012, the *Convention on Mutual Administrative Assistance in Tax Matters, done at Strasbourg on 25 January 1988 (Text amended by the provisions of the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters, which entered into force on 1 June 2011*) was tabled in the Commonwealth Parliament.

Background

4.2 – 4.3 [Repeats National Interest Summary (NIS) at 1-2]

4.4 [Repeats NIS 5 but omits list of countries]

National interest summary

4.5 - 4.6 [Repeats NIS 7-8]

4.7 This agreement does not override any domestic Australian law regarding confidentiality of information. Australian domestic secrecy laws continue to apply and the convention superimposes an additional layer of secrecy above the domestic laws.

Reasons for Australia to take the proposed treaty action

4.8 The Convention will complement Australia's network of comprehensive tax treaties and tax information exchange agreements by providing an additional tool for detecting and preventing tax evasion and recovering outstanding tax debts.

4.9 [Repeats NIS 9-13]

Obligations

4.13 - 4.14 [Repeats NIS 14-15]

Exchange of information

4.15 - 4.18 [Repeats NIS 16-19]

Assistance in recovery of tax debts

4.19 - 4.22 [Repeats NIS 20-23]

Service of documents

4.23 - 4.27 [Repeats NIS 24-28]

Implementation

4.28 - 4.29 [Repeats NIS 29-30]

Relationship with TIEAs

4.30 As part of its efforts to combat tax evasion and encourage international transparency on taxation issues, Australia has signed thirty-three tax information exchange agreements (TIEAs).

4.31 Although this Convention is open to all countries to sign, most of the countries who have signed the TIEAs are not party to this Convention. However, the exchange-of-information standards in both the TIEAs and the Convention are very similar. In practical terms, it makes very little difference which agreement is utilised. Both are used and they can operate in parallel.

4.32 Along with the TIEAs, this Convention represents an additional legal basis for exchanging taxpayer information and for providing other forms of assistance. The most suitable is chosen depending on the circumstances.

Costs

4.33 As the Convention is intended to reduce international fiscal evasion by Australian taxpayers, the proposal is expected to increase taxpayer compliance and therefore tax revenue.

4.34 - 4.35 [Repeats 32-34]

Conclusion

4.36 The Committee agrees that the Convention will complement Australia's network of comprehensive tax treaties and TIEAs by providing an additional tool for detecting and preventing tax evasion as well as recovering outstanding tax debts.

4.37 The Committee supports agreements such as this one as it helps Australia protect its revenue base by providing a legal framework through which the Australian authorities can seek such administrative assistance from the revenue authorities of other countries. Improving the integrity of the tax system by discouraging tax avoidance by individuals and other entities is a desirable goal and the Committee supports binding action on this agreement.

Recommendation 3

The Committee supports the *Convention on Mutual Administrative Assistance in Tax Matters, done at Strasbourg on 25 January 1988 (Text amended by the provisions of the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters, which entered into force on 1 June 2011) and recommends that binding treaty action be taken.*

Kelvin Thomson MP
Chair

APPENDIX 3

Subdivision 263-A -- Foreign revenue claims

Guide to Subdivision 263-A

263-5 What this Subdivision is about

This Subdivision can be activated if there is in force an agreement between Australia and a foreign country or territory that contains an article relating to assistance in collection of foreign tax debts.

The Commissioner can collect from an entity an amount in respect of a tax debt that the person owes to such a country or territory or take action to conserve assets of the entity.

The Commissioner is required to remit amounts collected to the foreign country or territory concerned.

Table of sections

Operative provisions

263-10 Meaning of *foreign revenue claim*

263-15 Requirements for foreign revenue claims

263-20 Foreign Revenue Claims Register

263-25 Registering claims

263-30 When amount is due and payable

263-35 Amending the Register etc.

263-40 Payment to competent authority

Operative provisions

263-10 Meaning of foreign revenue claim

A ***foreign revenue claim*** is a claim made to the Commissioner:

(a) in accordance with an agreement (the ***international agreement***) between Australia and:

(i) a foreign country or a constituent part of a foreign country; or

(ii) a foreign territory; and

(b) for one or both of these purposes:

(i) the recovery by the Commissioner of an amount from an entity (the ***debtor***) in respect of taxes imposed otherwise than by an * Australian law (including any associated amounts);

(ii) the conserving of assets for the purposes of a recovery of that kind.

263-15 Requirements for foreign revenue claims

A * foreign revenue claim must:

(a) be made by or on behalf of an entity that is, under the relevant international agreement, the competent authority; and

(b) be consistent with the provisions of that agreement; and

(c) be made in the * approved form; and

(d) specify the amount owed by the debtor in Australian currency (calculated as at the day the claim is made); and

(e) be accompanied by a declaration by the competent authority stating that the claim fulfils the requirements of that agreement.

263-20 Foreign Revenue Claims Register

(1) The Commissioner must keep a register called the Foreign Revenue Claims Register (the ***Register***).

(2) The regulations may make provision in relation to the form in which the Register may be kept.

(3) The register is not a legislative instrument.

263-25 Registering claims

If the Commissioner is satisfied that a * foreign revenue claim has been made in accordance with section 263- 15, the Commissioner must register the claim by entering particulars of it in the Register within 90 days after receiving the claim.

263-30 When amount is due and payable

(1) When particulars of a * foreign revenue claim are entered in the Register, the amount owed by the debtor becomes a pecuniary liability to the Commonwealth by the debtor.

Note 1: The amount to be recovered from the debtor will be a primary tax debt for the purposes of Part IIB and the Commissioner may allocate the debt to a running balance account under that Part.

Note 2: For provisions about collection and recovery of the debt, see Part 4-15.

(1A) To avoid doubt, the amount owed by the debtor may not be the same as the amount (if any) entered in the Register.

(2) The amount owed by the debtor becomes due and payable 30 days after notice of the particulars of the * foreign revenue claim is given to the debtor or on a later day specified in the notice.

(3) If that amount remains unpaid after it is due and payable, the debtor is liable to pay * general interest charge on the unpaid amount for each day in the period that:

(a) started at the beginning of the day by which the amount was due to be paid; and

(b) finishes at the end of the last day at the end of which either of the following remains unpaid:

(i) the amount;

(ii) general interest charge on any of the amount.

263-35 Amending the Register etc.

(1) The Commissioner may, with the agreement of the relevant competent authority, amend the Register to correct an error.

(2) The Commissioner may, with the agreement of the relevant competent authority:

(a) remove from the Register the particulars of a * foreign revenue claim; or

(b) reduce an amount to be recovered from a debtor under the claim.

(2A) To avoid doubt, the Commissioner may reduce an amount to be recovered from a debtor under paragraph (2)(b) without amending the Register.

(3) A debtor may, after receiving a copy of the particulars of a * foreign revenue claim entered in the Register, apply to the Commissioner in the * approved form to have those particulars removed from the Register.

(4) The Commissioner may, after considering the application, remove those particulars from the Register.

(5) If the Commissioner removes particulars of a * foreign revenue claim relating to the recovery of an amount from the Register under paragraph (2)(a) or subsection (4), the debtor is entitled to a credit for the purposes of Part IIB equal to the sum of:

(a) the amount (as reduced by any previous application of subsection (6)); and

(b) any * general interest charge for which the debtor is liable as a result of the foreign revenue claim.

Note: How the credit is applied is set out in Part IIB.

(6) If the Commissioner reduces the amount to be recovered from a debtor under a * foreign revenue claim under paragraph (2)(b), the debtor is entitled to a credit for the purposes of Part IIB equal to the amount of the reduction.

Note: How the credit is applied is set out in Part IIB.

263-40 Payment to competent authority

(1) The Commissioner must, if the Commissioner recovers all or part of an amount to be recovered from a debtor under a registered * foreign revenue claim, pay that amount to the competent authority concerned or to another entity on behalf of that competent authority.

(2) The Commissioner may also pay to the competent authority all or part of an amount that the Commissioner has received and that is attributable to * general interest charge in relation to the claim.

(3) The Commissioner may also pay to the competent authority all or part of an amount that the Commissioner has received and that is attributable to any of the following in relation to the claim:

(a) judgment interest;

(b) costs that:

(i) have been recovered in the course of legal proceedings; and

(ii) represent an amount that has previously been paid by the competent authority to the Commonwealth in relation to the recovery of the claim.

APPENDIX 4

Dwyer Lawyers

Principal

Terence M. Dwyer FTIA
B.A. (Hons), B.Ec. (Hons) (Sydney)
M.A., Ph.D. (Harvard), Dip. Law (Sydney)

Consultant

Deborah R. Dwyer FTIA
B.A. (cum laude), M.A. (Smith)
LL.B. (ANU), LLMCL (NTU)

UNITED KINGDOM FREE TRADE AGREEMENT NEGOTIATIONS

Submission by UK-Australia Contractors Group

Executive Summary

- Her Majesty's UK Revenue and Customs, (HMRC or the UK Revenue) have sought to recover alleged UK tax debts from former UK contractors now living back in Australia.

- HMRC have sought to do this even though the tax liabilities are still disputed and under contest in the United Kingdom. HMRC have sought to do this even though purported UK tax debts (or even proved UK tax debts) are not enforceable in Australian Courts.

- By sending letters to Australian residents demanding payment of money, it appears that HMRC has involved itself in the apparent crime of extortion, demanding money with menaces when there was no legal basis for enforcing HMRC's demands in Australia.

- Subsequently, HMRC sought to enlist the assistance of the Australian Taxation Office in the collection of these purported UK tax debts by having the ATO put the disputed UK HMRC tax claims on the Foreign Claims Register, so that the ATO could issue a demand in the ATO's name - but for the benefit of HMRC.

- This was also illegal.

- The ATO purported to act under the 2012 OECD Multilateral *Convention on Mutual Administrative Assistance in Tax Matters* (the *OECD Convention*).

- However, the purported UK tax debts in many cases preceded the *OECD Convention* by many years, going back to the 1990s. The attempt by HMRC to get the ATO to use the *OECD Convention* on its behalf was clearly illegal retrospectivity.

- The ATO attempt to use the *OECD Convention* for HMRC's benefit relied on the 2006 Australian legislation introducing a Foreign Claims Register and which clearly contemplated a *specific bilateral agreement* between Australia and each country.

Level 9, Nishi
2 Phillip Law Street, NewActon
GPO Box 2529, CANBERRA CITY ACT 2601, Australia

Phone: *+ 61 (0)2 6247 8184* ***Email:*** *office@dwyerlawyers.com.au*

- It is fundamentally objectionable that an agency of the Commonwealth Government should be acting as an agent of an overseas government or a foreign power where the Australian facing demands from the ATO on behalf of a foreign power has no means of disputing the basis of the alleged foreign tax debt in Australian Courts.

- While it may be accepted that the United Kingdom is a friendly and kindred country, the implications of the abuse of the 2012 *OECD Convention* by HMRC and the ATO may not have gone unnoticed by less friendly countries.

- The OECD Convention has over 90 signatories, being countries ranging from Albania to Vanuatu, and notably including Russia and China.

- On the approach taken by the ATO for HMRC, if the ATO were presented with a demand from *any foreign power* ranging from Albania, through China, Russia, et cetera the ATO would have no option but to enforce the demand against the purported Australian tax debtor.

- It is already well known that some foreign governments have sought to enforce large money demands against Australian residents and have intimidated Australian residents into complying with those demands. The ABC *Four Corners* program has documented several examples and the Senate has established a Committee on foreign interference in Australia.

- Given the diverse and multicultural nature of Australian public sector employment, it can be expected that some persons facing such intimidating demands from the ATO on behalf of foreign governments could be employed in, or have relatives employed in, sensitive positions in Parliamentary offices or in Australian Government Departments such as Defence, Immigration, Treasury, Prime Minister and Cabinet, as well as in State Government Departments or in contractors undertaking, for example, IT work for governments.

- Do the Australian Federal and State Governments and Parliaments really want to create a situation whereby *foreign governments are assisted by the ATO in suborning Federal and State civil servants* (for example, from migrant families or with relatives from migrant families) into acting as agents of foreign powers?

- As a matter of law, as well as common prudence in the interests of national security, it is essential that Australia make abundantly clear to the United Kingdom - and to every other country - that:

    (1) any assistance in tax collection under the *OECD Convention* is subject to specific legislation by the Federal Parliament embodying a specific article on mutual assistance in tax collection in the relevant bilateral tax agreement and legally incorporated by Act of Parliament into the *International Tax Agreements Act 1953*;

(2) assistance is not automatic but subject to national interest considerations;

(3) Australians can dispute the legal and factual basis of the alleged tax liability as with any other tax demand by the ATO and such foreign claims are fully reviewable by the AAT and the Courts as to their merits or *bona fides*.

UNITED KINGDOM FREE TRADE AGREEMENT NEGOTIATIONS

Submission by UK-Australia Contractors Group

Background

Many Australian contractors have worked in the UK, whether in the IT industry or other industries. Many contractors were employed and hired out by third parties rather than directly by the ultimate UK employers (which included government bodies such as the NHS and local authorities) where the third parties were companies located, for example, in the Isle of Man and relying on the United Kingdom - Isle of Man tax treaty. At the time it was the general view of UK legal counsel (which appeared to be shared by the UK government agencies also participating) that these arrangements were perfectly lawful and appeared to have been accepted by Her Majesty's United Kingdom Revenue and Customs Commissioners (HMRC).

Be that as it may, eventually HMRC decided to change its mind and sought to raise and enforce tax assessments retrospectively years later, for very large sums, against the individual contractors working for third party employers as above. The size of some HMRC back tax claims can be gauged by the fact that some UK contractors have committed suicide, been forced to sell their homes or have gone or are going bankrupt.

Many such contractors were Australian expatriates. Naturally, these new HMRC assessments have been disputed and continue to be disputed by relevant parties.

All that, of course, is a matter for the UK and not a matter in which any Australian Government is interested in *per se*.

However, the story does not end there.

HMRC actions in Australia

Extraordinarily, the UK Revenue then purported to seek to demand payment of these UK tax debts as if they were debts owing in Australia. HMRC has sent letters of demand since at least 2015 to Australians who had now returned to Australia, demanding payment for what are called Accelerated Payment Notices (APNs) which are designed to circumvent the UK Court processes retrospectively by enforcing payment of disputed income tax in advance of final legal decision.

HMRC ignored Australian law

You will be aware that foreign tax debts are not enforceable within Australia, save as may be provided by Australian law. It has been an established rule of law for centuries, called the Revenue Rule, that no country enforces another country's tax laws.

Lord Mansfield CJ said: "One nation does not take notice of the revenue laws of another", *Planché v Fletcher* (1779) 1 Doug. 251 at 253. The rule was re-affirmed by the House of Lords in *Government of India v Taylor* [1955] AC 491. In that case, Lord Keith of Avonholm stated the rule to be that "in no circumstances will the Courts directly or indirectly enforce the revenue laws of another country". The Revenue Rule has been consistently followed by the

High Court and is consistent with the rule of public (or private) international law is that domestic Courts will not enforce a foreign penal or public law: *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 40-42 per Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ; *Permanent Trustee Co (Canberra) Ltd v Finlayson* (1968) 122 CLR 338 at 345-346 per Barwick CJ, McTiernan, Kitto, Menzies, Windeyer and Owen JJ.

The reason for the rule is obvious. Taxation is the act of a sovereign power and if a place is not a district or colony, that sovereign's writ does not run there. The rule has even been applied between Australian states, so that New South Wales tax debts could not be enforced in the ACT. It is basic international law that one country does not seek to enforce its tax laws inside the territorial boundaries of another jurisdiction. That also applied to self-governing colonies within the British Empire which were treated as "foreign" to each other for fiscal purposes. Hence, since the grant of self-government to the Australian colonies, starting with New South Wales Constitution Act of 1855, UK taxes and tax debts have not been enforceable or able to be collected in Australia.

The basic principle is very clear. Taxes are granted in favour of the Crown by a local legislature. Australians residents do not get to vote in UK elections on UK taxes and UK residents do not get to vote on Australian taxes.

No authority under the Foreign Judgments Act

There is no provision in the *Foreign Judgements Act* which permitted HMRC to seek to enforce foreign tax claims in Australia.

In the case of *Pattenden v Commissioner of Taxation* [2008] FCA 1590 at para 95 it was stated "So far as the United Kingdom is concerned, the consensus between the parties was that, though provision is made by and under the *Foreign Judgements (Reciprocal Enforcements) Act 1933* (UK) for the registration of, materially, judgments of this Court or of the Supreme Court of a State, an exception prevails in respect of "a sum payable in respect of taxes or other charges of a like nature" (see s 1(2)). That being so and having regard to *Government of India v Taylor* [1955] AC 491, it was common ground that a judgment obtained here in respect of a revenue debt could not be enforced in the United Kingdom." That the *Foreign Judgments Act* would be of no assistance to Her Majesty's UK Revenue and Customs Commissioners, is acknowledged by the Australian Taxation Office at paragraph 36 of Practice Statement Law Administration PS LA 2011/13 on "Cross border recovery of taxation debts".

The UK Revenue ought also to know, and doubtless does know, that it is a criminal offence under Australian law to demand money with menaces such as threatening penalties or fines when in fact the alleged tax debt is not enforceable in Australian Courts. The crime of extortion notably occurs when a public official threatens a person by demanding money without lawful authority (e.g. now enacted as section 249K of the NSW *Crimes Act*). We note that, at least since 1986, there would not be any Crown immunity available to any UK Revenue and Customs Commissioner who sets foot in Australia and who had caused such demands to be made by post in Australia.

HMRC had no authority under the UK-Australia Double Tax Agreement

Unless there is an enforceable tax treaty in place between Australia and the UK, neither country can enforce its taxes or tax debts in the other or expect the other country to assist it in doing so. But there is no provision in the UK-Australia Double Tax Agreement (UK DTA) which permitted the UK Revenue to make money demands in Australia as HMRC did. Turning to the UK-Australia double taxation agreement (*Australian Treaty Series* [2003] ATS 22), which entered into force on 17 December 2003, one sees that it does ***not*** have an article which provides for the mutual collection of taxes. Even if it had, any demand for payment would have to be made by the ATO, *not* by HMRC.

HMRC treated Australia law with contempt

The actions of HMRC in making such demands for money with menaces were outrageous and the UK Customs and Revenue Commissioners thereby showed an extraordinary contempt for Australians and Australian laws, State and Federal. That has been pointed out by some of our members to the UK Revenue and Customs Commissioners. We are not aware of any reply from the Commissioners seeking to justify their conduct.

The letters sent to Australian residents by HMRC demanding money from Australians were thus totally obnoxious and show an underhanded and untrustworthy approach by the UK authorities to their international legal obligations and the jurisdictional limits on their authority.

In short, one questions whether the UK authorities can be trusted to keep treaties in good faith.

Accordingly, before entering into any Free Trade Agreement (FTA) with United Kingdom, Australia should insist on proper respect from the UK tax authorities for Australia's sovereign rights, Federal and State laws and the rights of Australians.

ATO collaboration in subsequent UK Revenue abuse of the OECD Convention

Nor does the story end there. It appears that the Australian Taxation Office was induced to connived at, and turn a blind eye, to the ignoring by the UK Revenue of the UK Double Tax Agreement with Australia and went on to collaborate with HMRC in an abuse of an international convention.

Notwithstanding the absence of any provision in the UK Australia Double Tax Agreement (DTA) for mutual assistance in the collection of Australian and UK taxes, the ATO appears to have sought to bypass Australian law at the behest of the UK Revenue. The ATO asserted that the OECD *Convention on Mutual Assistance in Tax Matters* (signed by Australia in 2012 but not enacted into law by Parliament) permits the ATO to collect UK taxes under Division 263 of Schedule 1 of the *Taxation Administration Act 1953.*

This was less than accurate, at the least.

Division 263 was enacted by Parliament in 2006 and was inserted into Schedule 1 of the *Taxation Administration Act 1953*. Division 263 provides a mechanism for the collection of foreign revenue claims by the Commissioner of Taxation. Technically, the foreign tax office approaches the Commissioner of Taxation and asks him to recognise the foreign tax debt. If the Commissioner accepts the request, he places the foreign tax debt on the Foreign Revenue Claims Register and the foreign tax debts then becomes a debt due to the Commonwealth of Australia under section 263-30(1) which the ATO can enforce as if it were an Australian tax debt.

However, where a DTA does not include an assistance in the collection of tax article, the Revenue Rule will continue to apply. Hence, the NSW Supreme Court recognised in *Jamieson v Commissioner for Internal Revenue* (2007) 66 ATR 441; [2007] NSWSC 324 that the Revenue Rule is still part of Australian law and Australian Courts will not enforce the tax debts of foreign governments. In particular, the Court recognised that Subdiv 263-A only has effect where there is a DTA in force *which contains a specific article relating to the assistance in collection of foreign tax debts*.

The Court held that Subdiv 263-A did not apply in the *Jamieson* case because the relevant DTA (the US Convention) did not contain an article dealing with assistance in the tax collection of tax debts.

It is important to note that Division 263 was only introduced into the *Taxation Administration Act* by Act No. 100 of 2006, the *International Tax Agreements Amendment Act (No. 1) 2006*. Accordingly, unless it was explicitly made retrospective, Division 263 would not apply to foreign revenue claims arising in respect of prior tax years. Thus, the Act is expressed to apply from the date of Royal Assent which was given on 14 September 2006.

There the matter should have ended, even for UK tax claims arising after that date because there is no mutual assistance or collection article in the UK tax treaty as envisaged by Division 263.

Faced with this problem, in order to assist HMRC, the ATO tried to pretend that the 2012 *OECD Convention* can be enforced in Australia ***for any country*** under the 2006 Division 263 legislation.

This is an abuse of law because not only does such an interpretation to give a retrospective effect to the 2012 *OECD Convention,* it also ignores the fact that the *OECD Convention* has never been enacted into law as such by Parliament. The OECD Convention is not attached to the *International Tax Agreements Act 1953* as a Schedule which has been given the force of law in Australia by the Federal Parliament.

The OECD Multilateral Convention

The ATO appears to think that Division 263 was suddenly given much larger scope by Australian accession to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. The ATO states at paras 49 seq. of PS LA 2011/13 on *Cross border recovery of taxation debts* -

> "The provisions in the TAA and the ITAA 1997 that facilitate the assistance in collection article in some of our bilateral treaties also apply to our assistance in collection obligations under the Multilateral Convention. The obligations under the Multilateral Convention are generally assumed by the signatories to the convention in respect of each other signatory. Therefore, broadly speaking, as a party to the Multilateral Convention, Australia's obligation for the recovery of foreign tax debts extends to all other parties to the convention. … The mutual obligations extend to countries that are existing signatories to the Multilateral Convention, as well as those which later become signatories to the convention from the date the convention comes into effect in that country. … A foreign state that is a signatory to the Multilateral Convention may also be one with which Australia has a bilateral treaty that includes an assistance in collection article. In such cases, either country is able to make a request for recovery on the basis of either the assistance in collection article in the bilateral treaty or the equivalent article in the Multilateral Convention. …. The following paragraphs apply to requests made pursuant to the mutual assistance articles in either the bilateral treaties or the Multilateral Convention for the recovery of tax debts."

That ATO view may originate from a misunderstanding of the National Interest Analysis [2012] ATNIA 2 at para 29 where it is stated "No new legislation is required to implement the obligations that will be imposed on Australia by the proposed treaty action. Australia is able to fulfil its obligations under the Convention under existing legislation, specifically, section 23 of the *International Tax Agreements Act 1953* in respect of exchange of tax information. Similarly, Division 263 of Schedule 1 to the *Taxation Administration Act 1953* applies to any agreement *in force between Australia and a foreign country that contains an article relating to assistance in collection of foreign tax debts*."

The ATO view is clearly wrong. It seems an extraordinary proposition that the Parliament has delegated the power to impose taxes to the Commissioner at the behest of any foreign country which may in future accede to the *Convention*. On the Commissioner's theory, if North Korea signs and ratifies the *OECD Convention* they may proceed to enforce their taxes via the ATO against any of their exiles resident in this country.

The better and time-honoured view seems to be that clear domestic legislation enshrining a double tax treaty with such a clause and giving it the force of law is first necessary and that seems assumed in the last sentence just quoted from the National Interest Analysis, which the Commissioner has apparently chosen to read differently.

What does Division 263 envisage?

It is important to look carefully at the definitions in Division 263 –

263-10 Meaning of foreign revenue claim

> A ***foreign revenue claim*** is a claim made to the Commissioner:
> (a) in accordance with an agreement (the ***international agreement***) between Australia and:

(i) a foreign country or a constituent part of a foreign country; or
(ii) an overseas territory;
(the ***overseas entity***); and
(b) for one or both of these purposes:
(i) the recovery by the Commissioner of an amount from an entity (the ***debtor***) in respect of taxes imposed otherwise than by an *Australian law (including any associated amounts);
(ii) the conserving of assets for the purposes of a recovery of that kind.

Division 263 refers to an agreement between Australia and a foreign country. It does not on its face appear to apply to a multilateral agreement which is an agreement between Australia and many other countries. Section 23 of the *Acts Interpretation Act* cannot be relied upon to change the singular to the plural as regards section 263-10 because that section would not make sense. The whole tenor of the Division is framed in terms of a one to one agreement with a single overseas entity. A foreign revenue claim is made by *one given country*; it is not a demand by *a group of countries*.

Further, the requirement for there to be a precise "one on one" double tax agreement follows from section 263-15 which clearly refers to *a given competent authority under a specific agreement*.

263-15 Requirements for foreign revenue claims

A *foreign revenue claim must:
(a) be made by or on behalf of an entity that is, under the relevant international agreement, *the competent authority*; and

(b) be consistent with the provisions of that agreement;

Therefore, the correct view is that it is still necessary for a mutual collection procedure to be incorporated in the relevant double tax agreement with the foreign country seeking to enforce its revenue claims within Australia.

If that were not enough, there is no separate enacting legislation to give the 2012 *OECD Convention* any legal effect outside double taxation agreements which are negotiated on a one to one basis and legislated for separately.

It is contrary to reason that an international convention can be adopted into domestic law by legislation which existed years before the treaty was entered into. That would deprive Parliament of the opportunity to consider in detail what legislation it wanted to enact to give effect to a treaty. The ATO interpretation is tantamount to saying that Parliament gave a blank cheque to foreign governments.

In the absence of clear legislation to give the *OECD Convention* domestic effect, the *OECD Convention* does not have the force of law in Australia save for those countries with a specific article in an Australian double tax agreement.

In addition, the *Convention on Mutual Administrative Assistance in Tax Matters* only applies to *uncontested* tax debts under Article 11(2). It therefore *never* applied to "tax debts" of the kind which are described as "accelerated payments" by HMRC. Accordingly, HMRC and the ATO were acting in bad faith when the ATO tried to use the Convention to collect APN debts for HMRC.

On top of all that, there is the question of timing. Australia only acceded to the multilateral *OECD Convention* in 2012 and it only entered into force for Australia on 1 December 2012. The National Interest Analysis states at para 4 "The provisions of the Convention will take effect for administrative assistance *related to taxable periods beginning on or after 1 January of the year following the one in which the Convention enters into force in respect of Australia*, in accordance with paragraph 6 of its Article 28. Where there is no taxable period, the Convention shall have effect for administrative assistance related to the imposition of tax arising on or after 1 January of the year following the one in which the Convention enters into force for Australia." As the Convention only entered into force for Australia on 1 December 2012, the Convention therefore could not cover UK tax debts for previous years (which was what the ATO at first contended!).

National security implications

There are implications of the ATO's actions and interpretation of the OECD convention which ought to be deeply troubling to Parliament and this country's intelligence and defence authorities.

It appears the ATO has been so hellbent on co-operating with foreign tax offices to get them to grab money overseas for the ATO that it has been totally negligent as regards Australia's national interests. Indeed, the ATO appears to be more loyal to foreign tax offices and owes them allegiance rather than having any allegiance to this country.

At its simplest, allegiance is a two-way street. Australians owe allegiance to the Crown and obey the laws and governments of Australia because our governments acting on behalf of the Crown are meant to protect us in our rights, customs, laws and liberties. We do not expect Australian governments and Australian public servants to act in the interests of foreign powers and harass us for their benefit.

On the ATO's interpretation of the *OECD Convention*, once it is presented with a duly certified allegedly final tax claim by a foreign tax office, it must place that claim on the Foreign Claims Register and proceed to enforce it as if it were an Australian tax debt and upon collecting the money pay that money to the foreign tax office.

Let us stop and consider the implications of this interpretation by the ATO. The OECD Convention has over 90 signatories, being countries ranging from Albania to Vanuatu, and notably including Russia and China. Thus, if the ATO were presented with a demand from *any foreign power* ranging from Albania, through China, Russia, et cetera the ATO would have no option but to enforce the demand against the purported Australian tax debtor.

It is already well known that some foreign governments have sought to enforce large money demands against Australian residents and have intimidated Australian residents into

complying with those demands. The ABC *Four Corners* program has documented several examples and the Senate has established a Committee on foreign interference in Australia.

The ATO has no means of knowing or checking whether a foreign tax claim is valid or simply being used as part of some overseas domestic political purge or for other ulterior purposes. In this regard it should be noted that Australia now has many migrants who have come from non-English-speaking backgrounds and are accustomed to totalitarian and repressive governments. Many such migrants have relatives back overseas exposed to central or local political demands and pressures from governmental party officials, whether for personally corrupt purposes or as part of a more sinister "national security" regime. Many migrants or their children have business connections still with the home country or have politically exposed investments back home. For example, many business migrants have outsourced manufacturing back to their home country in order to import goods into Australia.

Over the last 40 years, many such migrants will have children who have married in Australia and have Australian spouses and grandchildren working in public service departments or in private sector contractors handling sensitive government contracts.

It can be expected that some governments may keep tabs on their emigrants and émigré communities and will be seeking to have a good understanding of the local connections of their diaspora communities. It would be naïve in the extreme to think that their national security agencies do not look for ways to find Australian citizens who may assist them with their inquiries as regards the operations of Australian governments.

Most people, quite naturally and understandably, put their family loyalties ahead of their national loyalties. If an Australian married to the son or daughter of an emigrant facing a huge ATO tax demand issued at the behest of a foreign tax office to the father or mother or uncle or aunt of his or her spouse, he or she might be willing to talk to a foreign government official with a view to sorting out the problem. The requests for information might at first seem quite innocuous and a small price to pay for helping out a relative. One does not need a great imagination to understand where it might end.

Persons facing or indirectly affected by such intimidating demands from the ATO on behalf of foreign governments could be employed in, or have relatives employed in, sensitive positions in Parliamentary offices or in Australian Government Departments such as Defence, Immigration, Treasury, Prime Minister and Cabinet, as well as in State Government Departments or in contractors undertaking, for example, IT work for governments.

From the point of view of a foreign intelligence service, what could be more elegant and cost efficient than having your national tax office issue a bogus tax assessment against one of your expatriates and have the ATO work for you in creating the financial pressure that will allow you to suborn him or members of his family into acting in your interests? The victim would even be financing, via the ATO, the cost of his own subversion.

Do the Australian Federal and State Governments and Parliaments really want to create a situation whereby ***foreign governments are assisted by the ATO in suborning Federal and State civil servants*** (for example, from migrant families or with relatives from migrant families) into acting as agents of foreign powers?

Conclusion

Given the abuses of treaties by the UK Revenue, and the facts above which show that the UK authorities cannot be trusted, nor can the ATO be relied upon to keep them honest, an Article needs to be inserted into any UK Free Trade Agreement (FTA) declaring that it is noted and acknowledged by the parties that –

1. UK taxes (including any digital tax) are not enforceable in Australia;

2. any future treaty between the UK and Australia altering that position will only have effect and be enforceable in respect of finally determined tax debts arising for tax years after ratification of any such treaty by Parliament;

3. all UK Revenue claims can be contested in Australian Courts; and

4. this above policy applies in a non-discriminatory way in respect of all Australia's international tax agreements.

APPENDIX 5

PS LA 2011/13 states:

D - Mutual assistance in the collection of tax debts

Bilateral treaties

40. Article 27 of the 2010 OECD Model Tax Convention on Income and on Capital provides for mutual assistance between countries for the collection of tax debts. This is known as the 'assistance in collection article'.

41. The assistance in collection article has been adopted and included in some bilateral treaties signed between Australia and other countries. It is anticipated that the article will be incorporated into some new or revised bilateral treaties as they are being progressively entered into.

42. Generally, the assistance in collection article allows for:

- action to preserve assets, including measures such as injunctions, and
- recovery action,

to be taken in respect of tax debts owed to the Commissioner, by the relevant taxation authority in the foreign state and on behalf of the Commissioner. This article allows for recovery of tax debts owed to the Commissioner by debtors who are either resident in that foreign state, or who hold assets in that foreign state.

43. Conversely, the foreign state may also make a request for action to preserve assets and recovery action to be commenced in Australia and through the ATO, in respect of tax debts owed to the taxation authority of that foreign state.

44. Both the TAA and the *Income Tax Assessment Act 1997* (ITAA 1997) contain provisions that facilitate this article, providing a legislative framework to allow the Commissioner to collect a taxation debt on behalf of a taxation authority of a foreign state, and to take action to preserve assets in relation to that debt.

45. The article is supplemented, under each treaty, by a Memorandum of Understanding (or Mode of Application) to cover various administrative arrangements between jurisdictions.

46. Some memoranda may contain a condition that domestic debts will be given priority over foreign revenue claims.

The Multilateral Convention

47. Similar articles for the provision of mutual assistance in the collection of tax debts and the commencement of action to preserve assets are contained in the Multilateral Convention, to which Australia is a signatory.

48. The Multilateral Convention also allows for:

- action to preserve assets, including measures such as injunctions, and
- recovery action,

to be taken in respect of tax debts owed to the Commissioner, by the relevant taxation authority in the foreign state on behalf of the Commissioner. The articles in the Multilateral Convention allow for recovery of tax debts owed to the Commissioner by debtors who are either resident in that foreign state, or who hold assets in that state. The obligations under the convention are mutual and accordingly, any other foreign state that is a signatory to the convention may also make a request of the Commissioner for action to preserve assets and for the recovery of tax debts owed to that state.

49. The provisions in the TAA and the ITAA 1997 that facilitate the assistance in collection article in some of our bilateral treaties also apply to our assistance in collection obligations under the Multilateral Convention.

50. The obligations under the Multilateral Convention are generally assumed by the signatories to the convention in respect of each other signatory. Therefore, broadly speaking, as a party to the Multilateral Convention, Australia's obligation for the recovery of foreign tax debts extends to all other parties to the convention. Conversely, each other party to the convention has a similar obligation in respect of a request made by Australia for action to preserve assets and for recovery action in respect of Australian tax debts. Note, however, that some parties may choose to reserve the right under the convention not to provide assistance in the recovery of any tax claim, or of any particular type of tax.

51. The mutual obligations extend to countries that are existing signatories to the Multilateral Convention, as well as those which later become signatories to the convention from the date the convention comes into effect in that country.

52. The ATO will seek to establish Memoranda of Understanding with each of the parties to the Multilateral Convention. A separate Memorandum of Understanding needs to be settled with each individual party to the Multilateral Convention.

53. The Memoranda of Understanding establish the basic terms and conditions under which each of the taxation authorities will operate when making and receiving a request for action to preserve assets or collection under the convention. They cover administrative matters such as the form in which the request must be made for each country, and other administrative requirements that each country may wish to prescribe as preconditions for accepting a request.

54. There may be instances in which a request for recovery is made by a country with which Australia does not have a Memorandum of Understanding. Conversely, there could be a case in which Australia may wish to make a request of another country for which no Memorandum of Understanding has yet been established. The obligations of each signatory to the Multilateral Convention do not depend on the existence of a Memorandum of Understanding as between the countries. Consequently, recovery action in respect of these requests will be undertaken in close collaboration with the competent authority of the other country to establish a general agreement on the submission of the request and administration of the recovery action.

55. A foreign state that is a signatory to the Multilateral Convention may also be one with which Australia has a bilateral treaty that includes an assistance in collection article. In such cases, either country is able to make a request for recovery on the basis of either the assistance in collection article in the bilateral treaty or the equivalent article in the Multilateral Convention.

APPENDIX 6

Thomson Reuters "Australian Tax Handbook" [36 340] Collection of foreign tax debts

There are 2 parallel streams of authority allowing the ATO collect a foreign tax debt in Australia or act to conserve a foreign tax debtor's assets here:

- Subdivision 263-A in Sch 1 TAA, in relation to bilateral obligations arising under an "assistance in collection of tax" article in a DTA (although as at 1 January 2023, few DTAs have such articles). These articles are supplemented by a Memorandum of Understanding to cover various administrative arrangements; and
- the *OECD Convention on Mutual Administrative Assistance in Tax Matters*. Australia's obligations in relation to the recovery of a foreign tax debt extend to all other parties to the Convention (over 70 countries and jurisdictions). While the ATO will be seeking to sign an MoU with each of the parties to the Convention, Australia's obligations do not depend on the existence of an MoU.

In a case where a country that is a signatory to the Convention also has a DTA with Australia that contains an assistance in collection of tax article, it can request recovery on the basis of either that article or the equivalent article in the Convention.

Where a foreign country makes a formal request, the ATO must register the claim and the claim becomes a tax-related liability subject to normal recovery provisions under Australian tax law. The amount to be recovered is due and payable after the particulars of the claim are given to the foreign debtor. If the foreign debtor does not pay within the specified period, the general interest charge (see [54 370]) will accrue on the debt.

The collection of tax obligations arising under a DTA or the Convention are mutual, ie Australia can request tax collection or conservancy measures in another country or jurisdiction: see PS LA 2011/13 (paras 92 to 103) for the relevant procedures.

APPENDIX 7

[EU] Recovery of claims relating to taxes, duties and other measures

SUMMARY OF:

Directive 2010/24/EU encouraging mutual assistance between EU countries for the recovery of claims relating to taxes, duties and other measures

WHAT IS THE AIM OF THE DIRECTIVE?

It aims to combat tax evasion by ensuring that EU countries work more closely together (they must provide assistance) with regard to the recovery of claims relating to taxes, duties and related measures levied in another EU country.

KEY POINTS

- This directive applies to claims relating to:
  - all taxes and duties levied by or on behalf of any EU country or on behalf of the EU as a whole;

    - refunds, interventions and other measures which contribute to the total or partial financing of the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD);
    - levies and other duties on the sugar sector market.
- EU countries were to notify the European Commission of their **competent national authority** or authorities by 20 May 2010 for publication in the *Official Journal of the EU*. Each competent authority must designate a central liaison office which will be responsible for contacts with other EU countries in this field.

Request for information

A competent authority is obliged to provide another competent authority with any information relevant to that applicant authority in the recovery of its claims, except if:

- the requested authority would **not be able to obtain such information** for the recovery of similar claims occurring in its own country;
- the information would disclose any **commercial, industrial or professional secrets**;
- the disclosure of the information would **put at risk the security** or **contravene the public policy** of the requested EU country.

Request for notification of documents

- When requested for notification of documents relating to claims, the requested authority must notify to the addressee all documents which emanate from the applicant EU country relating to a claim or to its recovery.
- The request for notification must include relevant information, such as the **name and address of the addressee**, the **purpose of the notification**, a **description of the nature** and **amount of the claim**, and the **contact details of the offices responsible** for the documents and for obtaining further information.

Recovery procedures

- Any available appropriate recovery procedures must be applied before the applicant authority makes a request for recovery, except where:
    - it is evident that there are **insufficient or no assets for recovery** in the applicant EU country but that the person concerned has the necessary assets in the requested EU country;
    - it would result in **disproportionate difficulty**.
- Any request for recovery must be accompanied by a **uniform instrument permitting enforcement** in the requested EU country.
- The requested competent authority will employ the powers and procedures provided under the laws, regulations or administrative provisions of the requested EU country regarding claims on the same or similar tax or duty. If the requested authority does not consider that the same or similar taxes or duties are applicable in the requested EU country, it shall instead apply the rules relating to tax levied on personal income.

Disputes

- Disputes relating to the claim, the initial or uniform instrument permitting enforcement, and the validity of a notification by the applicant authority are the responsibility of the competent authorities of the applicant EU country. Disputes relating to the validity of a notification made

by a competent authority of the requested EU country will be brought before the competent authority of that EU country.
- The applicant authority may make a request for recovery of a contested claim. If the claim is successful, the applicant authority will be responsible for the reimbursement of the amount recovered, in addition to any compensation due.

Amendment or withdrawal of the request for recovery assistance

The applicant authority must immediately notify the requested authority of any amendment to or withdrawal of its request for recovery, detailing the reasons for amendment or withdrawal.

Request for precautionary measures

Where the claim or the instrument permitting enforcement in the applicant EU country is contested at the time when the request is made, the requested authority will take precautionary measures, in accordance with its national law, to ensure recovery when requested to do so by the applicant authority.

Limits to the requested authority's obligations

The requested authority is **not obliged** to grant the recovery assistance if:

- recovery of the claim would result in **serious economic or social difficulties** in the requested EU country;
- the initial request for assistance relates to claims **more than 5 years old**;
- the total sum of the claims is **less than EUR 1 500**.

General rules

- Any information and documents disclosed under this directive will be covered by the obligation of official secrecy and will therefore be protected under the appropriate national law of the EU country which received it.
- This directive repeals Directive 2008/55/EC from 1 January 2012. References to the repealed directive will be understood as references to this directive.

FROM WHEN DOES THE DIRECTIVE APPLY?

It has applied since 20 April 2010. EU countries had to incorporate it into national law by 31 December 2011.

APPENDIX 8

ATO response to FOI request dated 1 May 2019

I refer to your requests for documents under the *Freedom of Information Act 1982* (FOI Act) dated 1 May 2019.

I am an officer authorised under section 23 of the FOI Act to make decisions regarding access to documents.

Your request and relevant background

You requested access to the following:

> The number of entries, their dates and their separate amounts of tax appearing on the Foreign Revenue Claims Register that have been made as a result of applications made by the United Kingdom's HM Revenue & Customs. A copy of each of the above claims made by the UK's HMRC. A copy of the declarations made by the UK's HMRC stating that their claim fulfils the requirements of the UK- Australia Double Tax Convention.

Decision

I have located documents within the scope of your request. I have decided to release to you in full a table which details the dates and amounts of tax appearing on the foreign revenue claims register as a result of applications made by the United Kingdom's tax authority. I can confirm that at the date of this data, there were 79 entries on the register relating to the United Kingdom.

I have decided that the remainder of the information you have sought (the claims made and the declarations made) are exempt in full under section 38 of the FOI Act on the basis that they comprise wholly of taxpayer information. However, I have decided to release to you a copy of the template ATO request for assistance that would have been utilised for those claims.

Entries on the Foreign Revenue Claim Register as a result of applications made by the UK's HMRC

FRC Amount Received	Date Claim Reg.	Date FRC	Amount Received	Date Claim	Reg. Date
$197,045.28	15/12/2017	4/01/2018	$29,162.92	26/07/2018	6/09/2018
$441,296.75	9/03/2018	6/04/2018	$471,935.41	19/07/2018	6/09/2018
$184,180.78	9/03/2018	6/04/2018	$99,722.47	24/07/2018	6/09/2018
$2,170,088.38	9/03/2018	6/04/2018	$37,363.38	15/08/2018	6/09/2018
$1,064,413.81	9/04/2018	20/04/2018	$45,035.71	15/08/2018	6/09/2018
$1,504,706.20	9/04/2018	20/04/2018	$38,690.60	15/08/2018	6/09/2018
$94,209.84	9/04/2018	24/04/2018	$26,880.46	15/08/2018	6/09/2018
$54,784.72	9/04/2018	24/04/2018	$34,988.92	15/08/2018	6/09/2018
$57,213.71	9/04/2018	24/04/2018	$38,015.76	15/08/2018	6/09/2018
$205,086.24	9/04/2018	24/04/2018	$33,331.50	15/08/2018	6/09/2018
$385,307.77	9/04/2018	24/04/2018	$38,920.57	15/08/2018	6/09/2018
$173,781.59	9/04/2018	24/04/2018	$111,225.61	15/08/2018	7/09/2018
$783,553.82	19/06/2018	29/06/2018	$46,761.60	31/07/2018	13/09/2018
$123,139.10	22/06/2018	29/06/2018	$39,084.95	31/07/2018	13/09/2018
$295,194.36	21/06/2018	29/06/2018	$49,756.78	31/07/2018	13/09/2018
$291,075.37	22/06/2018	29/06/2018	$24,415.79	31/07/2018	13/09/2018
$125,274.62	22/06/2018	29/06/2018	$18,695.94	31/07/2018	13/09/2018
$54,808.45	22/06/2018	29/06/2018	$166,268.77	2/08/2018	13/09/2018
$123,589.87	26/06/2018	18/07/2018	$18,604.29	3/08/2018	13/09/2018
$95,928.88	29/06/2018	18/07/2018	$30,842.04	25/07/2018	13/09/2018
$50,607.60	28/06/2018	18/07/2018	$19,321.66	16/08/2018	14/09/2018
$42,772.57	28/06/2018	19/07/2018	$25,485.48	16/08/2018	14/09/2018
$42,985.86	29/06/2018	19/07/2018	$81,475.66	20/08/2018	14/09/2018
$118,272.48	2/07/2018	19/07/2018	$22,178.36	23/08/2018	14/09/2018
$76,719.75	4/07/2018	19/07/2018	$25,485.48	30/08/2018	14/09/2018

$51,619.59	3/07/2018	19/07/2018	$51,511.44	6/09/2018	14/09/2018
$46,059.11	3/07/2018	19/07/2018	$85,175.92	6/09/2018	14/09/2018
$58,764.40	4/07/2018	19/07/2018	$436,341.13	23/08/2018	14/09/2018
$50,269.78	3/07/2018	19/07/2018	$471,436.69	23/08/2018	14/09/2018
$52,786.80	3/07/2018	19/07/2018	$71,368.18	30/08/2018	14/09/2018
$39,587.35	6/07/2018	19/07/2018	$65,721.20	6/11/2018	14/12/2018
$101,059.80	4/07/2018	19/07/2018	$40,802.69	16/10/2018	14/12/2018
$36,642.09	4/07/2018	19/07/2018	$139,911.68	1/10/2018	14/12/2018
$73,419.65	5/07/2018	19/07/2018	$128,159.84	29/11/2018	18/12/2018
$59,654.56	2/07/2018	19/07/2018	$26,326.96	29/11/2018	3/01/2019
$48,929.41	9/07/2018	19/07/2018	$126,045.69	29/11/2018	3/01/2019
$39,653.89	9/07/2018	9/08/2018	$80,641.63	17/01/2019	8/02/2019
$75,350.53	12/07/2018	9/08/2018	$253,147.06	31/01/2019	8/02/2019
$37,273.23	19/07/2018	9/08/2018	$141,175.80	1/03/2019	18/03/2019
$23,180.18	19/07/2018	9/08/2018	$36,057.66	1/03/2019	18/03/2019
$106,000.65	2/07/2018	28/08/2018	$17,058.37	1/03/2019	18/03/2019
$27,573.00	26/07/2018	6/09/2018	$24,543.59	1/03/2019	18/03/2019
$28,463.32	25/07/2018	6/09/2018			

HMRC response dated 23 May 2019 to FOI request of 1 May 2019

Freedom of Information Act 2000 (FOIA)

Thank you for your request, which was received on 1 May, for the following information:

"I would like to know please:-

1. The number of requests to the HMRC International Debt Unit, MARD Team that have been made by HMRC officers in relation to UK tax debtors living in Australia since 2010;

2. The number of requests made from the HMRC International Debt Unit, MARD Team to the Australian Taxation Office since 2010;

3. The date and amount of UK tax mentioned in each of the requests in point 2 above; I would like to have please:-
4. A copy of each of the requests mentioned in point 3 above; and

5. A copy of each of the declarations stating that the HMRC claim fulfils the requirements of the UK-Australia Double Tax Convention; or

6. A copy of each of the declaration stating that the HMRC claim fulfils the requirements of the OECD Convention on Mutual Administrative Assistance in Tax Matters."

I can confirm HMRC holds information within scope of your request, but part of your request is covered by an exemption at section 44(1)(a) of the FOIA, which applies when the information is prohibited from disclosure by another piece of legislation.

In this instance, the Commissioners for Revenue and Customs Act 2005 (CRCA) section 18 specifies how the department must treat information as confidential and when it may be released. To determine whether the exemption applies, we are required to consider two questions at section 23(1) of the CRCA:

 is the requested information held in connection with a function of HMRC? and

 does the information relate to a "person" who is identified, or who could be identified from the information requested?

If, as in this case, the answers to both questions is "Yes", then the statutory duty of confidentiality (at section 18(1) of the CRCA) means the information is exempt under the FOIA. It also removes any possibility of disclosure under the FOIA on a discretionary basis.

The term "person" includes legal entities such as companies, trusts and charities, as well living individuals. (See Schedule 1 of the Interpretation Act 1978.)

However, although I am unable to answer your request in full, we do hold information that would not fall under the above legislation, we therefore have discretion to consider *part* of the request outside of the FOIA which is in relation to our administrative processes. I can provide the following:

1. The number of requests to the HMRC International Debt Unit, MARD Team that have been made by HMRC officers in relation to UK tax debtors living in Australia since 2010 is 121.

2. The number of requests made from the HMRC International Debt Unit, MARD Team to the Australian Taxation Office since 2010 is 100.

3. The date and amount of UK tax mentioned in each of the requests in point 2 above. We are unable to provide the detail requested, but the 100 requests amount to £7,998,564.70.

If you are not satisfied with this reply you may request a review within two months by emailing foi.review@hmrc.gsi.gov.uk, or by writing to the address at the top right-hand side of this letter.
If you are not content with the outcome of an internal review you can complain to the Information Commissioner's Office

APPENDIX 9

DMBM560205 - DMBM560205 - Debt and return pursuit: foreign cases: Mutual Assistance in the Recovery of Debt (MARD) (OECD and DTA): about the agreement

What is MARD?

MARD (Mutual Assistance in the Recovery of Debt) is an arrangement which allows a relevant authority in another country to ask HMRC for assistance in either:
obtaining information
serving legal documents
recovering a tax or duty debt
where the defaulting taxpayer is living in, or has assets in, the UK. There are a number of different MARD arrangements in place, but all are reciprocal.

This guidance refers only to the recovery arrangements made with countries under the Council of Europe (CoE) / Organisation for Economic Co-Operation and Development Convention (OECD) and Double Taxation Agreements (DTA) for tax and duty debts. For information on the MARD arrangements with other members of the EU see DMBM560010. For information on the MARD arrangements under the EU Social Security Regulation see DMBM560500.

The Law and Regulations

There are two routes:
Council of Europe (CoE) / Organisation for Economic Co-Operation and Development (OECD) Convention
a bilateral arrangement, typically an Article within a Double Taxation Agreement

Legislation that applies to recovery of debts

HMRC powers to recover taxes and duties in the UK when requested to do so by a country under either of these routes are contained in the following legislation:
Section 173 Finance Act 2006
SI 3507/07 'The Recovery of Foreign Taxes Regulations 2007'
SI 794/10 'The Recovery of Foreign Taxes (Amendment) Regulations 2010'.

Council of Europe (CoE) / Organisation for Economic Co-Operation and Development (OECD) Convention

The CoE / OECD Convention on Mutual Administrative Assistance in Tax Matters sets out the basis for the agreement.
The Convention is given effect in UK law by SI 2126/07 'The International Mutual Administrative Assistance in Tax Matters Order 2007' and SI1079/11 'The International Mutual Administrative Assistance in Tax Matters Order 2011'.
It came into force on 1 May 2008.

Double Taxation Agreements

The documents which set up the basis for the arrangement are typically either:

a Double Taxation Agreement (DTA) between the UK and another country; or
a Protocol amending the DTA to include debt recovery provisions if these were not covered by the DTA when it was first signed.

The DTA and any protocol are given effect in UK law by means of a Statutory Instrument.

Memorandum of Understanding / Mode of Application

In addition, the operational detail of how assistance will be given can be agreed and set out in the form of a Memorandum of Understanding (MOU) or Mode of Application (MOA), although this is not a legal requirement.

Countries covered

All those countries where the OECD Convention is in force, and which have not entered a reservation on assistance in collection.

All those countries with which the UK has agreed reciprocal recovery under a DTA or a Protocol amending a DTA.
(This content has been withheld because of exemptions in the Freedom of Information Act 2000)

Debts covered
The debts covered will depend on the specific agreement. (This content has been withheld because of exemptions in the Freedom of Information Act 2000)