2010-2011-2012

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

INTERNATIONAL TAX AGREEMENTS AMENDMENT BILL 2012

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Deputy Prime Minister and Treasurer, the Hon Wayne Swan MP)

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

Abbreviation	***Definition***
Agreements Act 1953	*International Tax Agreements Act 1953*
ATO	Australian Taxation Office
Commissioner	Commissioner of Taxation
Indian Agreement	*Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*
Indian Protocol	*Protocol Amending the Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*
ITAA 1936	*Income Tax Assessment Act 1936*
ITAA 1997	*Income Tax Assessment Act 1997*
OECD	Organisation for Economic Co-operation and Development
OECD Model	OECD *Model Tax Convention on Income and on Capital*
Marshall Islands agreement	*Agreement between the Government of Australia and the Government of the Republic of the Marshall Islands for the Allocation of Taxing Rights with Respect to Certain Income of Individuals and to Establish a Mutual Agreement Procedure in Respect of Transfer Pricing Adjustments*
Mauritius agreement	*Agreement between the Government of Australia and the Government of the Republic of Mauritius for the Allocation of Taxing Rights with Respect to Certain Income of Individuals and to Establish a Mutual Agreement Procedure in Respect of Transfer Pricing Adjustments*

General outline and financial impact

New Agreements

Indian Protocol

Schedule 1 to this Bill amends the *International Tax Agreements Act 1953* (Agreements Act 1953) to give the force of law in Australia to the *Protocol Amending the Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (Indian Protocol), which was signed in New Delhi on 16 December 2011.

Date of effect: The Indian Protocol must first enter into force. For entry into force, Australia and India are required to provide notification on the completion of the necessary domestic procedures. Once the Indian Protocol enters into force its provisions will take effect in Australia in three stages:

- in respect of Australian tax on income, profits or gains of any year of income beginning on or after 1 July next following entry into force;
- in respect of Article 24A (Non-Discrimination) and Article 26 (Exchange of Information), upon entry into force; and
- in respect of Article 26A (Assistance in the Collection of Taxes), on a date agreed in an exchange of diplomatic notes.

Proposal announced: This measure was announced on the Treasury website on 22 December 2011.

Financial impact: Unquantifiable, but potentially positive.

Human rights implications: This Bill does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 4, paragraphs 4.1 to 4.4.

Compliance cost impact: The Indian Protocol is broadly consistent with international norms and would generally be expected to reduce compliance costs.

Marshall Islands agreement

Schedule 1 to this Bill amends the Agreements Act 1953 to give the force of law in Australia to the *Agreement between the Government of Australia and the Government of the Republic of the Marshall Islands for the Allocation of Taxing Rights with Respect to Certain Income of Individuals and to Establish a Mutual Agreement Procedure in Respect of Transfer Pricing Adjustments* (Marshall Islands Agreement), which was signed in Majuro on 12 May 2010.

Date of effect: The Marshall Islands Agreement must first enter into force. For entry into force, Australia and the Marshall Islands are required to provide notification on the completion of the necessary domestic procedures. Once the Marshall Islands Agreement enters into force it will apply in Australia in respect of any income year beginning on or after 1 July in the calendar year next following the date on which it enters into force.

Proposal announced: This measure was announced in the then Assistant Treasurer's Media Release No. 105 of 13 May 2010.

Financial impact: Minimal

Human rights implications: This Bill does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 4, paragraphs 4.1 to 4.4.

Compliance cost impact: No significant compliance costs are expected to result from the entry into force of the Marshall Islands agreement.

Mauritius agreement

Schedule 1 to this Bill amends the Agreements Act 1953 to give the force of law in Australia to the *Agreement between the Government of Australia and the Government of the Republic of Mauritius for the Allocation of Taxing Rights with Respect to Certain Income of Individuals and to Establish a Mutual Agreement Procedure in Respect of Transfer Pricing Adjustments* (the Mauritius Agreement), which was signed in Port Louis on 8 December 2010.

Date of effect: The Mauritius agreement must first enter into force. For entry into force, Australia and Mauritius are required to provide notification on the completion of the necessary domestic procedures. Once the Mauritius agreement enters into force it will apply in Australia

in respect of any income year beginning on or after 1 July in the calendar year next following the date on which it enters into force.

Proposal announced: This measure was announced in the then Assistant Treasurer's Media Release No. 022 of 9 December 2010.

Financial impact: Minimal

Human rights implications: This Bill does not raise any human rights issues. See *Statement of Compatibility with Human Rights* — Chapter 4, paragraphs 4.1 to 4.4.

Compliance cost impact: No significant compliance costs are expected to result from the entry into force of the Mauritius agreement

Other Amendments

Schedule 1 to this Bill also amends the Agreements Act 1953 to update certain references to some of Australia's existing taxation agreements.

The notes to the definitions of the *Aruban agreement*, the *Guernsey agreement*, the *Jersey agreement* and the *Malaysian Protocol (No. 3)* contained in section 3AAA(1) of that act will be updated to refer to the Australian Treaty Series number of each of those agreements. This will assist readers in accessing the text of each of those agreements.

These amendments are of a minor and technical nature and will not result in any substantive law changes.

Indian protocol

Outline of chapter

1.1 Schedule 1 to this Bill amends the *International Tax Agreements Act 1953* (Agreement Act 1953) to define and give the force of law to the 2011 *Protocol Amending the Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (Indian Protocol). Subsection 3AAA(1) of the Agreements Act 1953 will define the Indian Protocol and subsection 5(1) will give it the force of law in Australia. Subsections 3AAA(1) and 5(1) refer to the Indian Protocol as the ***Indian protocol (No. 1)***. This chapter explains the rules that apply in the Indian Protocol.

1.2 All references to the articles in the Indian Agreement are to Articles as amended by the Indian Protocol.

Context of amendments

1.3 The Indian Protocol was signed in New Delhi on 16 December 2011.

1.4 Once in force, the Indian Protocol will amend the Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (the Indian Agreement), which was signed in 1991.

1.5 The Indian Protocol will improve the administrative framework for tax cooperation between Australia and India and update the rules for the taxation of business profits and services to bring them more into line with international practice. It will also insert rules to protect taxpayers from tax discrimination.

Summary of new law

Main features of the Indian Protocol

1.6 The main features of the Indian Protocol are as follows:

- A permanent establishment of an enterprise of one country is deemed to exist in the other country, unless otherwise excluded, where:
  - that enterprise furnishes services in the other country, through employees or other personnel, where the relevant activities continue for more than 183 days in any 12 month period ***[Article 5, subparagraph (3)(a) of the Indian Agreement]***;
  - that enterprise carries on activities in the other country in the exploration for or exploitation of natural resources located in that country, for more than 90 days in any 12 month period ***[Article 5, subparagraph (3)(b) of the Indian Agreement]***; or
  - that enterprise operates substantial equipment in the other country for more than 183 days in any 12 month period ***[Article 5, subparagraph (3)(c) of the Indian Agreement]***.
- Only the business profits attributable to an enterprise's permanent establishment in the other country may be taxed in that country ***[Article 7, paragraph 1 of the Indian Agreement]***.
- Rules in the Indian Protocol will protect individuals and entities from tax discrimination in the other country and give them private rights of appeal. However, Article 24A does not restrict either country from applying provisions designed to prevent the avoidance or evasion of taxes (for Australia such measures include thin capitalisation rules or measures designed to ensure that taxes can be effectively collected or recovered and research and development concessions ***[Article 24A of the Indian Agreement]***.
- The Indian Protocol provides for enhanced exchange of information, including bank information, between the two taxation authorities. It authorises and requires Australia to exchange information where the information relates to federal taxes ***[Article 26 of the Indian Agreement]***.

- The Indian Protocol improves the integrity of the tax system by providing for the mutual assistance in the collection of tax debts. This would allow the Australian Taxation Office (ATO), in certain circumstances, to seek assistance from the Indian tax administration to collect Australian taxation debts in respect of all federal taxes, and vice versa ***[Article 26A of the Indian Agreement].***

Comparison of key features of new law and current law

New law	*Current law*
Updates the circumstances, in Article 5 (*Permanent Establishment*), under which an enterprise is deemed to have a permanent establishment in a country. This will occur if the enterprise: • furnishes services (including consultancy services) in that country for more than 183 days in any 12 month period. • carries on activities in that country (including the operation of substantial equipment) in the exploration for or exploitation of natural resources located in that country for more than 90 days in any 12 month period; or • operates substantial equipment in that country (including in relation to natural resource activities) for more than 183 days in any 12 month period.	An enterprise is deemed to have a 'permanent establishment' in a country if: • it furnishes services in that country for more than 90 days in any 12 month period; • it furnishes services in that country, for any period of time, for an associated enterprise; • substantial equipment is being used in that country, for any period of time, by, for or under contract with the enterprise; or • it carries on activities in that country, for any period of time, in connection with the exploration for or exploitation of natural resources in that country.
The business profits of an enterprise of one country will only be taxable in the other country to the extent that they are attributable to a permanent establishment in the other country. This removes the 'force of attraction' rule contained in the Indian Agreement. Therefore the business profits attributable to a permanent establishment of an enterprise of one country will no longer include profits from the sale of goods or	In addition to profits that are attributable to a permanent establishment in the other country, the business profits of an enterprise of one country are taxable in the other country to the extent that they are attributable to the sale of goods or merchandise, or from other business activities, carried on by the enterprise in that other country, that are the same or similar to the sales or activities carried on through that permanent establishment. This is

New law	Current law
merchandise, or other business activities, within that other country, that are not conducted through the permanent establishment but are of the same or a similar kind to those carried on through that permanent establishment.	known as the 'force of attraction' rule.
Includes a comprehensive article preventing tax discrimination under tax laws.	No equivalent.
Updates the framework for the tax authorities to exchange taxpayer information to the current international standard.	The information that can be exchanged is restricted to information relating to the taxes covered by Article 2 (*Taxes Covered*) of the Indian Agreement. Other restrictions can also apply, including restrictions relating to bank secrecy.
Includes a framework for the countries to provide mutual assistance in the collection of taxes.	No equivalent.

The Indian Protocol

1.7 A full transcript of the Indian Protocol and detailed explanation follows:

PROTOCOL AMENDING THE AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE REPUBLIC OF INDIA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME

(New Delhi, 16 December 2011)

The Government of Australia and the Government of the Republic of India,

Desiring to amend the Agreement between the Government of Australia and the Government of the Republic of India for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income signed at Canberra on the 25th day of July 1991 (in this Protocol referred to as "the Agreement"),

Have agreed as follows:

ARTICLE 1

Article 3 of the Agreement is amended by inserting new sub-paragraph k) in paragraph (1):

" (k) the term "national", in relation to a Contracting State, means:

(i) any individual possessing the nationality or citizenship of that Contracting State; and

(ii) any legal person, company, partnership or association deriving its status as such from the laws in force in that Contracting State."

ARTICLE 2

Article 5 of the Agreement is amended by omitting paragraph 3 and substituting:

"(3) Notwithstanding the provisions of paragraphs 1 and 2, where an enterprise of a Contracting State:

(a) furnishes services, including consultancy services, through employees or other personnel engaged by the enterprise for such purpose, but only where activities of that nature continue (for the same or connected project) within that other State for a period or periods aggregating more than 183 days in any 12 month period;

(b) carries on activities (including the operation of substantial equipment) in the other State in the exploration for or exploitation of natural resources situated in that other State for a period or periods exceeding in the aggregate 90 days in any 12 month period; or

(c) operates substantial equipment in the other State (including as provided in subparagraph b)) for a period or periods exceeding in the aggregate 183 days in any 12 month period;

such activities shall be deemed to be carried on through a permanent establishment of the enterprise situated in that other State, unless the activities are limited to those mentioned in paragraph 4 which, if exercised through a fixed place of business, would

not make this place of business a permanent establishment under the provisions of that paragraph."

ARTICLE 3

Article 7 of the Agreement is amended by omitting paragraph 1 and substituting:

"(1) The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment."

ARTICLE 4

The Agreement is amended by inserting:

Article 24A

NON-DISCRIMINATION

(1) Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected. This provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the Contracting States.

(2) The taxation on a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favorably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities. This provision shall not be construed as obliging a Contracting State to grant to individuals who are residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents. This provision shall not be construed as preventing a Contracting State from charging the profits of a permanent establishment which a company of the other Contracting State has in the first mentioned State at a rate of tax which is higher than that imposed on the profits of

a similar company of the first mentioned Contracting State, nor as being in conflict with the provisions of paragraph 3 of Article 7.

(3) Except where the provisions of paragraph 1 of Article 9, paragraph 6 of Article 11 or paragraph 6 of Article 12, apply, interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State.

(4) Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State are or may be subjected.

(5) The provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of every kind and description.

(6) This Article shall not apply to any provision of the laws of a Contracting State which:

(a) is designed to prevent the avoidance or evasion of taxes, including measures designed to address thin capitalization or to ensure that taxes can be effectively collected or recovered; or

(b) provides tax incentives to eligible taxpayers for expenditure on research or development, provided that a company that is a resident of one Contracting State and is wholly or partly owned by residents of the other State can access such incentives on the same terms and conditions as any other company that is a resident of the first-mentioned State; or

(c) is agreed between the Contracting States through an Exchange of Notes. “

ARTICLE 5

The Agreement is amended by omitting Article 26 and substituting:

“Article 26

EXCHANGE OF INFORMATION

(1) The competent authorities of the Contracting States shall exchange such information (including documents or certified copies of the documents) as is

foreseeably relevant for carrying out the provisions of this Agreement, or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, insofar as the taxation thereunder is not contrary to the Agreement. The exchange of information is not restricted by Articles 1 and 2.

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

(3) In no case shall the provisions of paragraphs 1 and 2 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 supply information (including documents or certified copies of the documents) which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

(4) If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

(5) In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.”

ARTICLE 6

The Agreement is amended by inserting:

"Article 26A

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 on behalf of the Contracting States, insofar as the taxation thereunder is not contrary to this Agreement 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 only be brought before the courts or administrative bodies of that State. Nothing in this Article shall be construed as creating or providing any right to such proceedings before any court or administrative body 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."

ARTICLE 7

ENTRY INTO FORCE

The Contracting States shall notify each other in writing through the diplomatic channel of the completion of their domestic requirements for the entry into force of this Protocol. The Protocol, which shall form an integral part of the Agreement, shall enter into force on the date of the last notification, and thereupon shall have effect:

(a) in the case of Australia, with regard to Australian tax, in relation to income, profits or gains of any year of income beginning on or after 1 July next following the date on which the Protocol enters into force;

(b) in the case of India in respect of income derived in any fiscal year beginning on or after 1 April next following the date on which the Protocol enters into force;

(c) for the purposes of Articles 24A (Non-Discrimination) and 26 (Exchange of Information) of the Agreement, from the date of entry into force of this Protocol;

(d) notwithstanding the provisions of subparagraphs (a), (b) and (c), Article 26A (Assistance in the Collection of Taxes) of the Agreement shall have effect from the date agreed in an exchange of notes through the diplomatic channel.

IN WITNESS WHEREOF the undersigned, being duly authorised, have signed this Protocol.

DONE in duplicate at New Delhi this sixteenth day of December, 2011, in the English and Hindi languages, both texts equally authentic, the English text to be the operative one in any case of doubt.

For the Government of Australia:

The Hon Bill Shorten
Minister for Employment and Workplace Relations and Minister for Financial Services

For the Government of the Republic of India:

Mr S S Palanimanickam
Union Minister of State for Finance and Superannuation

Detailed explanation of the Indian Protocol

Article 1

Amends Article 3 (General Definitions) of the Indian Agreement

1.8 This Article inserts a new subparagraph into Article 3 (*General Definitions*) of the Indian Agreement to define the term 'national'. ***National*** is defined by reference to an individual's nationality or citizenship. A legal person, company, partnership or association will also be a national if it is created, organised or treated as such under the laws of Australia or India. For example, a company's nationality is determined by where it is incorporated. ***[Article 3, subparagraph (1)(k) of the Indian Agreement]***

Article 2

Amends Article 5 (Permanent Establishment) of the Indian Agreement

1.9 This article amends the circumstances under which an enterprise is deemed to have a permanent establishment in a country.

Deemed permanent establishment

Services

1.10 Where an enterprise of one country furnishes services, including consultancy services, in the other country through its employees or other personnel engaged by it for that purpose, the enterprise will be deemed to have a permanent establishment in that other country through which those services are carried on. This rule only applies, however, where the relevant activities continue, for the same project or for a connected project, for a period or periods aggregating more than 183 days in any 12 month period.

1.11 In addition, this rule is subject to the provisions of paragraph 4 of Article 5 of the Indian Agreement which deems that certain activities that are ordinarily of a preparatory or auxiliary character do not constitute a permanent establishment. Examples of such activities include the use of facilities solely for the purpose of storage or display of goods or merchandise. ***[Article 5, new subparagraph (3)(a) of the Indian Agreement]***

Natural resource activities

1.12 Where an enterprise of one country carries on activities (including the operation of substantial equipment) in the exploration for or exploitation of natural resources located in the other country for a period

or periods exceeding in the aggregate 90 days in any 12 month period, the enterprise will be deemed to have a permanent establishment in that other country through which those activities are carried on (unless the activities are of a type described in paragraph 4 of Article 5 of the Indian Agreement). ***[Article 5, new subparagraph (3)(b) of the Indian Agreement]***

1.13 This rule replaces the corresponding rule in the Indian Agreement which deems a permanent establishment to exist in relation to natural resource activities, regardless of the duration of those activities.

Substantial equipment

1.14 An enterprise of a country is deemed to have a permanent establishment in the other country where it operates substantial equipment (including in relation to natural resource activities) for a period or periods exceeding in the aggregate 183 days in any 12 month period (unless the activities are of a type described in paragraph 4 of Article 5 of the Indian Agreement).

1.15 Subparagraphs 3b) and c) together reflect Australia's reservation to the Organisation for Economic Co-operation and Development *Model Tax Convention on Income and on Capital* (OECD Model) concerning activities relating to natural resources and the use of substantial equipment. Australia's experience is that the permanent establishment provision in the OECD Model may be inadequate to deal with high value mobile activities; in particular those involving the use of such equipment.

1.16 The words 'operation' and 'operates' have been included to clarify that only active use of substantial equipment assets will be captured by subparagraphs 3b) and c). This means that an enterprise that merely leases substantial equipment to another person for that other person's own use in a country, would not be deemed to have a permanent establishment in that country under these provisions.

1.17 For example, if an Indian enterprise itself operates a mobile crane at an Australian port for more than 183 days in a 12 month period, the Indian enterprise would be deemed to have a permanent establishment in Australia under subparagraph 3c). If, however, that Indian enterprise merely leases the mobile crane to another person and that other person operates the crane at an Australian port for its own purposes, the Indian enterprise would not be deemed to have a permanent establishment in Australia under subparagraph 3c). However, if that other person operates the substantial equipment for or on behalf of the Indian enterprise in Australia, the Indian enterprise would be considered to operate the equipment in Australia.

1.18 The meaning of the term 'substantial equipment' depends on the relevant facts and circumstances of each individual case. Factors such as size, quantity or value of the equipment, or the role of the equipment in income producing activities, are relevant in determining whether the equipment is substantial. However, some examples of substantial equipment would include:

- industrial earthmoving equipment or construction equipment used in road building, dam building or powerhouse construction;
- manufacturing or processing equipment used in a factory; or
- oil or drilling rigs, platforms and other structures used in the petroleum, gas or mining industry.

Article 3

Amends Article 7 (Business Profits) of the Indian Agreement

1.19 This article revises the rules that allow for the taxation by one country of business profits derived by an enterprise that is a resident of the other country.

1.20 The business profits of an enterprise that is a resident of one country will be taxable only in that country unless the profits are attributable to the carrying on of a business through a permanent establishment in the other country. To the extent that they are attributable to a permanent establishment located in the other country, such profits may also be taxed in that other country.

1.21 This article will remove the 'force of attraction' rule contained in the corresponding article of the existing Indian Agreement. The force of attraction rule provides that a country may also generally tax income attributable to certain related sales of goods or merchandise or other business activities where those sales are made or business activities are carried on within that country other than through the permanent establishment.

1.22 The force of attraction rule is inconsistent with current international treaty practice which generally does not permit source country taxation of 'indirect profits' earned by a foreign enterprise and its removal will place Australian investors in India on an equal footing with investors from other countries with similar treaty protection. ***[Article 7, paragraph (1) of the Indian Agreement]***

Article 4

Inserts new Article 24A (Non-Discrimination) into the Indian Agreement

1.23 The Indian Protocol inserts new rules into the Indian Agreement to prevent tax discrimination. The Australian tax system is generally non-discriminatory. However, for clarity this Article provides that certain features of the Australian tax system should not be seen as coming within the Article's terms.

Discrimination based on nationality

1.24 Article 24A prevents discrimination on the grounds of nationality by providing that nationals of one country may not be less favourably treated than nationals of the other country in the same circumstances. ***[New Article 24A, paragraph (1) of the Indian Agreement]***

1.25 The discrimination that this Article precludes applies to both taxation and any requirement connected with such taxation. Accordingly, discrimination in the administration of the tax law is also generally precluded.

1.26 The term ***national*** is defined in new sub-paragraph (k) of Article 3 of the Indian Agreement (*General Definitions*) and covers both an individual who is a national or citizen of one country or the other, and any legal person, company, partnership or association deriving its status as such from the laws in force in one country or the other. Accordingly, a company that is incorporated in Australia would be a national of Australia while a company that is incorporated under a law of India would be a national of India for the purposes of this paragraph.

The meaning of 'in the same circumstances' and 'in particular with respect to residence'

1.27 The expression 'in the same circumstances' refers to persons who, from the point of the application of the ordinary taxation laws, are in substantially similar circumstances both in law and in fact.

1.28 Where a person operates in an industry that is subject to government regulation such as prudential oversight, another person operating in the same industry but not subject to the same oversight, would not be in the same circumstances.

1.29 The inclusion of the further clarification 'in particular with respect to residence' makes clear that the residence of the taxpayer is one of the factors that are relevant in determining whether taxpayers are

placed in similar circumstances. Therefore, different treatment accorded to an Indian resident compared to an Australian resident will not constitute discrimination for the purposes of this Article. A potential breach of paragraph 1 of this Article only arises if two persons who are residents of the same country are treated differently solely by reason of one being a national of Australia and the other a national of India.

The meaning of 'other or more burdensome' taxation

1.30 The words 'more burdensome' taxation refer to the quantum of taxation while 'other' taxation may refer to some form of income tax other than the form of income tax to which a national of the country is subject (*Woodend Rubber Co. v Commissioner of Inland Revenue* [1971] A.C. 321 at 332).

1.31 The phrase 'any requirement connected therewith' makes the Article also applicable to administrative or compliance requirements that a taxpayer may be called upon to meet where those requirements differ based on nationality grounds.

Non-residents of Australia/India

1.32 Consistent with paragraph 1 of Article 24 (*Non-Discrimination*) of the OECD Model, paragraph 1 of this Article applies to persons who are residents of neither Australia nor India. Consequently, residents of third countries who are nationals of either Australia or India are able to seek the benefits of this provision. Paragraph 1 does not, however, extend to residents of either country who are not 'nationals' (as defined in sub-paragraph (k) of paragraph 1 of Article 3 (*General Definitions*) of either country.

Non-discrimination and permanent establishments

1.33 The tax on permanent establishments of enterprises of the other country will not be levied less favourably than on the country's own enterprises carrying on the same activities. This applies to all residents of a treaty country, irrespective of their nationality, who have a permanent establishment in the other country. The purpose of this provision is to prevent discrimination in the treatment of permanent establishments as compared with resident enterprises. ***[Article 24A, paragraph (2) of the Indian Agreement]***

1.34 For this paragraph to apply, the comparison must therefore be made between a permanent establishment and local enterprises carrying on the same activities. Paragraphs 37 and 38 of the OECD Model Commentary on Article 24 (*Non-discrimination*) note, by way of example, that the legal structure of the permanent enterprise and the regulation of its

activities may be relevant in determining whether or not those activities are the same as those of local enterprises.

1.35 Permanent establishments of non-resident enterprises may be treated differently from resident enterprises as long as the treatment does not result in more burdensome taxation for the former than for the latter. That is, a different mode of taxation may be adopted with respect to non-resident enterprises, to take account of the fact that they often operate in different conditions to resident enterprises. The provision would not affect, for example, domestic law provisions that tax a non-resident by withholding, provided that calculation of the tax payable is not greater than that applying to a resident taxpayer.

1.36 Paragraph 2 permits a country to charge a higher rate of tax on the profits of a permanent establishment of a non-resident company than it charges on the profits of similar resident companies. Such treatment would not breach this paragraph or paragraph 3 of Article 7 of the Indian Agreement. This provision is consistent with India’s long-standing differential tax rate treatment between its resident companies and non-resident companies. ***[Article 24A, paragraph 2 of the Indian Agreement]***

1.37 In determining whether taxation has been less favourably levied, regard would be had only to the rules applicable to the taxation of the permanent establishment’s own activities, and how those rules compare with those applicable to the taxation of similar activities carried on by a local enterprise. As noted in paragraph 41 of the Commentary on Article 24 of the OECD Model, the equal treatment principle in this paragraph ‘does not extend to rules that take account of the relationship between an enterprise and other enterprises (for example, rules that allow consolidation, transfer of losses or tax-free transfers of property between companies under common ownership), since the latter rules do not focus on the taxation of an enterprise’s own business activities similar to those of the permanent establishment’. Accordingly, this paragraph does not affect Australia’s roll-over rules for capital gains, consolidation rules or loss transfer rules. Nor does it affect rules concerning the allowance of rebates or credits in relation to dividends, since these do not relate to the business activities of the permanent establishment.

Non-resident individuals

1.38 Non-resident individuals do not have to be granted the personal allowances, reliefs or reductions granted on account of civil status or family responsibilities to residents of the tax treaty countries. ***[Article 24A, paragraph (2) of the Indian Agreement]***

1.39 This means that Australia will continue to be able to grant certain tax offsets only to resident individuals, such as the tax offset for dependents contained in Division 13 of the ITAA 1997.

Deductions for payments to foreign residents

1.40 The treaty partner countries must allow the same deductions for interest, royalties and other disbursements paid to residents of the other country as it does for payments to its own residents. However, the treaty countries are allowed to reallocate profits between related enterprises on an arm's length basis under Article 9 (*Associated Enterprises*) and to limit deductions in accordance with paragraph 6 of Article 11 (*Interest*), and paragraph 6 of Article 12 (*Royalties*). ***[Article 24A, paragraph (3) of the Indian Agreement]***

Companies owned or controlled abroad

1.41 A country must not give less favourable treatment to companies, the capital of which is owned or controlled, wholly or partly, directly or indirectly, by one or more residents of the other country. That is, Australian companies owned or controlled by Indian residents may not be given other or more burdensome treatment than locally owned or controlled Australian companies. ***[Article 24A, paragraph (4) of the Indian Agreement]***

1.42 Differential tax treatment based on residency is not affected by this paragraph. Nor does the paragraph require the same treatment of non-resident shareholders in the company as resident shareholders. Accordingly, there is no obligation under paragraph 4 or any other provision of this Article to allow imputation credits to non-resident shareholders.

Taxes to which this Article applies

1.43 This Article applies to 'taxes of every kind and description'. It is intended that the Article extend to any identical or substantially similar taxes which are subsequently imposed by either country in addition to, or in place of, these taxes.

1.44 In the case of Australia, the relevant taxes include the income tax (including the petroleum resource rent tax, the mineral resource rent tax and tax on capital gains), the GST and the fringe benefits tax. The provisions of this Article also apply to taxes imposed by the Australian states and territories.

1.45 In the case of India, the relevant taxes are all taxes levied by, or on behalf of, India, its political subdivisions or local authorities. In

addition to the income tax and the surtax imposed on chargeable profits of companies, this would also include, for example, Value-Added Tax (VAT) both levied by the Indian Union Government and India's state governments. ***[Article 24A, paragraph (5) of the Indian Agreement]***

Exclusions

1.46 Certain provisions of the law of both countries are not restricted in their application by this Article. The specific exclusion of these provisions will ensure that they can continue to operate for their intended purpose. The provisions of the law of Australia and India which are not restricted in the application by this Article are those that:

- are 'designed to prevent the avoidance or evasion of taxes', including measures designed to address thin capitalisation. In the case of Australia these laws include, dividend stripping, transfer pricing, controlled foreign companies and transferor trust provisions. Although it is commonly accepted by most Organisation for Economic Co-operation and Development (OECD) member countries that such provisions do not contravene *Non-Discrimination* Articles, this outcome is specifically provided for in the amended Indian Agreement by the exclusion of such rules from the operation of the Article;

- ensure that taxes are effectively collected or recovered. This preserves the rules relating to the enforcement and operation of the various aspects of the withholding tax provisions relating to non-residents. For example, section 26-25 (*Interest or royalty*) of the ITAA 1997 provides that where interest and royalties are paid to a non-resident and the payer fails to deduct withholding tax, the interest or royalty expense cannot be claimed as a deduction. No similar measure exists in relation to payments from a resident to another resident;

- provide tax incentives for research and development expenditure, provided that a company that is a resident of one country and is wholly or partly owned by residents of the other country can access such incentives on the same terms and conditions as any other company that is a resident of the first-mentioned country; or

- are agreed in an exchange of notes between the two Governments to be unaffected by this Article.

[Article 24A, paragraph (6) of the Indian Agreement]

More favourable treatment

1.47 Nothing in this Article prevents either country from treating residents of the other country more favourably than its own residents.

Article 5

Substitutes new Article 26 (Exchange of Information) into the Indian Agreement

1.48 The Indian Protocol aligns the information exchange provisions to the current OECD standard by replacing Article 26 (*Exchange of Information*) of the Indian Agreement. The new Article 26 continues to provide for the exchange of tax information by the tax administrations of the two countries, but differs from the previous approach in the following ways:

- the scope is expanded to a wider range of taxes;
- the new provision clarifies that the tax authorities in India and Australia are obliged to obtain information for the tax authorities of the other country regardless of whether the first country has a domestic tax interest in the information sought or whether the information concerns a resident of either country;
- bank secrecy laws do not limit the exchange of information; and
- information received by a tax authority may be used for other purposes when the laws of both countries permit this and where the tax authority supplying the information authorises such use.

Foreseeably relevant information

1.49 Article 26 authorises and limits the exchange of information by the two competent authorities to information foreseeably relevant to the administration or enforcement of the relevant taxes. The exchange of information is not restricted by Article 1 (*Personal Scope*) of the Indian Agreement, and may therefore cover persons who are not residents of Australia or India.

1.50 The change in wording from 'necessary' used in Article 26 of the Indian Agreement to a 'foreseeably relevant' standard reflects the wording in Article 26 (*Exchange of Information*) of the OECD Model.

1.51 The standard of foreseeable relevance is intended to ensure that information may be exchanged to the widest possible extent and, at the same time, to clarify that competent authorities of Australia and India are not entitled to request information from the other country which is unlikely to be relevant to the tax affairs of a taxpayer, or to the administration and enforcement of tax laws. ***[Article 26, paragraph (1) of the Indian Agreement]***

Taxes to which this Article applies

1.52 Under the corresponding Article in the Indian Agreement, the information that could be requested and obtained between the two countries was limited to information in relation to taxes to which that agreement applied (generally income taxes).

1.53 Under the Article 26, the range of taxes for which information may be exchanged has been expanded. The exchange of information is not restricted by Article 2 (*Taxes Covered*) of the Indian Agreement. The Australian competent authority can now request and obtain information concerning all Australian federal taxes from the Indian competent authority. This means, for example, that information concerning Australian indirect taxes (such as the goods and services tax (GST)) may be requested and obtained from India. ***[Article 26, paragraph (1) of the Indian Agreement]***

1.54 Similarly, in the case of India, the Indian competent authority can now request and obtain information concerning all Indian national taxes from the Australian competent authority.

Use of exchanged information

1.55 The purposes for which the exchanged information may be used and the persons to whom it may be disclosed are restricted in a manner which is consistent with the approach taken in the OECD Model. However, the final sentence of paragraph 2 permits the information to be used for other purposes when the laws of both countries permit this and the tax authority supplying the information authorises such use. ***[Article 26, paragraph (2) of the Indian Agreement]***

1.56 Any information received by a country must be treated as secret in the same manner as information obtained under the domestic law of that country, and can only be disclosed to the persons identified in paragraph 2 of the Article. ***[Article 26, paragraph (2)of the Indian Agreement]***

No domestic tax interest required

1.57 When requested, a country is required to obtain information under the new Article in the same manner as if it were administering its

domestic tax system, notwithstanding that the country may not require the information for its own purposes. Australia would recognise this obligation to obtain relevant information for treaty partner countries, even in the absence of an explicit provision to this effect. ***[Article 26, paragraph (4) of the Indian Agreement]***

Limitations

1.58 The country requested to provide information is not obliged to do so where:

- it would be required to carry out administrative measures at variance with the law and administrative practice of either Australia or India; or
- such information is not obtainable under the domestic law or in the normal course of administration of either Australia or India.

[Article 26, subparagraphs (3)(a) and (b) of the Indian Agreement]

1.59 Also, in no case is the country receiving the request obliged to supply information that would:

- disclose any trade, business, industrial, commercial or professional secret or trade process; or
- be contrary to public policy.

[Article 26, subparagraph (3)(c)]

1.60 Paragraph 5 ensures that paragraph 3 of Article 26 cannot be used to prevent the supply of information solely because the information is held by entities including banks, other financial institutions, trusts, foundations, nominees. The addition of this paragraph will not have any practical application for Australia, since Australian domestic tax law already permits the Commissioner to obtain information from banks and financial institutions in order to meet obligations under exchange of information articles in tax treaties or Tax Information Exchange Agreements. ***[Article 26, paragraph 5 of the Indian Agreement]***

Information that existed prior to the entry into force of the Indian Protocol

1.61 Once the new Article 26 is effective, the competent authorities can exchange information that relates to transactions or events occurring prior to entry into force of the Indian Protocol. This approach conforms to

the international practice contained in paragraph 10.3 of the OECD Model Commentary on Article 26 (*Exchange of Information*).

Article 6

Inserts new Article 26A (Assistance in Collection of taxes) into the Indian Agreement

1.62 The Indian Protocol inserts rules into the Indian Agreement to provide for assistance in the collection of taxes. Australia and India will be authorised and required to provide assistance to each other in the collection of revenue claims. This assistance is not to be restricted by the terms of Article 1 (*Personal Scope*) of the Indian Agreement. Assistance must therefore be provided as regards a revenue claim owed to either country by any person, whether or not a resident of Australia or India. The form of the assistance is set out in paragraphs 3 and 4 of this Article. ***[Article 26A, paragraph (1) of the Indian Agreement]***

1.63 The term 'revenue claim' is defined for the purposes of this Article to mean an amount owed in respect of taxes of every kind and description, imposed on behalf of Australia or India. A revenue claim may cover any Indian tax, or any Australian federal tax, but only insofar as the imposition of such taxes is not contrary to the amended agreement or any other instrument in force between Australia and India. It also applies to interest, administrative penalties and costs of collection or conservancy related to such amount. ***[Article 26A, paragraph (2) of the Indian Agreement]***

Enforceable revenue claims

1.64 Assistance in collection will only be provided by Australia in relation to a revenue claim that is enforceable in India. Similarly, India is not required to provide assistance in collection in respect of an Australian revenue claim that is not enforceable in Australia. A revenue claim will be enforceable where the requesting country has the right, under its domestic law, to collect the revenue claim. Further, the revenue claim must be owed by a person who, at that time, under the law of that country, has no administrative or judicial rights to prevent its collection.

1.65 The way in which the revenue claim of the requesting country is to be collected by the requested country is stipulated. Other than in relation to time limits and priority (see paragraphs 1.68 to 1.71), the requested country is required to collect the revenue claim as though it were its own revenue claim. This obligation applies even if, at that time, the requested country has no need to undertake collection actions related to that taxpayer for its own tax purposes. ***[Article 26A, paragraph (3) of the Indian Agreement]***

1.66 Where a request from India or Australia concerns a tax that does not exist in the other country, the country that received the request will follow the procedure applicable to a claim for a similar domestic tax or any other appropriate procedure if no similar tax exists.

Measures of conservancy

1.67 Australia or India may request the other country to take measures of conservancy even where it cannot yet ask for assistance in collection, such as where the revenue claim is not yet enforceable or when the debtor still has the right to prevent its collection. An example of a conservancy measure is the seizure or the freezing of assets before final judgment to guarantee that the assets will still be available when collection can subsequently take place.

1.68 If requested to do so by India, Australia is required to take measures of conservancy in respect of the revenue claim in accordance with the provisions of Australian law as if the revenue claim were an Australian revenue claim. Although Australia does not have specific conservancy measures, the Commissioner may apply for a *Mareva* injunction, which would prevent the taxpayer and the taxpayer's associates from dealing with certain assets. ***[Article 26A, paragraph (4) of the Indian Agreement]***

Time limits

1.69 The requested country's domestic law time limitations beyond which a revenue claim cannot be enforced or collected do not apply to a revenue claim in respect of which the other country has made a request for assistance in collection. Rather, the time limits of the requesting country apply. ***[Article 26A, paragraph (5) of the Indian Agreement]***

1.70 This paragraph follows the OECD provision but has no practical effect in Australia as there is currently no time limit imposed on the collection of a revenue claim.

Priority of claims

1.71 Any rules of Australia and India which give priority to tax debts over the claims of other creditors do not apply to a revenue claim of the other country. This restriction applies regardless of the fact that the requested country must generally treat the claim as its own revenue claim.

1.72 The words 'by reason of its nature as such' in paragraph 5 indicate that any time limits and priority rules to which the paragraph applies are only those that are specific to unpaid taxes. Consequently, paragraph 5 does not prevent the application of general rules concerning

time limits or priority which would apply to all debts, such as rules giving priority to a claim by reason of that claim having arisen or having been registered before another one. ***[Article 26A, paragraph (5) of the Indian Agreement]***

Restriction on judicial and administrative proceedings

1.73 Any legal or administrative objection concerning the existence, validity or the amount of a revenue claim of the requesting country is to be exclusively dealt with in that country. For example, no legal or administrative proceedings, such as a request for judicial review, may be initiated in Australia with respect to the existence, validity or amount of an Indian revenue claim. ***[Article 26A, paragraph (6) of the Indian Agreement]***

Change in circumstances

1.74 Where the relevant conditions in paragraph 3 or 4 of this Article are no longer satisfied after a request for assistance has been made, but before the revenue claim has been collected and remitted by the requested country, the competent authority of the requesting country is required to promptly notify the competent authority of the other country of that fact. ***[Article 26A, paragraph (7) of the Indian Agreement]***

1.75 An example of such a situation would be where a request for assistance in collection has been made by India, but the revenue claim ceases to be enforceable in India prior to its collection by Australia.

1.76 Following such notification, the requested country has the option to ask the requesting country to either suspend or withdraw its request for assistance. If the request is suspended, the suspension applies until such time as the requesting country informs the other country that the conditions necessary for making a request as regards the revenue claim are again satisfied or that it withdraws its request. ***[Article 26A, paragraph (7) of the Indian Agreement]***

Limitations

1.77 The requested country is permitted to refuse the request for assistance in certain circumstances.

1.78 The first limitation on the obligations of the country receiving the request is that it is not required to exceed the bounds of its own domestic laws and administrative practice or those of the other country in fulfilling its obligations under this Article. ***[Article 26A, subparagraph (8)(a) of the Indian Agreement]***

1.79 However, this does not prevent Australia from applying administrative measures to collect an Indian revenue claim, even though invoked solely to provide assistance in the collection of Indian taxes.

1.80 The second limitation provides that the country is not required to satisfy a request where it would require the carrying out of measures that are contrary to public policy, such as where providing assistance may affect the vital interests of the country itself. ***[Article 26A, subparagraph (8)(b) of the Indian Agreement]***

1.81 The third limitation provides that neither country is obliged to satisfy a request for assistance if the other country has not pursued all reasonable measures of collection or conservancy that are available under its own laws or administrative practice. ***[Article 26A, subparagraph (8)(c) of the Indian Agreement]***

1.82 The final limitation allows either country to reject a request for assistance on the basis of practical administrative considerations such as when the costs of recovering a revenue claim would exceed the amount of the revenue claim itself. ***[Article 26A, subparagraph (8)(d) of the Indian Agreement]***

Article 7

Date of entry into force of the Indian protocol

1.83 This Article provides for the entry into force of the Indian Protocol, which will form an integral part of the Indian Agreement. The Indian Protocol will enter into force on the last date on which diplomatic notes are exchanged notifying that the domestic processes to approve the Indian Protocol in the respective countries have been completed. In Australia, enactment of the legislation giving the force of law in Australia to the Indian Protocol, along with tabling the protocol in Parliament, are prerequisites to the exchange of diplomatic notes. ***[Article 7 of the Indian Protocol]***

Date of application for Australian taxes

1.84 Once it enters into force, the Indian Protocol will apply in Australia with regard to Australian tax, in relation to income, profits or gains of any year of income beginning on or after 1 July next following the date on which the Indian Protocol enters into force. ***[Article 7, paragraph (a) of the Indian Protocol]***

Date of application for Indian taxes

1.85 The Indian Protocol will apply in India in respect of income derived in any fiscal year beginning on or after 1 April next following the

date on which the Indian Protocol enters into force. ***[Article 7, paragraph (b) of the Indian Protocol]***

Non-Discrimination and Exchange of Information

1.86 Article 24A (*Non-Discrimination*) and Article 26 (*Exchange of Information*) are intended to have effect from the date of entry into force of the Indian Protocol. ***[Article 7, paragraph (c) of the Indian Protocol]***

Assistance in Collection

1.87 Article 26A (*Assistance in the Collection of Taxes*) shall have effect from a date agreed in a subsequent Exchange of Notes through the diplomatic channel between Australia and India. ***[Article 7, paragraph (d) of the Indian Protocol]***

Australia — Marshall Islands agreement

Outline of chapter

2.1 Schedule 1 to this Bill amends the *International Tax Agreements Act 1953* (Agreement Act 1953) to define and give the force of law to the 2010 *Agreement between the Government of Australia and the Government of the Republic of the Marshall Islands for the Allocation of Taxing Rights with Respect to Certain Income of Individuals and to Establish a Mutual Agreement Procedure in Respect of Transfer Pricing Adjustments* (the Marshall Islands agreement). Subsection 3AAA (1) of the Agreements Act 1953 will define the Marshall Islands agreement and subsection 5(1) will give it the force of law in Australia. This chapter explains the rules that apply in the Marshall Islands agreement.

Context of amendments

2.2 The Marshall Islands agreement was signed in Majuro on 12 May 2010. There is no pre-existing agreement of this type between Australia and the Republic of the Marshall Islands (the Marshall Islands).

Summary of new law

Main features of the Marshall Islands agreement

2.3 The main features of the Marshall Islands agreement are as follows:

- Income from pensions and retirement annuities will generally be taxed only in the country of residence of the recipient, provided the income is subject to tax in that country.

- Income from government service will generally be taxed only in the country that pays the remuneration. However, the remuneration shall only be taxed in the other country where the services are rendered in that other country by a resident of that other country who is a national of that other country or did not become a resident of that other country for the purpose of rendering the services.

- Payments made from abroad to visiting students and business apprentices for the purposes of their maintenance, education or training will be exempt from tax in the country visited.

2.4 A non-binding administrative mechanism will be established to assist taxpayers to seek resolution of transfer pricing disputes.

Comparison of key features of new law and current law

New law	*Current law*
Australian source pensions and retirement annuities derived by residents of the Marshall Islands will be exempt from Australian tax, provided they are taxed in the Marshall Islands.	Australian source income of foreign residents is generally subject to Australian tax.
Certain income derived by residents of the Marshall Islands from government service in Australia will be exempt from Australian tax.	Australian source income of foreign residents is generally subject to Australian tax.
Certain payments received by visiting students and business apprentices from the Marshall Islands will be exempt from Australian tax.	Some payments received by foreign students and business apprentices may be taxable in Australia, depending on the circumstances
The competent authorities of Australia and the Marshall Islands will endeavour to resolve taxpayers' transfer pricing disputes arising from transfer pricing adjustments that contravene the arm's length principle.	No equivalent.

The Marshall Islands agreement

2.5 A full transcript of the Marshall Islands agreement and detailed explanation follows:

AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE REPUBLIC OF THE MARSHALL ISLANDS FOR THE ALLOCATION OF TAXING RIGHTS WITH RESPECT TO CERTAIN INCOME OF INDIVIDUALS AND TO ESTABLISH A MUTUAL AGREEMENT PROCEDURE IN RESPECT OF TRANSFER PRICING ADJUSTMENTS

(Majuro, 12 May 2010)

Agreement between the Government of Australia and the Government of the Republic of the Marshall Islands for the allocation of taxing rights with respect to certain income of individuals and to establish a mutual agreement procedure in respect of transfer pricing adjustments.

The Government of Australia and the Government of the Republic of the Marshall Islands ("the Contracting States"),

Recognising that the Contracting States have concluded an Agreement for the Exchange of Information with Respect to Taxes, and

Desiring to conclude an Agreement for the allocation of taxing rights with respect to certain income of individuals and to establish a mutual agreement procedure in respect of transfer pricing adjustments,

Have agreed as follows:

ARTICLE 1

PERSONS COVERED

This Agreement shall apply to persons who are residents of one or both of the Contracting States.

ARTICLE 2

TAXES COVERED

1 The existing taxes to which this Agreement shall apply are:

(a) in Australia, the income tax imposed under the federal law of Australia; (hereinafter referred to as "Australian tax").

(b) in the Republic of the Marshall Islands, income tax imposed under the national laws of the Republic of the Marshall Islands; (hereinafter referred to as "Marshall Islands tax").

2 This Agreement shall also apply to any identical or substantially similar taxes which are imposed after the date of signature of this Agreement in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other within a reasonable period of time of any substantial changes to the taxation laws covered by this Agreement.

3 This Agreement shall not apply to taxes imposed by states, municipalities, local authorities or other political subdivisions, or possessions of a Contracting State.

ARTICLE 3

DEFINITIONS

1 For the purposes of this Agreement, unless the context otherwise requires:

(a) the term "Australia", when used in a geographical sense, excludes all external territories other than:

(i) the Territory of Norfolk Island;

(ii) the Territory of Christmas Island;

(iii) the Territory of Cocos (Keeling) Islands;

(iv) the Territory of Ashmore and Cartier Islands;

(v) the Territory of Heard Island and McDonald Islands; and

(vi) the Coral Sea Islands Territory,

and includes any area adjacent to the territorial limits of Australia (including the Territories specified in this subparagraph) in respect of which there is for the time being in force, consistently with international law, a law of Australia dealing with the exploration for or exploitation of any of the natural resources of the exclusive economic zone or the seabed and subsoil of the continental shelf;

(b) the term "the Republic of Marshall Islands" means; any land territory within the territorial limits of the Republic of the Marshall Islands, and includes the internal waters and territorial sea of the Republic of the Marshall Islands;

(c) the term "competent authority" means in the case of Australia, the Commissioner of Taxation or an authorised representative of the Commissioner and, in the case of the Republic of the Marshall Islands; the Secretary of Finance or an authorised representative of the Secretary of Finance,

(d) the term "Contracting State" means Australia or the Republic of the Marshall Islands, as the context requires;

(e) the term "national", in relation to a Contracting State, means any individual possessing the nationality or citizenship of that Contracting State;

(f) the term "person" includes an individual, a company and any other body of persons;

(g) the term "tax" means Australian tax or Marshall Islands tax as the context requires; and

(h) the term "transfer pricing adjustment" means an adjustment made by the competent authority of a Contracting State to the profits of an enterprise as a result of applying the domestic law concerning taxes referred to in Article 2 of that State regarding transfer pricing.

2 As regards the application of this Agreement at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State, for the purposes of the taxes to which this Agreement applies, with any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

ARTICLE 4

RESIDENT

1 For the purposes of this Agreement, the term "resident of a Contracting State" means:

(a) in the case of Australia, a person who is a resident of Australia for the purposes of Australian tax; and

(b) in the case of the Republic of the Marshall Islands, a person who is a resident of Marshall Islands for the purposes of Marshall Islands Tax; and

2 A person is not a resident of a Contracting State for the purposes of this Agreement if the person is liable to tax in that State in respect only of income from sources in that State or, in the case of the Republic of the Marshall Islands, is not subject to the most comprehensive taxation provided under the national tax laws of the Republic of the Marshall Islands.

3 Where by reason of the preceding provisions of this Article a person, being an individual, is a resident of both Contracting States, then the person's status shall be determined as follows:

(a) the individual shall be deemed to be a resident only of the State in which a permanent home is available to that individual; if a permanent home is available in both States, or in neither of them, that individual shall be deemed to be a resident only of the State with which the individual's personal and economic relations are closer (centre of vital interests);

(b) if the State in which the individual has their centre of vital interests cannot be determined, the individual shall be deemed to be a resident only of the State of which the individual is a national;

(c) if the individual is a national of both States or of neither of them, the competent authorities of the Contracting States shall endeavour to resolve the question by mutual agreement.

4 Where, by reason of paragraph 1, a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its place of effective management is situated.

ARTICLE 5

PENSIONS AND RETIREMENT ANNUITIES

1 Pensions (including government pensions) and retirement annuities paid to an individual who is a resident of a Contracting State shall be taxable only in that State.

However, pensions and retirement annuities arising in a Contracting State may be taxed in that State where such income is not subject to tax in the other Contracting State.

2 The term "retirement annuity" means:

(a) in the case of Australia, a superannuation annuity payment within the meaning of the taxation laws of Australia;

(b) in the case of the Republic of the Marshall Islands, a superannuation annuity payment within the meaning of the taxation laws of the Republic of the Marshall Islands.

(c) any other similar periodic payment agreed upon by the competent authorities.

ARTICLE 6

GOVERNMENT SERVICE

1 (a) Salaries, wages and other similar remuneration, other than a pension or retirement annuity, paid by a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority shall be taxable only in that State.

(b) However, such salaries, wages and other similar remuneration shall be taxable only in the other Contracting State if the services are rendered in that State and the individual is a resident of that State who:

(i) is a national of that State; or

(ii) did not become a resident of that State solely for the purpose of rendering the services.

2 Notwithstanding the provisions of paragraph 1, salaries, wages and other similar remuneration in respect of services rendered in connection with any trade or business carried on by a Contracting State or a political subdivision or a local authority thereof may be taxed in accordance with the laws of a Contracting State.

ARTICLE 7

STUDENTS

Payments which a student or business apprentice, who is or was immediately before visiting a Contracting State a resident of the other Contracting State and who is temporarily present in the first-mentioned State solely for the purpose of their education or training, receives for the purpose of their maintenance, education or training shall not be taxed in that State, provided such payments arise from sources outside that State.

ARTICLE 8

MUTUAL AGREEMENT PROCEDURE IN RESPECT OF TRANSFER PRICING ADJUSTMENTS

1 Where a resident of a Contracting State considers the actions of the other Contracting State results or will result in a transfer pricing adjustment not in accordance with the arm's length principle, the resident may, irrespective of the remedies provided by the domestic law of those States, present a case to the competent authority of the first-mentioned State. The case must be presented within 3 years of the first notification of the adjustment.

2 The competent authorities shall endeavour to resolve any difficulties or doubts arising as to the application of the arm's length principle by a Contracting State regarding transfer pricing adjustments. They may also communicate with each other directly for the purposes of this Article.

ARTICLE 9

EXCHANGE OF INFORMATION

The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement. Information may be exchanged by the competent authorities for the purposes of this Article in accordance with the provisions of the Agreement on the Exchange of Information with Respect to Taxes concluded by the Contracting States (whether or not this Agreement, in whole or in part, forms part of the domestic law of either Contracting State).

ARTICLE 10

ENTRY INTO FORCE

1 The Contracting States shall notify each other, in writing, through the diplomatic channel of the completion of their constitutional and legal procedures for the entry into force of this Agreement. This Agreement shall enter into force on the date of the last notification, and shall, provided an Agreement for the Exchange of Information with Respect to Taxes is in force between the Contracting States, thereupon have effect:

(a) in respect of Australian tax, for any year of income beginning on or after 1 July in the calendar year next following the date on which this Agreement enters into force; and

(b) in respect of the Republic of the Marshall Islands, for any year of income beginning on or after 1 October in the calendar year next following the date on which this Agreement enters into force;

ARTICLE 11

TERMINATION

1 This Agreement shall continue in effect indefinitely, but either of the Contracting States may give to the other Contracting State through the diplomatic channel written notice of termination.

2 Such termination shall become effective:

(a) in respect of Australian tax, in the year of income beginning on or after 1 July in the calendar year next following that in which the notice of termination is given;

(b) in respect of Marshall Islands tax, in the year of income beginning on or after 1 October in the calendar year next following that in which the notice of termination is given.

3 Notwithstanding the provisions of paragraph 1 or 2, this Agreement shall, on receipt through the diplomatic channel of written notice of termination of the Agreement for the Exchange of Information with Respect to Taxes between the Contracting States, terminate and cease to be effective on the first day of the month following the expiration of a period of six (6) months after the date of receipt of such notice.

IN WITNESS WHEREOF the undersigned, being duly authorised by their respective Governments, have signed this Agreement.

DONE at Majuro in duplicate, on this 12th day of May 2010.

For the Government of Australia:

Susan Cox
Ambassador

For the Government of the Republic of the Marshall Islands:

Brenson Wase
Acting Finance Minister

Detailed explanation of new law

2.6 This Bill gives effect to the Marshall Islands Agreement, which deals with the allocation of taxing rights with respect to certain income of individuals.

Article 1 — Persons Covered

2.7 This Article establishes the scope of the application of the Marshall Islands agreement by providing for it to apply to persons who are residents of one or both of the countries. ***[Article 1]***

2.8 The application of the Marshall Islands agreement to persons who are dual residents (that is, residents of both countries) is dealt with in Article 4 (*Resident*).

Article 2 — Taxes Covered

2.9 This Article specifies the existing taxes of each country to which the Marshall Islands agreement applies. This is, in the case of Australia, the federal income tax. ***[Article 2, subparagraph 1(a)]***

2.10 For the Marshall Islands, the Marshall Islands agreement applies to the national income tax. ***[Article 2, subparagraph 1(b)]***

2.11 The application of the Marshall Islands agreement will be automatically extended to any identical or substantially similar taxes which are subsequently imposed by either country in addition to, or in place of, the existing taxes. The competent authorities of Australia and the Marshall Islands are required to notify each other in the event of a substantial change to the taxation laws of the respective countries, within a reasonable period of time after any such changes. ***[Article 2, paragraph 2]***

2.12 The Marshall Islands agreement shall not apply to taxes imposed by states, municipalities, local authorities or other political subdivisions or possessions of either country. ***[Article 2, paragraph 3]***

Article 3 — Definitions

Definition of Australia

2.13 The definition of 'Australia' follows corresponding definitions in Australia's modern tax treaties. 'Australia' is defined to include certain external territories and areas of the continental shelf. ***[Article 3, subparagraph 1(a)]***

Definition of the Marshall Islands

2.14 The Marshall Islands is defined to mean any land territory within the territorial limits of the Republic of the Marshall Islands, and includes the internal waters and territorial sea of the Republic of the Marshall Islands. ***[Article 3, subparagraph 1(b)]***

Definition of competent authority

2.15 The competent authority is the person or institution specifically authorised to perform certain actions under the Marshall Islands agreement. For example, to notify each other of any significant changes to the tax law of their respective countries (Article 2 (*Taxes Covered*)), to communicate for the purposes of Article 8 (*Mutual Agreement Procedure*) and to exchange information in accordance with Article 9 (*Exchange of Information*).

2.16 In the case of Australia, the competent authority is the Commissioner of Taxation or an authorised representative of the Commissioner ***[Article 3, subparagraph 1(b)]***. In the case of Marshall Islands, it is the Secretary of Finance or an authorised representative of the Secretary of Finance. ***[Article 3, subparagraph 1(c)]***

Definition of Contracting State

2.17 ***Contracting State*** means Australia or the Marshall Islands, as the context requires. ***[Article 3, subparagraph 1(d)]***

Definition of national

2.18 ***National*** means any individual possessing the nationality or citizenship of Australia or the Marshall Islands. ***[Article 3, subparagraph 1(e)]***

Definition of person

2.19 ***Person*** includes an individual, a company and any other body of persons. ***[Article 3, subparagraph 1(f)]***

Definition of tax

2.20 The term ***tax*** means either Australian tax or Marshall Islands tax, depending on the context. ***[Article 3, subparagraph 1(g)]***

Definition of transfer pricing adjustment

2.21 A ***transfer pricing adjustment*** is an adjustment made by the tax authorities of Australia or Marshall Islands to the profits of an enterprise,

based on the application of domestic transfer pricing laws ***[Article 3, subparagraph 1(h)]***. For Australia, such laws are contained in Division 13 of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936) and Subdivision 815A of the *Income Tax Assessment Act 1997* (ITAA 1997).

Terms not specifically defined

2.22 A term that is not specifically defined in the Marshall Islands agreement shall have (unless the context requires otherwise) the meaning that it has under the domestic taxation law of the country applying the Marshall Islands agreement at the time of its application. In that case, the term's domestic taxation law meaning will have precedence over any meaning it may have under that country's other domestic laws. ***[Article 3, paragraph 2]***

Article 4 — Resident

2.23 This Article sets out the basis upon which the residence of a person is to be determined for the purposes of the Marshall Islands agreement. Residence is a criterion for determining each country's taxing rights and is a necessary condition for the provision of relief under the Marshall Islands agreement. In the case of Australia, a person's residence is determined according to Australia's taxation law ***[Article 4, subparagraph 1(a)]***. In the case of the Marshall Islands, residence is determined according to Marshall Islands' taxation law ***[Article 4, subparagraph 1(b)]***.

Special residency rules

2.24 A person is not a resident of a country, for the purposes of the Marshall Islands agreement, if that person is liable to tax in that country in respect only of income from sources in that country. In the Australian context, this would mean, for example, that Norfolk Island residents, who are generally only subject to Australian tax on Australian source income, are not residents of Australia for the purposes of the Marshall Islands agreement. Accordingly, the Marshall Islands will not have to forego tax in accordance with the Marshall Islands agreement on income derived by Norfolk Island residents (which will not be subject to Australian tax).

Dual residents

2.25 Tie-breaker rules are included for determining residency of a person, for the purposes of the Marshall Islands agreement, if a person qualifies as a dual resident, that is, a resident of both countries in accordance with paragraph 1 of Article 4. These rules, in order of application are:

- if the individual has a permanent home available in only one of the countries, the person is deemed to be a resident solely of that country for the purposes of the Marshall Islands agreement ***[Article 4, subparagraph 3(a)]***;
- if the individual has a permanent home available in both countries or in neither, then the person's personal or economic relations with Australia and the Marshall Islands is taken into account, and the person is deemed for the purposes of the Marshall Islands agreement to be a resident only of the country with which they have the closer personal and economic relations ***[Article 4, subparagraph 3(a)]***;
- residency will be determined on the basis of an individual's nationality where the foregoing tests are not determinative ***[Article 4, subparagraph 3(b)]***; or
- if the individual is a 'national' of both countries, or of neither, the competent authorities will endeavour to resolve the question by mutual agreement ***[Article 4, subparagraph 3(c)]***.

2.26 A person other than an individual, such as a company or other body of persons, that is a dual resident will be deemed to be a resident of the country in which its effective place of management is situated. ***[Article 4, paragraph 4]***

2.27 In relation to Australia, a dual resident remains a resident for the purposes of Australian domestic law. Accordingly, that person remains liable to tax in Australian as a resident, insofar as the Marshall Islands agreement allows.

Article 5 — Pensions and Retirement Annuities

2.28 Pensions and retirement annuities are taxable only by the country of which the recipient is a resident, provided such income is subject to tax in that country. If such income is not subject to tax in that country, the income may be taxed by the country from which the relevant payments were made. ***[Article 5, paragraph 1]***

Meaning of retirement annuity

2.29 In the case of Australia, ***retirement annuity*** means a superannuation annuity payment within the meaning of the taxation laws of Australia. That is, a superannuation annuity as defined by regulation 995-1.01 of the *Income Tax Assessment Regulations 1997*, which took effect from 1 July 2007. ***[Article 5, subparagraph 2(a)]***

2.30 In the case of Marshall Islands, a 'retirement annuity' means superannuation annuity payment within the meaning of the taxation laws of the Marshall Islands. ***[Article 5, subparagraph 2 (b)]***

Article 6 — Government Service

2.31 Salary and wage type income, other than government service pensions or annuities, paid to an individual for services rendered to a government of one of the countries (including a political subdivision or local authority), is to be taxed only in that country ***[Article 6, subparagraph 1(a)]***. However, such remuneration will be taxable only in the other country if the services are rendered in that other country and:

- the recipient is a resident of, and a national of, that other country; or
- the recipient is a resident of that other country and did not become a resident of that country solely for the purpose of rendering the services (for example, if the recipient is a permanent resident of that other country).

[Article 6, subparagraph 1(b)]

Business income

2.32 However, salaries, wages and other similar remuneration in respect of services rendered in connection with a trade or business carried on by any governmental authority is excluded from the scope of the Article. Such remuneration will remain subject to the domestic taxation laws of the two countries. ***[Article 6, paragraph 2]***

Article 7 — Students

Exemption from tax

2.33 Article 7 applies to students or business apprentices who are temporarily present in one of the countries solely for the purpose of their education or training if they are, or immediately before the visit, were, resident in the other country. In these circumstances, payments from abroad received by the students or business apprentices solely for their maintenance, education or training will be exempt from tax in the country visited. This will apply even though the student or apprentice may qualify as a resident of the country visited during the period of their visit.

Employment income

2.34 Where, however, a Marshall Islands student visiting Australia solely for educational purposes undertakes employment in Australia, for example, part-time work with a local employer, the income earned by that student as a consequence of that employment may be subject to tax in Australia.

2.35 For business apprentices, this Article only applies where the apprentice's remuneration consists solely of subsistence payments to cover training or maintenance. Remuneration for service, that is, salary equivalents, falls for consideration under domestic taxation law.

2.36 In the case of a Marshall Islands business apprentice visiting Australia solely for training purposes, it may therefore be necessary to distinguish between remuneration for service and a payment for the apprentice's maintenance or training. The quantum of the payment will be relevant in such cases.

2.37 A payment for maintenance or training would not be expected to exceed the level of expenses likely to be incurred to ensure the apprentice's maintenance and training (that is, a subsistence payment). If the remuneration is similar to the amounts paid to persons who provide similar services who are not business apprentices (that is, salary equivalent), this would generally indicate that the payments constitute income from employment that would fall for consideration under domestic taxation law. Likewise, if that business apprentice undertakes any other employment in Australia, the income earned from that employment may be subject to tax in Australia.

2.38 In these situations, the payments received from abroad for the student or apprentice's maintenance, education or training will not, however, be taken into account in determining the tax payable on the employment income that is subject to tax in Australia. No Australian tax would be payable on the employment income if the student or apprentice qualifies as a resident of Australia during the visit and the taxable income of the student or apprentice does not exceed the tax-free threshold applicable to Australian residents for tax purposes.

Article 8 — Mutual Agreement Procedure in Respect of Transfer Pricing Adjustments

2.39 Article 8 provides for consultation between the competent authorities of the two countries for the purpose of endeavouring to resolve disputes concerning transfer pricing adjustments purportedly made not in accordance with the arm's length principle. ***[Article 8, paragraph 2]***

2.40 The term 'arm's length principle' refers to the requirement that businesses price their related party international dealings according to what truly independent parties acting independently would reasonably be expected to have done in the same situation. The Commissioner of Taxation would apply the arm's length principle when reviewing business transactions in the context of Division 13 of Part III of the ITAA 1936.

2.41 A person wishing to use this mutual agreement procedure must present their case to the competent authority of their country of residence within three years of the first notification of the transfer pricing adjustment. This procedure operates independently of, and in addition to, domestic legal remedies available to taxpayers. ***[Article 8, paragraph 1]***

Article 9 — Exchange of Information

2.42 Article 9 authorises and limits the exchange of information by the competent authorities to information that is foreseeably relevant to the administration of the Marshall Islands agreement.

2.43 The exchange of information is subject to the provisions of the *Agreement on the Exchange of Information with Respect to Taxes*, which was signed by the two countries on 12 May 2010. That agreement provides for exchange of information that is foreseeably relevant to the administration of the taxation laws of the two countries. It also contains safeguards to protect taxpayers' rights. For example:

- confidentiality rules to ensure that information exchanged is only disclosed to authorised recipients; and
- limitations to ensure that the competent authorities do not exceed domestic laws and administrative procedures in the course of obtaining and supplying information.

Article 10 — Entry into Force

Date of entry into force

2.44 The Marshall Island agreement will enter into force on the date of the last exchange of diplomatic notes notifying that the domestic procedures to give it the force of law have been completed. In Australia, enactment of the legislation giving the Marshall Islands agreement the force of law along with tabling the Marshall Islands agreement in Parliament are prerequisites to the exchange of diplomatic notes. Entry into force is also conditional upon the related *Agreement on the Exchange of Information with Respect to Taxes* between the two countries being in

force at that time. That Agreement entered into force on 25 November 2011.

Date of application in Australia

2.45 Following entry into force, the Marshall Islands agreement will take effect in Australia in respect of any income year beginning on or after 1 July in the calendar year next following the date on which it enters into force. ***[Article 10, subparagraph 1(a)]***

Date of application in Marshall Islands

2.46 Following entry into force, the Marshall Islands agreement will take effect in Marshall Islands in respect of any income year beginning on or after 1 October in the calendar year next following the date on which it enters into force. ***[Article 10, subparagraph 1(b)]***

Article 11 — Termination

2.47 The Marshall Islands agreement is to continue in effect indefinitely. However, either country may give the other country written notice of termination of the agreement through the diplomatic channel. ***[Article 11, paragraph 1]***

Cessation in Australia

2.48 In the event of either country terminating the Marshall Islands agreement, it would cease to be effective in Australia in the year of income beginning on or after 1 July in the calendar year next following that in which the notice of termination is given. ***[Article 11, subparagraph 2(a)]***

Cessation for Marshall Islands

2.49 The Marshall Islands agreement would correspondingly cease to be effective in Marshall Islands for any year of income beginning on or after 1 October in the calendar year next following that in which the notice of termination is given. ***[Article 11, paragraph 2(b)]***

Cessation in other circumstances

2.50 The Marshall Islands agreement will also terminate and cease to be effective if the *Agreement for the Exchange of Information with Respect to Taxes* between Australia and the Marshall Islands is terminated. In that event, the Marshall Islands agreement would terminate on the first day of the month following the expiration of six months after

receipt of notification of termination of the *Agreement for the Exchange of Information with Respect to Taxes*. ***[Article 11, paragraph 3]***

Australia — Mauritius agreement

Outline of chapter

3.1 Schedule 1 to this Bill amends the *International Tax Agreements Act 1953* (Agreement Act 1953) to define and give the force of law to the 2010 *Agreement between the Government of Australia and the Government of the Republic of Mauritius for the Allocation of Taxing Rights with Respect to Certain Income of Individuals and to Establish a Mutual Agreement Procedure in Respect of Transfer Pricing Adjustments* (Mauritius agreement). Subsection 3AAA(1) of the Agreements Act 1953 will define the Mauritius agreement and subsection 5(1) will give it the force of law in Australia. This chapter explains the rules that apply in the Mauritius agreement.

Context of amendments

3.2 The Mauritius agreement was signed in Port Louis on 8 December 2010. There is no pre-existing agreement of this type between Australia and the Republic of Mauritius (Mauritius).

Summary of new law

Main features of the Mauritius agreement

3.3 The main features of the Mauritius agreement are as follows:

- Income from pensions and retirement annuities will generally be taxed only in the country of residence of the recipient, provided the income is subject to tax in that country.

- Income from government service will generally be taxed only in the country that pays the remuneration. However, the remuneration shall only be taxed in the other country where the services are rendered in that other country by a resident of that other country who is a national of that other country or did not become a resident of that other country for the purpose of rendering the services.

- Payments made from abroad to visiting students and business apprentices for the purposes of their maintenance, education or training will be exempt from tax in the country visited.
- A non-binding administrative mechanism will be established to assist taxpayers to seek resolution of transfer pricing disputes.

Comparison of key features of new law and current law

New law	*Current law*
Australian source pensions and retirement annuities derived by residents of Mauritius will be exempt from Australian tax, provided they are taxed in Mauritius.	Australian source income of foreign residents is generally subject to Australian tax.
Certain income derived by residents of Mauritius from government service in Australia will be exempt from Australian tax.	Australian source income of foreign residents is generally subject to Australian tax.
Certain payments received by visiting students and business apprentices from Mauritius will be exempt from Australian tax.	Some payments received by foreign students and business apprentices may be taxable in Australia, depending on the circumstances.
The competent authorities of Australia and Mauritius will endeavour to resolve taxpayers' transfer pricing disputes arising from transfer pricing adjustments that contravene the arm's length principle.	No equivalent.

The Mauritius agreement

3.4 A full transcript of the Mauritius agreement and detailed explanation follows:

AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE REPUBLIC OF MAURITIUS FOR THE ALLOCATION OF TAXING RIGHTS WITH RESPECT TO CERTAIN INCOME OF INDIVIDUALS AND TO ESTABLISH A MUTUAL AGREEMENT PROCEDURE IN RESPECT OF TRANSFER PRICING ADJUSTMENTS

(Port Louis, 8 December 2010)

The Government of Australia and the Government of the Republic of Mauritius,

Recognising that the two Governments have concluded an Agreement on the Exchange of Information with Respect to Taxes, and

Desiring to conclude an Agreement for the allocation of taxing rights with respect to certain income of individuals and to establish a mutual agreement procedure in respect of transfer pricing adjustments,

Have agreed as follows:

ARTICLE 1

PERSONS COVERED

This Agreement shall apply to persons who are residents of one or both of the Contracting States.

ARTICLE 2

TAXES COVERED

1 The existing taxes to which this Agreement shall apply are:

(a) in Australia, the income tax imposed under the federal law of Australia; (hereinafter referred to as "Australian tax").

(b) in Mauritius, the income tax;(hereinafter referred to as "Mauritius tax").

2 This Agreement shall also apply to any identical or substantially similar taxes which are imposed after the date of signature of this Agreement in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall

notify each other within a reasonable period of time of any substantial changes to the taxation laws covered by this Agreement.

3 This Agreement shall not apply to taxes imposed by states, municipalities, local authorities or other political subdivisions, or possessions of a Contracting State.

ARTICLE 3

DEFINITIONS

1 For the purposes of this Agreement, unless the context otherwise requires:

(a) the term "Australia", when used in a geographical sense, excludes all external territories other than:

(i) the Territory of Norfolk Island;

(ii) the Territory of Christmas Island;

(iii) the Territory of Cocos (Keeling) Islands;

(iv) the Territory of Ashmore and Cartier Islands;

(v) the Territory of Heard Island and McDonald Islands; and

(vi) the Coral Sea Islands Territory,

and includes any area adjacent to the territorial limits of Australia (including the Territories specified in this subparagraph) in respect of which there is for the time being in force, consistently with international law, a law of Australia dealing with the exploration for or exploitation of any of the natural resources of the exclusive economic zone or the seabed and subsoil of the continental shelf;

(b) the term "Mauritius" means the Republic of Mauritius and includes;

(i) all the territories and islands which, in accordance with the laws of Mauritius, constitute the State of Mauritius;

(ii) the territorial sea of Mauritius; and

(iii) any area outside the territorial sea of Mauritius which in accordance with the international law has been or may hereafter be designated under the laws of Mauritius as an area,

including the Continental Shelf, within which the rights of Mauritius with respect to the sea, the sea-bed and sub-soil and their natural resources may be exercised;

(c) the term “competent authority” means,

(i) in the case of Australia, the Commissioner of Taxation or an authorised representative of the Commissioner; and

(ii) in the case of Mauritius, the Director General of Mauritius Revenue Authority or an authorised representative of the Director General;

(d) the term "Contracting State" means Australia or Mauritius, as the context requires;

(e) the term "national", in relation to a Contracting State, means any individual possessing the nationality or citizenship of that Contracting State;

(f) the term "person" includes an individual, a company and any other body of persons;

(g) the term "tax" means Australian tax or Mauritius tax, as the context requires; and

(h) the term "transfer pricing adjustment" means an adjustment made by the competent authority of a Contracting State to the profits of an enterprise as a result of applying the domestic law concerning taxes referred to in Article 2 of that State regarding transfer pricing.

2 As regards the application of this Agreement at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State, for the purposes of the taxes to which this Agreement applies, with any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

ARTICLE 4

RESIDENT

1 For the purposes of this Agreement, the term "resident of a Contracting State" means:

(a) in the case of Australia, a person who is a resident of Australia for the purposes of Australian tax; and

(b) in the case of Mauritius, a person who, under the income tax law of Mauritius, is liable to tax therein by reason of his residence.

2 A person is not a resident of a Contracting State for the purposes of this Agreement if the person is liable to tax in that State in respect only of income from sources in that State.

3 Where by reason of the preceding provisions of this Article a person, being an individual, is a resident of both Contracting States, then the person's status shall be determined as follows:

(a) the individual shall be deemed to be a resident only of the State in which a permanent home is available to that individual; if a permanent home is available in both States, or in neither of them, that individual shall be deemed to be a resident only of the State with which the individual’s personal and economic relations are closer (centre of vital interests);

(b) if the State in which the individual has their centre of vital interests cannot be determined, the individual shall be deemed to be a resident only of the State of which the individual is a national;

(c) if the individual is a national of both States or of neither of them, the competent authorities of the Contracting States shall endeavour to resolve the question by mutual agreement.

4 Where, by reason of paragraph 1, a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its place of effective management is situated.

ARTICLE 5

PENSIONS AND RETIREMENT ANNUITIES

1 Pensions (including government pensions) and retirement annuities paid to an individual who is a resident of a Contracting State shall be taxable only in that State. However, pensions and retirement annuities arising in a Contracting State may be taxed in that State where such income is not subject to tax in the other Contracting State.

2 The term "retirement annuity" means:

(a) in the case of Australia, a superannuation annuity payment within the meaning of the taxation laws of Australia;

(b) in the case of Mauritius, a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make the payment in return for adequate and full consideration in money or money’s worth; and

(c) any other similar periodic payment agreed upon by the competent authorities.

ARTICLE 6

GOVERNMENT SERVICE

1 (a) Salaries, wages and other similar remuneration, other than a pension or retirement annuity, paid by a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority shall be taxable only in that State.

(b) However, such salaries, wages and other similar remuneration shall be taxable only in the other Contracting State if the services are rendered in that State and the individual is a resident of that State who:

(i) is a national of that State; or

(ii) did not become a resident of that State solely for the purpose of rendering the services.

2 Notwithstanding the provisions of paragraph 1, salaries, wages and other similar remuneration in respect of services rendered in connection with any trade or business carried on by a Contracting State or a political subdivision or a local authority thereof may be taxed in accordance with the laws of a Contracting State.

ARTICLE 7

STUDENTS

Payments which a student or business apprentice, who is or was immediately before visiting a Contracting State a resident of the other Contracting State and who is temporarily present in the first-mentioned State solely for the purpose of their education or training, receives for the purpose of their maintenance, education or training shall not be taxed in that State, provided such payments arise from sources outside that State.

ARTICLE 8

MUTUAL AGREEMENT PROCEDURE IN RESPECT OF TRANSFER PRICING ADJUSTMENTS

1 Where a resident of a Contracting State considers the actions of the other Contracting State results or will result in a transfer pricing adjustment not in accordance with the arm’s length principle, the resident may, irrespective of the remedies provided by the domestic law of those States, present a case to the competent authority of the first-mentioned State. The case must be presented within three years of the first notification of the adjustment.

2 The competent authorities shall endeavour to resolve any difficulties or doubts arising as to the application of the arm’s length principle by a Contracting State regarding transfer pricing adjustments. They may also communicate with each other directly for the purposes of this Article.

ARTICLE 9

EXCHANGE OF INFORMATION

The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement. Information may be exchanged by the competent authorities for the purposes of this Article in accordance with the provisions of the Agreement on the Exchange of Information with Respect to Taxes concluded by the Contracting States (whether or not this Agreement, in whole or in part, forms part of the domestic law of either Contracting State).

ARTICLE 10

ENTRY INTO FORCE

The Government of Australia and the Government of the Republic of Mauritius shall notify each other, in writing, through the diplomatic channel of the completion of their constitutional and legal procedures for the entry into force of this Agreement. This Agreement shall enter into force on the date of the last notification, and shall, provided an Agreement on the Exchange of Information with Respect to Taxes is in force between Australia and the Republic of Mauritius, thereupon have effect:

(a) in respect of Australian tax, for any year of income beginning on or after 1 July in the calendar year next following the date on which this Agreement enters into force; and

(b) in respect of Mauritius tax, for any year of income beginning on or after 1 January in the calendar year next following the date on which this Agreement enters into force .

ARTICLE 11

TERMINATION

1 This Agreement shall continue in effect indefinitely, but either of the Contracting States may, after the expiration of 3 years from the date of its entry into force, give to the other Contracting State through the diplomatic channel written notice of termination.

2 Such termination shall become effective:

(a) in respect of Australian tax, in the year of income beginning on or after 1 July in the calendar year next following that in which the notice of termination is given;

(b) in respect of Mauritius tax, in the year of income beginning on or after 1 January in the calendar year next following that in which the notice of termination is given.

3 Notwithstanding the provisions of paragraph 1 or 2, this Agreement shall, on receipt through the diplomatic channel of written notice of termination of the Agreement on the Exchange of Information with Respect to Taxes between the Contracting States, terminate and cease to be effective on the first day of the month following the expiration of a period of six months after the date of receipt of such notice.

IN WITNESS WHEREOF the undersigned, being duly authorised by their respective Governments, have signed this Agreement.

DONE in duplicate at Port Louis, this 8th day of December 2010.

For the Government of Australia:

Cathy Johnstone
High Commissioner

For the Government of the Republic of Mauritius:

Pravind Jugnauth
Vice Prime Minister and Minister of Finance and Economic Development

Detailed explanation of new law

3.5 This Schedule gives effect to the Mauritius agreement, which deals with the allocation of taxing rights with respect to certain income of individuals.

Article 1 — Persons Covered

3.6 This Article establishes the scope of the application of the Mauritius agreement by providing for it to apply to persons who are residents of one or both of the countries. ***[Article 1]***

3.7 The application of the Mauritius agreement to persons who are dual residents (that is, residents of both countries) is dealt with in Article 4 (*Resident*).

Article 2 — Taxes Covered

3.8 This Article specifies the existing taxes of each country to which the Mauritius agreement applies. This is, in the case of Australia, the federal income tax. ***[Article 2, subparagraph 1(a)]***

3.9 For Mauritius, the Mauritius agreement applies to income tax. ***[Article 2, subparagraph 1(b)]***

3.10 The application of the Mauritius agreement will be automatically extended to any identical or substantially similar taxes which are subsequently imposed by either country in addition to, or in place of, the existing taxes. The competent authorities of Australia and Mauritius are required to notify each other in the event of a substantial change to the taxation laws of the respective countries, within a reasonable period of time after any such changes. ***[Article 2, paragraph 2]***

3.11 The Mauritius agreement shall not apply to taxes imposed by states, municipalities, local authorities or other political subdivisions or possessions of either country. ***[Article 2, paragraph 3]***

Article 3 — Definitions

Definition of Australia

3.12 The definition of 'Australia' follows corresponding definitions in Australia's modern tax treaties. 'Australia' is defined to include certain external territories and areas of the continental shelf. ***[Article 3, subparagraph 1(a)]***

Definition of Mauritius

3.13 Mauritius is defined to mean the Republic of Mauritius and includes all the territories and islands that constitute the State of Mauritius; the territorial sea of Mauritius; and area outside the territorial sea of Mauritius which in accordance with the international law has been designated under the laws of Mauritius as an area, including the Continental Shelf, within which the rights of Mauritius with respect to the sea, the seabed and subsoil and their natural resources may be exercised. ***[Article 3, subparagraph 1(b)]***

Definition of competent authority

3.14 The competent authority is the person or institution specifically authorised to perform certain actions under the Mauritius agreement. For example, to notify each other of any significant changes to the tax law of their respective countries (Article 2 (*Taxes Covered*)), to communicate for the purposes of Article 8 (*Mutual Agreement Procedure*) and to exchange information in accordance with Article 9 (*Exchange of Information*).

3.15 In the case of Australia, the competent authority is the Commissioner of Taxation (Commissioner) or an authorised representative of the Commissioner. In the case of Mauritius, it is the Director General of Mauritius Revenue Authority or an authorised representative of the Director General. ***[Article 3, subparagraph 1(c)]***

Definition of Contracting State

3.16 ***Contracting State*** means Australia or Mauritius, as the context requires. ***[Article 3, subparagraph 1(d)]***

Definition of national

3.17 ***National*** means any individual possessing the nationality or citizenship of Australia or Mauritius. ***[Article 3, subparagraph 1(e)]***

Definition of person

3.18 ***Person*** includes an individual, a company and any other body of persons. ***[Article 3, subparagraph 1(f)]***

Definition of tax

3.19 The term ***tax*** means either Australian tax or Mauritius tax depending on the context. ***[Article 3, subparagraph 1(g)]***

Definition of transfer pricing adjustment

3.20 A ***transfer pricing adjustment*** is an adjustment made by the tax authorities of Australia or Mauritius to the profits of an enterprise, based on the application of domestic transfer pricing laws ***[Article 3, subparagraph 1(h)]***. For Australia, such laws are contained in Division 13 of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936) and Subdivision 815A of the *Income Tax Assessment Act 1997* (ITAA 1997).

Terms not specifically defined

3.21 A term that is not specifically defined in the Mauritius agreement shall have (unless the context requires otherwise) the meaning that it has under the domestic taxation law of the country applying the Mauritius agreement at the time of its application. In that case, the term's domestic taxation law meaning will have precedence over any meaning it may have under that country's other domestic laws. ***[Article 3, paragraph 2]***

Article 4 — Resident

3.22 This Article sets out the basis upon which the residence of a person is to be determined for the purposes of the Mauritius agreement. Residence is a criterion for determining each country's taxing rights and is a necessary condition for the provision of relief under the Mauritius agreement. In the case of Australia, a person's residence is determined according to Australia's taxation law ***[Article 4, subparagraph 1(a)]***. In the case of Mauritius, residence is determined according to Mauritius' taxation law ***[Article 4, subparagraph 1(b)]***.

Special residency rules

3.23 A person is not a resident of a country, for the purposes of the Mauritius agreement, if that person is liable to tax in that country in respect only of income from sources in that country ***[Article 4, paragraph 2]***. In the Australian context, this would mean, for example, that Norfolk Island residents, who are generally only subject to Australian tax on Australian source income, are not residents of Australia for the purposes of the Mauritius agreement. Accordingly, Mauritius will not have to forego tax in accordance with the Mauritius agreement on income derived by Norfolk Island residents (which will not be subject to Australian tax).

Dual residents

3.24 Tie-breaker rules are included for determining residency of a person, for the purposes of the Mauritius agreement, if the person qualifies as a dual resident, that is, a resident of both countries in

accordance with paragraph 1 of Article 4. These rules, in order of application are:

- if the individual has a permanent home available in only one of the countries, the person is deemed to be a resident solely of that country for the purposes of the Mauritius agreement ***[Article 4, subparagraph 3(a)]***;
- if the individual has a permanent home available in both countries or in neither, then the person's economic relations with Australia and Mauritius are taken into account, and the person is deemed for the purposes of the Mauritius agreement to be a resident only of the country with which they have the closer personal and economic relations ***[Article 4, subparagraph 3(a)]***;
- residency will be determined on the basis of an individual's nationality where the foregoing tests are not determinative ***[Article 4, subparagraph 3(b)]***; or
- if the individual is a 'national' of both countries, or of neither, the competent authorities will endeavour to resolve the question by mutual agreement ***[Article 4, subparagraph 3(c)]***.

3.25 A person other than an individual, such as a company or other body of persons, that is a dual resident will be deemed to be a resident of the country in which its effective place of management is situated ***[Article 4, paragraph 4]***.

3.26 In relation to Australia, a dual resident remains a resident for the purposes of Australian domestic law. Accordingly, that person remains liable to tax in Australian as a resident, insofar as the Mauritius agreement allows.

Article 5 — Pensions and Retirement Annuities

3.27 Pensions and retirement annuities are taxable only by the country of which the recipient is a resident, provided such income is subject to tax in that country. If such income is not subject to tax in that country, the income may be taxed by the country from which the relevant payments were made. ***[Article 5, paragraph 1]***

Meaning of retirement annuity

3.28 In the case of Australia, **retirement annuity** means a superannuation annuity payment within the meaning of the taxation laws

of Australia. That is, a superannuation annuity as defined by regulation 995-1.01 of the *Income Tax Assessment Regulations 1997*, which took effect from 1 July 2007. ***[Article 5, subparagraph 2(a)]***

3.29 In the case of Mauritius, a 'retirement annuity' means a stated sum payable periodically at stated times during life or during a specific or ascertainable period of time under an obligation to make the payment in return for adequate and full consideration in money or money's worth. ***[Article 5, subparagraph 2 (b)]***

Article 6 — Government Service

3.30 Salary and wage type income, other than government service pensions or annuities, paid to an individual for services rendered to a government of one of the countries (including a political subdivision or local authority), is to be taxed only in that country ***[Article 6, subparagraph 1(a)].*** However, such remuneration will be taxable only in the other country if the services are rendered in that other country and:

- the recipient is a resident of, and a national of, that other country; or
- the recipient is a resident of that other country and did not become a resident of that country solely for the purpose of rendering the services (for example, if the recipient is a permanent resident of that other country)

[Article 6, subparagraph 1(b)]

Business income

3.31 However, salaries, wages and other similar remuneration in respect of services rendered in connection with a trade or business carried on by any governmental authority is excluded from the scope of the Article. Such remuneration will remain subject to the domestic taxation laws of the two countries. ***[Article 6, paragraph 2]***

Article 7 — Students

Exemption from tax

3.32 Article 7 applies to students or business apprentices who are temporarily present in one of the countries solely for the purpose of their education or training if they are, or immediately before the visit were, resident in the other country. In these circumstances, payments from abroad received by the students or business apprentices solely for their maintenance, education or training will be exempt from tax in the country

visited. This will apply even though the student or apprentice may qualify as a resident of the country visited during the period of their visit.

Employment income

3.33 Where, however, a Mauritian student visiting Australia solely for educational purposes undertakes employment in Australia, for example, part-time work with a local employer, the income earned by that student as a consequence of that employment may be subject to tax in Australia.

3.34 For business apprentices, this Article only applies where the apprentice's remuneration consists solely of subsistence payments to cover training or maintenance. Remuneration for service, that is, salary equivalents, falls for consideration under domestic taxation law.

3.35 In the case of a Mauritian business apprentice visiting Australia solely for training purposes, it may therefore be necessary to distinguish between remuneration for service and a payment for the apprentice's maintenance or training. The quantum of the payment will be relevant in such cases.

3.36 A payment for maintenance or training would not be expected to exceed the level of expenses likely to be incurred to ensure the apprentice's maintenance and training (that is, a subsistence payment). If the remuneration is similar to the amounts paid to persons who provide similar services who are not business apprentices (that is, salary equivalent), this would generally indicate that the payments constitute income from employment that would fall for consideration under domestic taxation law. Likewise, if that business apprentice undertakes any other employment in Australia, the income earned from that employment may be subject to tax in Australia.

3.37 In these situations, the payments received from abroad for the student or apprentice's maintenance, education or training will not, however, be taken into account in determining the tax payable on the employment income that is subject to tax in Australia. No Australian tax would be payable on the employment income if the student or apprentice qualifies as a resident of Australia during the visit and the taxable income of the student or apprentice does not exceed the tax-free threshold applicable to Australian residents for tax purposes.

Article 8 — Mutual Agreement Procedure in Respect of Transfer Pricing Adjustments

3.38 Article 8 provides for consultation between the competent authorities of the two countries for the purpose of endeavouring to resolve disputes concerning transfer pricing adjustments purportedly made not in accordance with the arm's length principle. ***[Article 8, paragraph 2]***

3.39 The term 'arm's length principle' refers to the requirement that businesses price their related party international dealings according to what truly independent parties acting independently would reasonably be expected to have done in the same situation. The Commissioner of Taxation would apply the arm's length principle when reviewing business transactions in the context of Division 13 of Part III of the ITAA 1936 and Subdivision 815A of the ITAA 1997.

3.40 A person wishing to use this mutual agreement procedure must present their case to the competent authority of their country of residence within three years of the first notification of the transfer pricing adjustment. This procedure operates independently of, and in addition to, domestic legal remedies available to taxpayers. ***[Article 8, paragraph 1]***

Article 9 — Exchange of Information

3.41 Article 9 authorises and limits the exchange of information by the competent authorities to information that is foreseeably relevant to the administration of the Mauritius agreement.

3.42 The exchange of information is subject to the provisions of the *Agreement on the Exchange of Information with Respect to Taxes* between Australia and Mauritius, which was signed by the two countries on 8 December 2010. That agreement provides for exchange of information that is foreseeably relevant to the administration of the taxation laws of the two countries. It also contains safeguards to protect taxpayers' rights. For example:

- confidentiality rules to ensure that information exchanged is only disclosed to authorised recipients; and
- limitations to ensure that the competent authorities do not exceed domestic laws and administrative procedures in the course of obtaining and supplying information.

Article 10 — Entry into Force

Date of entry into force

3.43 The Mauritius agreement will enter into force on the date of the last exchange of diplomatic notes notifying that the domestic procedures to give it the force of law have been completed. In Australia, enactment of the legislation giving the Mauritius agreement the force of law along with tabling the Mauritius agreement in Parliament are prerequisites to the exchange of diplomatic notes. Entry into force is also conditional upon the related *Agreement on the Exchange of Information with Respect to Taxes* between the two countries being in force at that time. That Agreement entered into force on 25 November 2011.

Date of application in Australia

3.44 Following entry into force, the Mauritius agreement will take effect in Australia in respect of any income year beginning on or after 1 July in the calendar year next following the date on which it enters into force. ***[Article 10, paragraph (a)]***

Date of application in Mauritius

3.45 Following entry into force, the Mauritius agreement will take effect in Mauritius in respect of any income year beginning on or after 1 January in the calendar year next following the date on which it enters into force. ***[Article 10, paragraph (b)]***

Article 11 — Termination

3.46 The Mauritius agreement is to continue in effect indefinitely, but either country may, after the expiration of 3 years from the date of its entry into force, give the other country written notice of termination of the agreement through the appropriate channel. ***[Article 11, paragraph 1]***

Cessation in Australia

3.47 In the event of either country terminating the Mauritius agreement, it would cease to be effective in Australia in the year of income beginning on or after 1 July in the calendar year next following that in which the notice of termination is given. ***[Article 11, subparagraph 2(a)]***

Cessation for Mauritius

3.48 The Mauritius agreement would correspondingly cease to be effective in Mauritius for any year of income beginning on or after 1

January in the calendar year next following that in which the notice of termination is given. ***[Article 11, paragraph 2(b)]***

Cessation in other circumstances

3.49 The Mauritius agreement will also terminate and cease to be effective if the *Agreement for the Exchange of Information with Respect to Taxes* between Australia and Mauritius is terminated. In that event, the Mauritius agreement would terminate on the first day of the month following the expiration of six months after receipt of notification of termination of the *Agreement for the Exchange of Information with Respect to Taxes*. ***[Article 11, paragraph 3]***

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

International Tax Agreement Amendment Bill 2012

4.1 This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

4.2 This Bill amends the *International Tax Agreements Act 1953* (Agreements Act 1953) to give the force of law in Australia to the following treaties:

- the *Protocol Amending the Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (Indian Protocol), which was signed in New Delhi on 16 December 2011;

- the *Agreement between the Government of Australia and the Government of the Republic of the Marshall Islands for the Allocation of Taxing Rights with Respect to Certain Income of Individuals and to Establish a Mutual Agreement Procedure in Respect of Transfer Pricing Adjustments* (Marshall Islands agreement), which was signed in Majuro on 12 May 2010; and

- the *Agreement between the Government of Australia and the Government of the Republic of Mauritius for the Allocation of Taxing Rights with Respect to Certain Income of Individuals and to Establish a Mutual Agreement Procedure in Respect of Transfer Pricing Adjustments* (the Mauritius agreement), which was signed in Port Louis on 8 December 2010.

Human rights implications

4.3 This Bill does not engage any of the applicable rights or freedoms.

Conclusion

4.4 This Bill is compatible with human rights as it does not raise any human rights issues.

Assistant Treasurer, the Hon David Bradbury