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Barrister at Law

6 December 2022

Committee Secretary
Joint Standing Committee on Treaties
PO Box 6021
Parliament House
Canberra ACT 2600

by email: jsct@aph.gov.au

Dear Sir / Madam,

RE: CONVENTION BETWEEN AUSTRALIA AND ICELAND FOR THE ELIMINATION OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME AND THE PREVENTION OF TAX EVASION AND AVOIDANCE AND ITS PROTOCOL

I thank the Joint Standing Committee for its invitation to make a submission in respect of the recently concluded double tax treaty between Australia and Iceland relating to:

> ….. matters arising from treaties and related National Interest Analyses and proposed treaty actions and related Explanatory Statements presented or deemed to be presented to the Parliament

Professional credentials

I am a barrister authorised to practise in the Supreme Court of New South Wales, the Federal Court of Australia and the High Court of Australia. I am a member of Ground Floor Wentworth Chambers, a leading Sydney chambers with a revenue law specialism.

Prior to joining the Bar, I was employed for 20 years by various financial institutions in Australia, the United Kingdom and Europe on tax related matters. At the Bar I specialise in providing advice on Australian taxation law and the

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resolution of controversies. Much of my advisory work arises in the fields of international taxation, taxation of trust estates and the taxation of capital gains. My end-clients include private taxpayers as well as government parties such as the Commonwealth of Australia, the Commissioner of Taxation and the Chief Commissioner of State Revenue (NSW). I am one of the co-authors of the *Australian CGT Handbook* published annually by Thomson Reuters.[1] I have written or co-authored numerous papers on Australian tax related matters.

Basis of submissions

On 25 October 2021 I responded to a request for submissions by Treasury in respect of a public consultation announced on 16 September 2021 titled "Expanding Australia's Tax Treaty Network" (the "**Consultation**"). The Consultation followed the then Treasurer's own media release dated 15 September 2021 in which he announced that the Government's plan was to:

> …… allow Australia to enter into 10 new and updated tax treaties by 2023, building on our existing network of 45 bilateral tax treaties……
>
> …… ensure Australia's tax treaty network will cover 80 per cent of foreign investment in Australia and about $6.3 trillion of Australia's two-way trade and investment……
>
> Negotiations with India, Luxembourg and Iceland are occurring this year as part of the first phase of the program. Negotiations with Greece, Portugal and Slovenia are scheduled to occur next year as part of the second phase……

Treasury published my submission (the "**Russell Tax Treaty Submission**") on its website and you may find it at: https://treasury.gov.au/sites/default/files/2021-12/c2021-208427-russell-tim.pdf

The Russell Tax Treaty Submission had three separate components, only the third of which is relevant to the Joint Standing Committee.

Third submission: review of foreign tax collection rules

I submitted to Treasury that the government should review *Taxation Administration Act 1953* sch 1 subdiv 263-A (the "**Foreign Tax Collection Rules**") which purports to give effect to those articles in Australia's Double Tax Agreements ("**DTAs**") (ratified since 2005) that are modelled on art 27 ("Assistance in the Collection of Taxes") of the OECD Model. The important question for review was whether the enactment of the Foreign Tax Collection Rules by *International Tax Agreements Amendment Act (No. 1) 2006* sch 1 fails as a

[1] https://legal.thomsonreuters.com.au/australian-cgt-handbook-2022-23-book-ebook/productdetail/130491

valid exercise of the Parliament's legislative power for the reason that it was required to observe the "just terms" restriction imposed by s 51(xxxi) of the *Constitution* but did not do so.

My own analysis warns of the following constitutional outcomes, that:

(1) the Foreign Tax Collection Rules are validly authorised by the external affairs power of s 51(xxix) of the *Constitution*;

(2) the Foreign Tax Collection rules are <u>not</u> authorised by the express grant of taxation power conferred by s 51(ii) of the *Constitution*;

(3) the Foreign Tax Collection rules are <u>not</u> authorised by the implied incidental grant of taxation power conferred by s 51(ii) or the express incidental power conferred by s 51 (xxxix) of the *Constitution*; and

(4) that the operation of the prohibition in s 51(xxxi) is attracted because the Foreign Tax Collection Rules cause property to be acquired by the Commonwealth from any person *and* that prohibition is infringed because the acquisition is not on "just terms"?

Subsequent developments

Treasury communicated to me its view in February 2022 that it did not believe that it was necessary for it to turn its mind to constitutional issues. When I asked whether it had approached the Attorney-General's department for its view, I was informed that Treasury did not intend to do so, but that I myself was welcome to approach the Attorney-General.

I found this a perplexing response, given that constitutional issues are a matter for Parliament when passing Commonwealth laws and Treasury, as an agency of the executive government is much better placed to speak to its sister-agency than I was. Nevertheless, through my contacts at the Australian Government Solicitor ("AGS") I endeavoured to contact the relevant officers within the Attorney-General's department. Unsurprisingly I was told that they could not speak to me about constitutional issues without the approval of the originating agency, being Treasury.

Disappointingly, the DTA signed with Iceland in Reykjavik on 12 October 2022 includes a new art 25 which is modelled directly on art 27 of the OECD Model. Put another way, my warning to Treasury in October 2021 has gone unheeded and unresearched.

In my view, the agreement by Australia to include a tax collection provision in the first of a series of new DTAs to be negotiated, enlivens the very real constitutional concern that the legislative branch of government is being invited to behave in a manner which is *ultra vires* the *Constitution*.

Adverse consequences

Should the Foreign Tax Collection Rules be determined to be defective on the basis articulated in the Russell Tax Treaty Submission, then it would follow that Australia has committed itself to a mutual obligation which it is incapable of enforcing domestically against resident parties. This of itself is a cause for embarrassment.

Should a foreign government, such as Iceland, now require enforcement of its taxation claims, regardless of the validity of the Foreign Tax Collection Rules, Australia will remain obliged under the new DTA to seek collection from parties within jurisdiction; however the Commonwealth would suffer a concurrent obligation to pay those parties fair compensation in the amount of the taxes collected.

The consequence appears to be that the Commonwealth would become obliged to fund recovery of the foreign taxes from its own pocket. Certainly, this cannot be what Treasury is bargaining for on behalf of Australia when it commits to negotiations for a fresh DTA. I telegraphed these concerns to Treasury in 2021 as part of its public consultation process and am of the view that appropriate constitutional inquiries should have been undertaken, the results of which were deserving of public dissemination.

I have written an academic article which is reflective of the foregoing concerns and have mentioned this to Treasury. Presently, the article is being peer reviewed by a leading taxation journal.

Yours sincerely

Tim Russell