

**AGREEMENT BETWEEN THE GOVERNMENT OF AUSTRALIA
AND THE GOVERNMENT OF BERMUDA [AS AUTHORISED BY]
THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND ON THE EXCHANGE OF INFORMATION
WITH RESPECT TO TAXES
(WASHINGTON, 10 NOVEMBER 2005)**

[2005] ATNIF 27

Documents tabled on 8 February 2006:

National Interest Analysis [2006] ATNIA 6

with attachment on consultation

Text of the proposed treaty action

Background information:

Country Political Brief and Country Fact Sheet

Other treaties with that country

Treaties of the same type with other countries

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

**Agreement between the Government of Australia and the Government of Bermuda
[as authorised by] the Government of the United Kingdom of Great Britain and
Northern Ireland on the exchange of information with respect to taxes
(Washington, 10 November 2005)
[2005] ATNIF 27**

Nature and timing of proposed treaty action

1. The Agreement between the Government of Australia and the Government of Bermuda [as authorised by] the Government of the United Kingdom of Great Britain and Northern Ireland (“Bermuda”) on the exchange of information with respect to taxes (“the Agreement”) will enter into force on the date of the last notification in writing by both Australia and Bermuda that the constitutional and legal procedures for the entry into force of the Agreement have been completed pursuant to Article 13.
2. The Agreement will then have effect from 1 January 2006 with respect to matters concerning serious tax evasion and from 1 January 2008 with respect to all other tax matters covered by the Agreement. The start date of 1 January 2008 for civil matters is in line with the Organisation for Economic Cooperation and Development (OECD) view that it may take up to three years for the implementation of taxation information exchange agreements (TIEAs).
3. Pursuant to Article 4(1)(b), the Agreement does not apply to any external territories except to the extent that they are specifically listed in the Agreement.

Overview and national interest summary

4. Bermuda is an overseas territory of the United Kingdom but largely self-governing. The economy of Bermuda is heavily dependent on tourism and international business. International business includes insurance, investment holding, pension fund, unit trust and mutual funds and shipping. Bermuda has a low tax structure, a stable political and legal system, well developed infrastructure, a highly skilled workforce, high education standards and a good climate.
5. There is substantial economic activity between Australia and Bermuda most of which pertains to the insurance and re-insurance industries and currency trading activities (including foreign exchange hedging, forward contract purchases etc). This is in line with Bermuda’s international position as a significant financial centre.
6. The Agreement will help Australia protect its revenue base by allowing access to necessary offshore information and improving the integrity of the tax system by discouraging tax evasion by certain individuals and businesses.
7. The Agreement is the first of its kind for Australia. It is an important step towards entering into TIEAs with other jurisdictions that have committed to work with OECD member countries under the auspices of the Global Forum on Taxation (Global Forum) to improve transparency and to establish effective exchange of information for tax purposes. It provides for full exchange of information on criminal and civil tax matters between Australia and Bermuda which will enhance economic cooperation between the two jurisdictions. It incorporates a number of important safeguards to protect the legitimate interests of taxpayers.

Reasons for Australia to take the proposed treaty action

8. The Agreement is related to the OECD's work on harmful tax competition, which has identified the lack of effective exchange of information as a key contributing factor to the existence of harmful tax practices.

9. Australia has taken a leadership role in this work and hosted the Global Forum in Melbourne in 2005, which was attended by 55 OECD member countries and non-OECD jurisdictions. At that event the chairperson of the OECD's Committee on Fiscal Affairs (Mr Bill McCloskey, Canada) welcomed the signature of the Australia-Bermuda Agreement as a "landmark model."

10. This Agreement will be seen by the international tax community as a positive step towards good international governance.

11. Internationally, 33 low tax jurisdictions have made a public political commitment to the elimination of harmful tax practices. These jurisdictions, together with OECD member countries (collectively referred to as Participating Partners), have worked together under the auspices of the OECD's Global Forum to develop international standards regarding transparency and effective exchange of information. The participating partners seek to ensure that the information needed by tax authorities to determine a taxpayer's correct tax liability is available.

12. On 18 April 2002, the OECD released a Model TIEA to facilitate negotiations between OECD member countries and the committed jurisdictions. Australia has, with some modifications, adopted the text of the OECD Model TIEA in the Agreement. The Agreement has an additional Article that prevents Australia or Bermuda from imposing 'prejudicial or restrictive measures based on harmful tax practices' on residents or nationals of either party while the agreement is in force. This reflects the understanding among participating partners that committed jurisdictions that enter into TIEAs will not be considered to be tax havens by OECD member countries.

13. Data held by the Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Australian Bureau of Statistics (ABS) indicates a substantial flow of funds between Australia and Bermuda. According to the ABS report on Australia's international investment position for 2004, Australia's total investment in Bermuda had reached \$3.7 billion, while Bermuda's total investment in Australia was \$4.7 billion by the end of 2004 (mainly in debt instruments). Bermuda invested \$2.2 billion in 2004, making it the fourth leading investor in Australia in that year, behind the United States of America, Netherlands and Canada. Many of these transactions are genuine business transactions and represent substantial economic activity between the two jurisdictions. Bermuda's tangible commitment to counter harmful tax practices is a positive step in its relationship with Australia.

14. It is estimated that \$5 billion is moved out of Australia each year to tax havens around the world. The Australian Tax Office (ATO) has recently commenced a major investigation of the use of offshore tax havens for alleged money laundering and tax evasion in conjunction with the Australian Crime Commission and the Australian Federal Police. Entering into TIEAs with committed jurisdictions is useful in such instances as information can be sought to establish the extent and nature of the tax evaded.

15. For Australia, this is the first TIEA signed with a committed jurisdiction and paves the way for Australia entering into TIEAs with other committed jurisdictions. It is in Australia's interest to develop a network of agreements with other committed jurisdictions to enhance transparency and information exchange to the benefit of Australia and committed jurisdictions.

16. This Agreement along with future TIEAs will make it harder for the taxpayers to evade Australian tax through the use of committed jurisdictions. This will help Australia protect its revenue base and improve the integrity of the tax system while opening up these jurisdictions to legitimate business activity.

17. This Agreement will also discourage those taxpayers who participate in abusive tax arrangements by increasing the chance that such arrangements will be discovered.

Obligations

18. The Agreement requires Australia to exchange information with Bermuda upon request where the information requested is relevant to the determination, assessment and collection of taxes, the recovery and enforcement of tax claims or the investigation or prosecution of tax matters. Australia must do so irrespective of whether the conduct being investigated is a crime under Australian law (Articles 1 and 5). There is no provision in the Agreement for the routine or voluntary exchange of information between the two jurisdictions.

19. If Bermuda requests information, Australia is obliged to supply information on any federal taxes administered by the Commissioner. Australia is also obliged to make the information available in the form of depositions of witnesses and authenticated copies of original records if requested (Article 5(3)). So that this obligation can be fulfilled, Australia must ensure that its competent authority has the necessary authority to obtain and provide information held by banks, other financial institutions and any person acting in an agency or fiduciary capacity, as well as information regarding the legal and beneficial ownership of companies, partnerships and other persons (Article 5(4)).

20. Australia must, pursuant to Article 5(5), provide certain details to Bermuda when making a request for information to demonstrate the relevance of the information sought.

21. Where the information in the possession of the Australian Commissioner of Taxation is insufficient to enable compliance with the request, Australia must, pursuant to Article 5(2), use all relevant information gathering methods to furnish the details to Bermuda even where it is not needed for domestic tax purposes. This is consistent with Article 26 of the OECD Model Convention on Income and on Capital, which was updated in 2005.

22. The information requested must be forwarded as soon as possible. Article 5(6) provides that when Australia receives a request for information, it must confirm receipt in writing and notify Bermuda within 60 days if there is a deficiency in the request. If Australia is unable to provide the information within 90 days of the receipt of the request, it must inform Bermuda of the difficulties involved or the reasons for refusing to provide the information. Article 7 governs the circumstances in which a request may be refused.

23. Article 8 imposes an obligation on Australia to treat information it receives confidentially. Such information may be revealed 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 all Bermudan taxes. These persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or judicial decisions. Generally, however, the express written consent of the Party that provided the information is required for any disclosure not covered by this Article. Both jurisdictions will remain bound by the confidentiality provisions of the Agreement even after the termination of the Agreement pursuant to Article 14(3). This is an

essential feature which ensures that adequate protection is provided to information exchanged between the two jurisdictions.

24. Both Parties are obliged to refrain from imposing prejudicial or restrictive measures based on harmful tax practices on residents or nationals of the other Party. Such measures are applied on the basis that the other party does not engage in effective information exchange and/or lacks transparency in the operation of its laws, regulations or administrative practices or on the basis of no or nominal taxes and one of the preceding criteria.

Implementation

25. Legislation will be required for Australia to fulfil its obligations under the Agreement. The legislative framework for giving effect to Australia's obligation to provide information under the Agreement will be achieved by appropriate amendments to the *International Tax Agreements Act 1953*.

Costs

26. The Agreement will have an impact on the ATO. It is likely that most requests for information will originate from Australia. Hence, costs are likely to be associated with the administration of those requests and the analysis of information by the ATO. Additional resources may be required to deal with the expected complexities of obtaining information from Bermuda. Actual impacts are difficult to estimate and will depend on the development of effective administrative arrangements between the ATO and the relevant revenue authorities in Bermuda.

27. The ATO and the Bermuda Ministry of Finance have entered into a Memorandum of Understanding under which certain costs may be payable by the ATO to Bermudan revenue authorities. Such costs are classified as extraordinary costs. Some examples are:

- Reasonable costs of engaging experts, interpreters, or translators.
- Reasonable litigation costs in relation to a specific request for information.
- Reasonable costs for obtaining depositions or testimony.

28. The compliance costs to taxpayers in Australia are likely to be minimal. It is unlikely that Australia will receive many requests for information from Bermuda and so it is unlikely that the ATO would be required to collect information from Australian taxpayers.

29. Overall, it is estimated that the whole of the TIEA programme will generate an additional full time equivalent requirement of one employee. The impact of the Agreement will be negligible and its administration will be absorbed into the ATO's existing exchange of information programme.

Regulation Impact Statement

30. The Office of Regulation Review (Productivity Commission) has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action

31. The Agreement does not provide for the negotiation of future legally binding instruments, amendments or appendices to the existing Agreement. However, this does not preclude the two jurisdictions from agreeing in the future to amend the existing Agreement. The Agreement does not

have an amendment clause, but Article 39 of the *Vienna Convention on the Law of Treaties 1969* provides that a treaty may be amended by agreement between the Parties. Any such amendment would be subject to the normal treaty process, including tabling and consideration by JSCOT. Any amendments to the Agreement may be considered in the future in line with Australian policy for TIEA negotiations current at that time.

Withdrawal or denunciation

32. The Agreement will continue to be in effect indefinitely unless terminated by either Party. Article 14 provides that termination of the Agreement is subject to a written notice of termination to the competent authority of the other Party.

33. In the event of termination, the Agreement will cease to have effect in both jurisdictions on the first day of the month following the expiration of six months after the date the other Party receives the notice terminating the Agreement. However, Parties remain bound by obligations of confidentiality with respect to any information obtained under the Agreement.

34. Withdrawal by Australia would be subject to the normal treaty process, including tabling and consideration by JSCOT.

Contact details

Tax Treaties Unit
International Tax and Treaties Division
Department of the Treasury

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CONSULTATION:

1. The Taxation Information Exchange Agreement negotiations with Bermuda were not in the public domain. Hence, the public was not consulted on the issue.
2. However, the Australian Taxation Office (ATO) was consulted in the development of the Agreement, as the responsibility for administration of the Agreement rests with the ATO and it was involved in negotiations with Bermuda on the development of the Agreement.
3. The State and Territory Governments have been consulted through the Commonwealth-State/Territory Standing Committee on Treaties (SCOT). Information on the negotiation of this treaty was included in the schedules of treaties to State and Territory representatives in February and September 2005. Further information on signing and tabling appear on the current schedule.
4. In addition to the Minister for Revenue and Assistant Treasurer, the Minister for Foreign Affairs and the Minister for Trade agreed to this treaty, and the Prime Minister was informed.

Political Brief on Bermuda

1. Bermuda is located in the Atlantic Ocean, approximately 900 kilometres east of the United States. It comprises around 138 islands and islets with a total area of 53 square kilometers and a population of 64,500 (2003). Its capital is Hamilton.

Government

2. Bermuda is a Crown Colony of the United Kingdom and the Governor of Bermuda, currently Sir John Vereker KCB, is the Crown's appointed representative in Bermuda. The United Kingdom retains responsibility for Bermuda's external affairs, defence, internal security and policing. It has authorised Bermuda to enter into the Agreement with Australia.

3. Since the introduction of internal self-government in 1968, the Bermudan legislature (the Senate and House of Assembly) has exercised control over much of its internal affairs. The current Progressive Labour Party (PLP) Government is headed by the Hon. William Alexander Scott JP, MP. The PLP was re-elected on 24 July 2003 after having come to power in a general election on 10 November 1998, in which it ousted the United Bermuda Party (UBP) Government which had dominated Bermudan politics for 35 years.

4. In 2004, the PLP officially reopened debate about full independence from the United Kingdom, establishing a Bermuda Independence Commission to study the feasibility of independence. The Government has suggested that a referendum on independence might be held in 2008 in conjunction with the next general election. However, polling indicates a lack of support for independence among the population. In 1995, a referendum on full independence from the United Kingdom was decisively defeated.

5. Bermuda's legal system is modeled on the UK system and comprises four magistrates' courts, three Supreme Courts and a Court of Appeal. The ultimate court of appeal is the UK Privy Council.

Economy¹

6. Bermuda has one of the world's highest per capita incomes with a per capita GDP of US\$65,936 (2004). According to the Bermudan Government's preliminary estimate, real GDP growth stood at 2.5% in 2005, a slight decrease on the 2004 rate of 2.8%. The budget for the 2005-06 financial year projects spending of US\$848m versus projected revenue of US\$750m, amounting to a budget deficit of 2.4% of GDP. This will be offset in part by an estimated 2004-2005 surplus of US\$39m.

7. The offshore financial services sector has been at the centre of the Bermudan economy. Approximately 300 international companies operate from Bermuda and an additional 13,000 are registered there. The reinsurance market in particular, which ranks third largest in the world after New York and London, is central to the Bermudan economy. Despite losses flowing to the reinsurance market in 2005, following Hurricanes Katrina and Rita in the United States, it is estimated by the *Economist Intelligence Unit* that the capital base of Bermudan companies will have reached US\$8bn by 2006.

¹Economic statistics have been drawn from the Economist Intelligence Unit.

8. Tourism is Bermuda's largest industry with annual revenue greater than US\$480m. Tourist arrivals increased by 3.9% year on year in the first nine months of 2005. Cruise-ship arrivals, a significant source of foreign-exchange, increased by 10.9% over the same period, although stop-over visitor arrivals, an otherwise important source of revenue, declined by 9.2% in the third quarter of 2005.

Bilateral Relations

9. Australia and Bermuda are both members of the Commonwealth and Bermuda is expected to participate in the 2006 Commonwealth Games in Melbourne. Trade with Bermuda is of a low-level. In 2004-2005 Australian exports to Bermuda totalled AU\$1.4m and Bermudan exports to Australia totalled AU\$6.4m. There are about 100 Australians resident in Bermuda.

BERMUDA



Location

Bermuda consists of a group of some 150 islands and islets situated in the western Atlantic Ocean about 910km east of North Carolina in the United States. It is NOT a Caribbean country.

Sovereign/Non-sovereign state

Bermuda is an overseas territory of the UK, but is largely self-governing. In August 1995, after several months of heated debate on the issue of becoming independent from the UK, Bermudians voted almost 75% in favour of maintaining Bermuda's status as an overseas territory.

Bermuda's Dealings with Australia

Data from Austrac shows major financial flows into and from Australia.

Amount in 99/00	Amount in 00/01	Amount in 01/02	Amount in 02/03	Amount in 03/04	Amount in 04/05
216,710,741	156,500,494	234,379,423	429,692,825	496,052,582	1,864,354,354

Amount Out 99/00	Amount out 00/01	Amount out 01/02	Amount out 02/03	Amount out 03/04	Amount out 04/05
103,151,375	162,503,997	2,542,875,854	409,946,141	814,254,180	1,474,728,357

The transactions to and from Australia are generally related to financial, insurance and currency purchases. This in line with Bermuda's international position as a major financial centre.

Economy

Bermuda has virtually no commercially exploitable natural resources. The economy of Bermuda is heavily dependent on tourism and international business. International business including insurance (Bermuda's captive insurance sector is the world's largest), investment holding, trust, pension fund, unit trust and mutual funds and not least, shipping finds Bermuda a very congenial centre of activity, not only on account of its tax haven status but also because of its stable political and legal system, well developed infrastructure, high standard of workforce, education and its physical attractions and equable climate.

Taxes & Legislation

Bermuda does not impose taxes on income, profits, capital, capital gains, or capital appreciation in Bermuda. Bermuda has always relied on consumption based taxes as a source of government revenue (eg land tax on the ownership of real property, customs duties, payroll tax, passenger tax, hotel occupancy tax, stamp duties, foreign currency purchase tax, municipal taxes, corporate services tax, Government fees, etc).

Other Treaties with Australia: None.

Other treaties with Bermuda

There are no other bilateral treaties between Australia and Bermuda

Treaties of the same type with other countries

**There are not yet any other treaties on the exchange of information
with respect to taxes**