

National Interest Analysis [2011] ATNIA 16

with attachment on consultation

Agreements between

**the Government of Australia and the Government of the Republic of the Marshall Islands on
the Exchange of Information with Respect to Taxes
done at Majuro on 12 May 2010
[2010] ATNIF 34**

**the Government of Australia and the Government of the Republic of Mauritius
on the Exchange of Information with Respect to Taxes
done at Port Louis on 8 December 2010
[2010] ATNIF 52**

**the Government of Australia and the Government of Montserrat (as authorised by the
Government of the United Kingdom of Great Britain and Northern Ireland)
on the Exchange of Information with Respect to Taxes
done at London on 23 November 2010
[2010] ATNIF 50**

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

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Nature and timing of proposed treaty action

1. The proposed treaty action is to bring the *Agreement between the Government of Australia and the Government of the Republic of the Marshall Islands on the Exchange of Information with Respect to Taxes* (the proposed Marshall Islands Agreement), the *Agreement between the Government of Australia and the Government of the Republic of Mauritius on the Exchange of Information with Respect to Taxes* (the proposed Mauritius Agreement) and the *Agreement between the Government of Australia and the Government of Montserrat, (as authorised by the Government of the United Kingdom of Great Britain and Northern Ireland), on the Exchange of Information with Respect to Taxes* (the proposed Montserrat Agreement) into force. The three agreements are hereinafter referred to collectively as “the proposed Agreements”.

Marshall Islands

2. Pursuant to Article 13, the proposed Marshall Islands Agreement will enter into force on the date of the last notification between Australia and the Marshall Islands, establishing that the necessary domestic procedures for entry into force have been completed. The proposed Marshall Islands Agreement will then have effect:

- from that date with respect to criminal tax matters; and
- from that date with respect to all other matters covered in Article, but only relating to taxable periods beginning on or after that date or, where there is no taxable period, charges to tax arising on or after that date.

Mauritius

3. Pursuant to Article 12, the proposed Mauritius Agreement will enter into force on the date of the last notification between Australia and Mauritius, establishing that the necessary domestic procedures for entry into force have been completed. The proposed Mauritius Agreement will then have effect:

- from 1 January 2011 with respect to criminal tax matters relating to taxable periods beginning on or after 1 January 2011 or, where there is no taxable period, all charges to tax arising on or after 1 January 2011; and
- from 1 January 2011 with respect to all other matters covered in Article 1 relating to taxable periods beginning on or after 1 January 2011 or, where there is no taxable period, all charges to tax arising on or after 1 January 2011.

Montserrat

4. Pursuant to Article 14, the proposed Montserrat Agreement will enter into force on the date of the last notification between Australia and Montserrat, establishing that the necessary domestic procedures for entry into force have been completed. The proposed Montserrat Agreement will then have effect:

- from 1 July 2010 with respect to criminal tax matters; and
- from 1 July 2010 for all other matters covered in Article 1, but only in respect of taxable periods beginning on or after that date or, where there is no taxable period, all charges to tax arising on or after that date.

Overview and national interest summary

5. The key objective of the proposed Agreements, commonly referred to as Tax Information Exchange Agreements (TIEAs), is to establish a legal basis for the exchange of tax information relating to certain persons and other entities between the Government of Australia and the Government of the Marshall Islands, the Government of Australia and the Government of Mauritius, and the Government of Australia and the Government of Montserrat.

6. The proposed Agreements will help Australia protect its revenue base by allowing the Commissioner of Taxation to request and receive certain information held in the Marshall Islands, Mauritius or Montserrat and will help improve the integrity of the tax system by discouraging tax evasion by individuals and other entities. The proposed Agreements also incorporate a number of important safeguards to protect the legitimate interests of taxpayers, including requirements in relation to confidentiality and legal privilege.

7. The proposed Agreements are three of 30 TIEAs signed by Australia with low-tax jurisdictions, 18 of which have entered into force. The proposed Agreements with the Marshall Islands, Mauritius and Montserrat are part of Australia's efforts to conclude TIEAs with jurisdictions that have committed to work to improve transparency and establish effective procedures for the exchange of tax information.

8. The Marshall Islands and Mauritius are both independent republics, responsible for their own domestic and foreign affairs. Montserrat is an internally self-governing overseas territory of the United Kingdom. It requires United Kingdom Government approval before undertaking international commitments. The United Kingdom has authorised the making of the proposed Montserrat Agreement. The United Kingdom Government is responsible for Montserrat's external relations, defence and internal security. In practice, Montserrat's nominated competent authority - the Comptroller of Inland Revenue - will be responsible for facilitating the exchange of tax information with Australia.

Reasons for Australia to take the proposed treaty action

9. The proposed Agreements, alongside TIEAs with other countries, are an important tool in Australia's efforts to combat offshore tax evasion. The proposed Agreements provide for the effective exchange of information between Australia and the Marshall Islands, Australia and

Mauritius, and Australia and Montserrat, which will promote fairness and enhance Australia's ability to administer and enforce its domestic tax laws.

10. The proposed Agreements are part of Australia's ongoing commitment to the OECD's work on eliminating harmful tax practices that contribute to international tax avoidance and evasion. Australia has taken a leadership role in this work and is currently the Chair of the Global Forum on Transparency and Exchange of Information for Tax Purposes, which has a membership of more than 100 jurisdictions.

11. Since 2002, more than 40 low-tax jurisdictions, including the three countries that are the subject of this National Interest Analysis, have publicly committed to the implementation of OECD standards of transparency and information exchange for tax purposes, which have been endorsed by both the United Nations and the G-20. These standards, when implemented, help to ensure the availability of information needed by tax authorities to determine a taxpayer's correct tax liability. TIEAs are the key bilateral means that facilitate the provision of such information by low-tax jurisdictions.

12. In April 2002, the OECD released a model TIEA to facilitate negotiations between OECD member countries and committed jurisdictions. In October 2003, the then Australian Treasurer approved an Australian model TIEA which is closely aligned to the OECD model. The Australian model TIEA was subsequently approved by the current Australian Government. The proposed Agreements with the Marshall Islands, Mauritius and Montserrat essentially follow the format of the Australian model TIEA.

13. Data held by the Australian Transaction Reports and Analysis Centre (AUSTRAC) indicates a relatively small flow of funds between Australia and the Marshall Islands and between Australia and Montserrat, and a significant flow of funds between Australia and Mauritius. While most financial flows to and from low-tax jurisdictions are legitimate, the legal frameworks and systems that make low-tax jurisdictions attractive for legitimate purposes may also be used in arrangements designed to evade paying tax elsewhere.

14. It is in Australia's interest to continue to develop a network of TIEAs with low-tax jurisdictions. The proposed Agreements, along with existing and future TIEAs, will make it harder for taxpayers to avoid or evade Australian tax and discourage those taxpayers from participating in illegitimate tax arrangements by increasing the probability of detection. This will help Australia protect its revenue base and improve the integrity of the tax system while enhancing the reputations of the Marshall Islands, Mauritius and Montserrat as locations for legitimate business activity.

15. The commitment by the Marshall Islands, Mauritius and Montserrat to implement the proposed Agreements is a positive step in each of their relationships with Australia. The OECD has identified the Marshall Islands and Mauritius as jurisdictions that have committed to and substantially implemented the internationally agreed standard for the exchange of information relating to tax. The OECD has identified Montserrat as a jurisdiction that has committed to the internationally agreed tax standard (on the exchange of information) but has not yet substantially implemented the standard.

Obligations

16. Article 5(1) of the proposed Agreements obliges the competent authorities of the Contracting States (referred to throughout the Montserrat Agreement as the "Contracting Parties") to provide, on request, information that is foreseeably relevant to the administration and enforcement of their respective domestic tax laws, including the collection of taxes and the investigation or prosecution of tax matters. A request for information must be in writing and contain the details required by Article 5(5) of the Marshall Islands Agreement and the Mauritius Agreement and Article 5(6) of the Montserrat Agreement. This obligation applies irrespective of whether the conduct being investigated would constitute a crime under the domestic law of the Requested State (or Party) if it occurred in the territory of that State (or Party).

17. Article 5(2) of the proposed Agreements provides that where the information in the possession of the Requested State (or Party) is insufficient to enable compliance with a request, the Requested State (or Party) must use its information gathering powers to obtain and provide the information, even if it is not needed for the Requested State's (or Party's) domestic tax purposes. This is consistent with Article 26 (Exchange of Information) of the *OECD Model Convention with Respect to Taxes on Income and on Capital*, which has been incorporated into Australia's tax treaty policy.

18. Article 5(3) of the proposed Agreements requires the provision of information in the form of depositions of witnesses and authenticated copies of original records, if requested, to the extent allowable under the laws of the Requested State (or Party). This is intended to assist the Applicant State (or Requesting Party) to satisfy evidentiary requirements in domestic tax proceedings.

19. Article 5(4) of the proposed Agreements obliges each Contracting State (or Party) to ensure its competent authority has the 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 ownership of companies, partnerships, trusts, foundations, 'Anstalten' (institutions similar to trusts or foundations) and other persons. The Commissioner of Taxation currently has the necessary legal authority to meet Australia's obligations under Article 5(4).

20. Article 5(6) of the Marshall Islands Agreement and the Mauritius Agreement and Article 5(7) of the Montserrat Agreement obliges the Contracting States (or Parties) to acknowledge receipt of requests for information and to provide the requested information as promptly as possible.

21. Article 6 of the proposed Agreements provides that one Contracting State (or Party) (the Applicant State or the Requesting Party) may, on request, permit interviews with individuals and the examination of records within its jurisdiction by officials of the other Contracting State (or Party), with the written consent of the persons concerned.

22. Article 7 of the proposed Agreements provides various grounds for the refusal of requests, including where requests are not in conformity with the proposed Agreement or if the Applicant State (or Requesting Party) would be unable to obtain the requested information under its own laws.

23. Article 8 of the proposed Agreements obliges the Contracting States (or Parties) to keep information received under each proposed Agreement confidential. Such information may be disclosed only to persons or authorities concerned with the administration or enforcement of taxation covered by the proposed Agreement and may only be used for such purposes, although this may include public court proceedings or in judicial decisions. For the proposed Marshall Islands and Mauritius Agreements, the express written consent of the competent authority of the Requested State is required for the disclosure of the requested information to any other person, entity, authority or jurisdiction. For the proposed Montserrat Agreement, the express written consent of the competent authority of the Requested Party is required for the disclosure of requested information to any other person, entity or authority, and information provided shall not be disclosed to any other jurisdiction.

24. Article 9 of the proposed Marshall Islands and Mauritius Agreements provides that the Requested State will bear ordinary costs associated with responding to requests for information, while extraordinary costs are to be borne by the Applicant State, unless the Contracting States otherwise agree. Article 10 of the proposed Montserrat Agreement requires that the incidence of costs incurred in providing assistance shall be agreed by the competent authorities of the Contracting Parties. As discussed in paragraph 34 below, the Contracting States (or Parties) to the Agreements have negotiated separate standing arrangements with respect to certain costs.

25. Article 11 of the Marshall Islands Agreement and Article 12 of the Montserrat Agreement oblige each Contracting State (or Party) to refrain from imposing prejudicial or restrictive measures on residents or nationals of the other Contracting Party on the basis that the other Contracting State (or Party) does not engage in effective exchange of information and/or because it lacks transparency

in the operation of its laws, regulations or administrative practices. A prejudicial or restrictive measure includes the denial of a deduction, credit or exemption, the imposition of a tax, or special reporting requirements. The Mauritius Agreement does not have such an Article.

26. Article 12 of the Marshall Islands Agreement, Article 11 of the Mauritius Agreement and Article 13 of the Montserrat Agreement require the Contracting States (or Parties) to endeavour jointly to resolve difficulties or doubts concerning the interpretation or application of the proposed Agreements and provide that they may also decide upon other forms of dispute resolution.

Implementation

27. Australia is able to fulfil its obligations under the proposed Agreements under existing legislation, specifically, section 23 of the *International Tax Agreements Act 1953*. Article 10 of the Marshall Islands Agreement and the Mauritius Agreement and Article 11 of the Montserrat Agreement require Contracting States (or Parties) to implement legislation necessary to give effect to the proposed Agreements. However, as the provisions of the proposed Agreements are within the scope of existing Australian legislation, no further legislation or regulation is required in order to implement the proposed Agreements.

28. The implementation of the proposed Agreements will not affect the existing roles of the Commonwealth or the States and Territories in tax matters.

Costs

29. The proposed Agreements will have a small administrative and financial impact on the Australian Taxation Office (ATO). As the Marshall Islands, Mauritius and Montserrat are unlikely to routinely need Australian information for their own tax purposes it is likely that most requests for information will originate from Australia. Some resources may need to be allocated by the ATO to provide technical assistance to the Marshall Islands, Mauritius or Montserrat in relation to their exchange of information procedures.

30. Pursuant to Article 9 of the proposed Marshall Islands and Mauritius Agreements and Article 10 of the proposed Montserrat Agreement, the ATO has negotiated Memoranda of Understanding with the competent authorities of the Marshall Islands, Mauritius and Montserrat respectively. Under these arrangements, certain costs associated with Australian requests for information will be borne by the ATO. Examples of such costs, classified as “extraordinary” costs, include:

- reasonable fees charged by third parties for carrying out research;
- reasonable fees charged by third parties for copying documents;
- reasonable costs of engaging experts, interpreters or translators;
- reasonable costs of conveying documents to Australia;
- reasonable litigation costs of the Requested State (or Party) in relation to a specific request for information; and
- reasonable costs of obtaining depositions or testimony.

31. Australian residents are unlikely to incur significant compliance costs in relation to the proposed Agreements. It is unlikely Australia will receive many requests for information from the Marshall Islands, Mauritius or Montserrat and consequently be required to collect significant amounts of information from Australian residents.

32. Overall, it is estimated that the administrative and financial impact of the proposed Agreements will be absorbed by the ATO’s existing exchange of information programme, which currently administers similar arrangements (including but not limited to TIEAs) with more than 40 countries. On a broader level, as the proposed Agreements are intended to help reduce tax

avoidance and evasion by Australian taxpayers, they could result in the generation of additional revenue for Australia.

Regulation Impact Statement

33. The Treasury has assessed the implementation of the proposed Agreements against criteria in the *Best Practice Regulation Handbook* and concluded that these regulatory options have no/low impact on businesses and individuals or on the economy. The Office of Best Practice Regulation has been consulted and confirms that Regulation Impact Statements are not required.

Future treaty action

34. The proposed Agreements do not provide for amendments or for the negotiation of future legally binding instruments. Pursuant to international law, in the absence of specific procedures, the Contracting States (or Parties) may amend their respective proposed Agreement by mutual consent at any time. Any future amendments would be subject to Australia's domestic treaty-making process, including tabling and consideration by the Joint Standing Committee on Treaties (JSCOT). Any such amendments to the proposed Agreements may be considered in line with Australian policy for TIEA negotiations current at that time.

Withdrawal or denunciation

Marshall Islands

35. Article 14 provides that the proposed Marshall Islands Agreement shall remain in force indefinitely, but either of the Contracting States may terminate the Agreement by providing written notice of termination through diplomatic channels. Termination would take effect on the first day of the month following the expiration of a period of six months after the date of receipt of the notice of termination by the other Contracting State. However, both Contracting States would remain bound by the confidentiality obligations contained in Article 8. This ensures the continued protection of information exchanged under the proposed Marshall Islands Agreement.

36. Termination of the proposed Marshall Islands Agreement by Australia would be subject to Australia's domestic treaty-making process, including tabling and consideration by JSCOT.

Mauritius

37. Article 13 provides that the proposed Mauritius Agreement shall remain in force indefinitely, but either of the Contracting States may, after the expiration of three years from the date of its entry into force, provide written notice of termination through diplomatic channels. Termination would take effect on the first day of the month following the expiration of a period of six months after the date of receipt of the notice of termination by the other Contracting State. However, both Contracting States would remain bound by the confidentiality obligations contained in Article 8. This ensures the continued protection of information exchanged under the proposed Mauritius Agreement.

38. Termination of the proposed Mauritius Agreement by Australia would be subject to Australia's domestic treaty-making process, including tabling and consideration by JSCOT.

Montserrat

39. Article 15 provides that the proposed Montserrat Agreement shall remain in force indefinitely, but either of the Contracting Parties may provide written notice of termination through diplomatic channels. Termination would take effect on the first day of the month following the expiration of a period of six months after the date of receipt of the notice of termination by the other Contracting Party. However, both Contracting Parties would remain bound by the confidentiality

obligations contained in Article 8. This ensures the continued protection of information exchanged under the proposed Montserrat Agreement.

40. Termination of the proposed Montserrat Agreement by Australia would be subject to Australia's domestic treaty-making process, including tabling and consideration by JSCOT.

Contact details

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ATTACHMENT ON CONSULTATION

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CONSULTATION

41. The proposed Agreements address only administrative matters, namely facilitating the full exchange of information between tax authorities. Accordingly, the public was not consulted.

42. The ATO was involved in the negotiation of the proposed Agreements and will administer them. Given that the proposed Agreements align with the international standard on tax information exchange and with Australia's recent bilateral tax treaty practice, the ATO was supportive of the proposed treaty actions.

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