

DOCUMENTS TO BE TABLED ON 29 MARCH 2010:

- **National Interest Analysis [2010] ATNIA 8**
with attachment on consultation

- **Agreement between the Government of Australia and the Government of the Cook Islands on 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, done at Rarotonga on 27 October 2009**
[2009] ATNIF 31

NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY

SUMMARY PAGE

**Agreement between the Government of Australia and the Government of the Cook Islands on 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,
done at Rarotonga on 27 October 2009
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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 Cook Islands on 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 Agreement) into force. Pursuant to Article 10, the Agreement will enter into force on the date of the completion of an exchange of notifications through the appropriate channel between Australia and the Cook Islands establishing that constitutional and legal procedures for entry into force have been completed.
2. The Agreement will then have effect:
 - a) in respect of Australian tax, for any year of income beginning on or after 1 July in the calendar year following the date of entry into force; and
 - b) in respect of Cook Islands tax, for any year of income beginning on or after 1 January in the calendar year following the date of entry into force.
3. For example, if the Agreement enters into force during 2010, it will have effect in respect of Cook Islands tax from 1 January 2011, and in respect of Australian tax from 1 July 2011.

Overview and national interest summary

4. The Agreement provides for the allocation of taxing rights between Australia and the Cook Islands with respect to certain income of certain classes of individuals who are residents of Australia or the Cook Islands. This helps to prevent double taxation of the same income. It also establishes a mechanism to assist in the resolution of disputes arising from transfer pricing adjustments made to taxpayers' income by the revenue authorities of Australia or the Cook Islands. The Agreement is consistent with provisions contained in Australia's comprehensive bilateral tax treaties.
5. The Cook Islands is a self-governing parliamentary democracy in free association with New Zealand. The Cook Islands is fully responsible for its internal affairs but New Zealand retains responsibility for external affairs and defence, in consultation with the Cook Islands. It has a low-tax structure and operates an offshore financial centre.
6. Detailed information on the level and type of economic activity between Australia and the Cook Islands is not available. However, data held by the Australian Transaction Reports and Analysis Centre indicates that a significant amount of funds flows between Australia and the Cook Islands.

7. The Agreement is part of a package of benefits offered to the Cook Islands as part of negotiations to conclude a Tax Information Exchange Agreement (TIEA) with Australia. That TIEA – the *Agreement between the Government of Australia and the Government of the Cook Islands on the Exchange of Information with Respect to Taxes* - was signed simultaneously with the Agreement on 27 October 2009.

Reasons for Australia to take the proposed treaty action

8. The Agreement supports Australia's efforts to combat offshore tax evasion through the establishment of transparency measures and effective exchange of information arrangements with low-tax jurisdictions. The Agreement was signed in conjunction with a TIEA between Australia and the Cook Islands on 27 October 2009. TIEAs are the bilateral means that facilitate the provision of information by low-tax jurisdictions, and enhance Australia's ability to protect its revenue base and improve the integrity of the tax system.

9. The Cook Islands' commitment to implement the Agreement is a positive step in its relationship with Australia.

Obligations

10. Article 1 provides that the Agreement applies only to persons who are residents (as defined in Article 4) of Australia and/or the Cook Islands. This precludes non-residents from obtaining the benefits of the Agreement. Pursuant to Article 4, a resident is a person who is resident in Australia or the Cook Islands for taxation purposes. However, a person is not a resident of a Party for the purposes of the Agreement if they are only liable to tax in that Party in respect of income from sources in that Party. For Australia, the Agreement only applies to federal income tax, and does not apply to State and Territory taxes (Article 2).

11. Under Articles 5, 6 and 7 of the Agreement, each Party is obliged to forego its taxing rights over certain income derived by retirees, pensioners, government employees, students and business apprentices, where they are residents of the other Party.

12. Article 5 obliges Australia not to tax Australian source pensions and retirement annuities paid to residents of the Cook Islands, provided such income is subject to tax in the Cook Islands. Article 5 permits Australia to tax Cook Islands source pensions and retirement annuities paid to Australian residents.

13. Article 6 obliges Australia not to tax the salaries of government employees of the Cook Islands working in government service, for non-commercial purposes, in Australia. This would apply, for example, to Cook Islands residents who staff representative offices established in Australia to provide information on investment opportunities in the Cook Islands. This approach provides Australia and the Cook Islands with sole taxing rights over the salaries they pay to individuals undertaking governmental functions.

14. Article 7 obliges Australia not to tax maintenance, education or training payments received by students or business apprentices from the Cook Islands who are temporarily studying in Australia, where those payments arise from sources outside Australia. Other income will remain liable to Australian tax as required under Australian law.

15. Article 8 establishes a mechanism to assist in the resolution of disputes arising from transfer pricing adjustments made to taxpayers' income by the revenue authorities of Australia or the Cook Islands. Article 8 permits taxpayers affected by the actions of one Party to present a case to the competent authority of the other Party and obliges Australia and the Cook Islands to endeavour to resolve such disputes. Affected taxpayers must invoke this process within three years of the first notification of the relevant adjustment.

16. Article 9 obliges the Parties to exchange information that is foreseeably relevant for the purposes of carrying out the Agreement. Article 9 specifies that any information may be

exchanged pursuant to the provisions of the *Agreement between the Government of Australia and the Government of the Cook Islands on the Exchange of Information with Respect to Taxes*, done at Rarotonga on 27 October 2009.

Implementation

17. To give effect to the Agreement, minor amendments to the *International Tax Agreements Act 1953* will be necessary, including the insertion of the Agreement as a Schedule to that Act. Legislation for this purpose is expected to be introduced into Parliament in 2010.

18. The implementation of the Agreement will not affect the existing roles of the Commonwealth or the States and Territories in tax matters.

Costs

19. The Agreement will have a financial impact on the Australian Taxation Office (ATO), which will administer it. However, the small number of taxpayers likely to be affected by the Agreement ensures that this impact will be minimal.

20. Affected Australian residents are unlikely to incur any significant compliance costs in relation to the Agreement, which may provide them with benefits.

21. Overall, it is estimated that the administrative and financial impact of concluding the Agreement will be minimal and can be absorbed into existing administrative arrangements relating to Australia's bilateral comprehensive tax treaties.

Regulation Impact Statement

22. The Treasury has assessed the implementation of the Agreement against criteria in the *Best Practice Regulation Handbook* and has concluded that this regulatory option has no/low impact on businesses and individuals or on the economy. The Office of Best Practice Regulation was consulted and confirmed that a Regulation Impact Statement was not required.

Future treaty action

23. The Agreement does not provide for amendments or for the negotiation of future legally binding instruments. In the absence of specific procedures, the Parties may amend the Agreement by mutual consent at any time. Any such amendments would be subject to the normal treaty process, including tabling and consideration by the Joint Standing Committee on Treaties (JSCOT). Any future amendments to the Agreement may be considered in line with Australian policy for tax treaty negotiations current at that time.

Withdrawal or denunciation

24. Article 11(1) provides that the Agreement shall remain in force until terminated by written notice from either Party.

25. Article 11(2) provides that such termination would take effect, in respect of Australian tax, from 1 July in the calendar year following that in which the notice of termination is given

and, in respect of Cook Islands tax, from 1 January in the calendar year following that in which the notice of termination is given.

26. In addition, Article 11(3) provides that the Agreement will terminate and cease to be effective six months after the receipt of notice from either Party terminating the related *Agreement between the Government of Australia and the Government of the Cook Islands on the Exchange of Information with Respect to Taxes* .

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

Contact details

International Tax Framework Unit
Department of the Treasury

ATTACHMENT ON CONSULTATION

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the Cook 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
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CONSULTATION

28. These negotiations with the Cook Islands were not in the public domain and, consequently, the public was not consulted.
29. The ATO was consulted in the development of the Australian model 'additional benefits' Agreement, which was used as a basis for the Agreement, and ATO officials negotiated the text of this proposed Agreement with the Cook Islands. The ATO will administer the Agreement.
30. In addition to the Assistant Treasurer, the Minister for Foreign Affairs, the Minister for Trade and the Prime Minister have agreed to this treaty.