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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

INTERNATIONAL TAX AGREEMENTS AMENDMENT BILL (No. 1) 2006

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Treasurer, the Hon Peter Costello MP)

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Glossary

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

<i>Abbreviation</i>	<i>Definition</i>
ATO	Australian Taxation Office
A\$	in Australian dollars
Commissioner	Commissioner of Taxation
ITAA 1936	<i>Income Tax Assessment Act 1936</i>
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
NZ Tax Commissioner	The New Zealand Commissioner for Inland Revenue
OECD	Organisation for Economic Co-operation and Development
OECD Model	<i>OECD Model Tax Convention on Income and on Capital</i>
TAA 1953	<i>Taxation Administration Act 1953</i>
the Agreement	Agreement between the Government of Australia and the Government of New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
the Assessment Acts	<i>Income Tax Assessment Act 1936</i> (ITAA 1936) and the <i>Income Tax Assessment Act 1997</i> (ITAA 1997)
the Protocol	Protocol amending the Agreement between the Government of Australia and the Government of New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
the Register	Foreign Revenue Claims Register

General outline and financial impact

Mutual assistance in collection of tax debts

Schedule 1 to this Bill amends the *Taxation Administration Act 1953* and the *Income Tax Assessment Act 1997* to provide a framework to allow the Commissioner of Taxation to collect a taxation debt on behalf of a foreign taxation authority or to take conservancy measures to ensure the collection of that debt.

Date of effect: These amendments will apply to requests made under *Assistance in Collection* provisions in an international agreement from the day following Royal Assent, provided that the relevant provision in the international agreement has entered into effect.

Proposal announced: The new treaty obligations were announced at the signature of the New Zealand Protocol and in the Treasurer's Press Release No. 098 of 15 November 2005.

Financial impact: The *Assistance in collection* Article will have a positive impact on revenue collection by the Australian Taxation Office and will improve international tax compliance.

Compliance cost impact: This measure is not expected to impact significantly on compliance costs.

Exchange of information

Schedule 2 to this Bill amends the *International Tax Agreements Act 1953* to provide the necessary framework to give effect to Australia's current and future treaty obligations to exchange information on tax matters with other revenue authorities.

Date of effect: These amendments will apply to requests for the exchange of information made from the day following Royal Assent, provided that the relevant international agreement under which the request has been made has entered into force.

Proposal announced: The new treaty obligations were announced at the signature of the New Zealand Protocol and in the Treasurer's Press Release No. 098 of 15 November 2005.

Financial impact: Nil.

Compliance cost impact: This measure is not expected to impact significantly on compliance costs.

The Protocol with New Zealand

Schedule 3 to this Bill amends the *International Tax Agreements Act 1953* to give the force of law in Australia to a protocol amending the Agreement of 27 January 1995 between the Government of Australia and the Government of New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income.

Date of effect: The provisions of the Protocol amending the Agreement between the Government of Australia and the Government of New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (the Protocol) will have effect from the date of entry into force of the Protocol. However, Article 4 of the Protocol, which inserts a new Article 27 dealing with assistance in collection of taxes, will have effect only from the date agreed in a subsequent exchange of notes through the diplomatic channel.

Proposal announced: Signature of the Protocol was announced in the Treasurer's Press Release No. 098 of 15 November 2005.

Financial impact: The Protocol does not cover the allocation of taxing rights. It deals with issues that are administrative in nature. Hence, there will be no financial implications. However, the *Assistance in collection* Article will have a positive impact on revenue collection by the Australian Taxation Office and will improve international tax compliance.

Compliance cost impact: No significant additional compliance costs are expected to result from entry into force of the Protocol.

Chapter 1

Mutual assistance in collection of tax debts

Outline of chapter

1.1 Schedule 1 to this Bill amends the *Taxation Administration Act 1953* (TAA 1953) and the *Income Tax Assessment Act 1997* (ITAA 1997) to enable the Commissioner of Taxation (Commissioner) to collect a taxation debt on behalf of a foreign taxation authority or to take conservancy measures to ensure the collection of that debt.

Context of amendments

1.2 There are a number of tax paying entities who are resident in Australia, or who hold assets in Australia, that have unpaid tax debts in a foreign state or territory. These tax paying entities will be referred to as foreign country debtors for the remainder of this chapter.

1.3 Under the current taxation law, the Commissioner has very limited authority to collect a tax debt from a foreign country debtor on behalf of the country in which that tax debt arose.

1.4 Consistent with Article 27 of the *OECD Model Tax Convention on Income and on Capital* (OECD Model), recent treaty actions by Australia (including the New Zealand Protocol) allow for mutual assistance in the collection of tax debts. The amendments to the TAA 1953 and the ITAA 1997 are designed to ensure that the Commissioner can meet Australia's current and future treaty obligations to provide such assistance.

1.5 The reciprocal nature of the international agreements will also allow foreign taxation authorities to:

- take conservancy measures in relation to unpaid Australian tax debts against taxpaying entities not resident in, or who hold no assets in Australia; and
- collect unpaid Australian tax debts from taxpaying entities not resident in, or who hold no assets in Australia,

if the foreign country has agreed to assist Australia in collecting Australian tax debts.

Summary of new law

Collecting tax debts or taking conservancy measures on behalf of a foreign country

1.6 These amendments provide that a foreign state or territory, under a relevant international agreement, may formally request the Commissioner to collect an amount (in Australian dollars), and/or take conservancy measures to ensure the collection of that amount, on behalf of that foreign state or territory, from a foreign country debtor.

1.7 The Commissioner will then register that amount, resulting in that amount becoming a tax-related liability under Australian tax law and activating the general debt recovery rules within the tax laws.

1.8 The amount to be recovered will become due and payable after the particulars of the claim are given to the foreign country debtor. If the foreign country debtor does not pay within the specified period, general interest charge will accrue on the debt.

1.9 The Commissioner may in certain situations remove the foreign country debtor from the Register, or reduce the foreign country debtor's debt on the register, if the Commissioner is satisfied that the foreign country debtor should not be on the Register, or that the stated debt exceeds the foreign country debtor's actual debt.

1.10 Once the Commissioner has recovered all or part of the amount from the foreign country debtor, the Commissioner will pay that amount to the foreign state or territory, thus discharging or reducing the foreign country debtor's unpaid tax debt.

Requesting assistance in the collection of an Australian tax debt

1.11 Any amounts received by the Commissioner pursuant to an *Assistance in collection* request that the Commissioner has made to a foreign taxation authority may be treated by the Commissioner as a credit on the relevant taxpayer's running balance account in Australia.

1.12 The credit will offset the debt on the relevant taxpayer's running balance account, reducing the taxpayer's outstanding liability by the amount of the credit.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
The Commissioner will be able to collect tax debts from foreign country debtors, or take action to conserve assets, on behalf of the foreign country, if there is an <i>Assistance in collection</i> agreement between Australia and the foreign country.	Australian authorities, including the Commissioner, cannot collect tax debts owed to foreign countries.
The Commissioner will be able to credit against the relevant taxpayer's running balance account amounts that the Commissioner receives pursuant to an <i>Assistance in collection</i> request.	No equivalent.

Detailed explanation of new law

Background

1.13 Currently it can be very difficult for the Commissioner to collect unpaid tax debts from:

- taxpaying entities who accrue tax debts in Australia but depart Australia without paying; or
- resident taxpaying entities who do not have sufficient assets in Australia to meet their tax debts, but who have offshore assets; or
- taxpaying entities who have never been resident in Australia but have accrued a tax debt in Australia (eg, a tax debt that arose from a capital gain made from the disposal of real property in Australia).

1.14 Even under those provisions that do allow the Commissioner to collect the unpaid tax debts, there are very limited provisions that allow the Commissioner to seek the assistance of a foreign country to collect the tax debt.

1.15 This problem is not confined to Australia. New Zealand taxation authorities, for example, are similarly limited in collecting unpaid tax debts raised in New Zealand if the taxpayer no longer resides in New Zealand nor has any assets in New Zealand.

1.16 In an effort to overcome this shortcoming, Article 27 of the OECD Model was developed in order to allow treaty partners to adopt an article in their international agreements that would provide support in the collection of revenue claims.

Policy objective

1.17 This measure will allow the Commissioner to collect foreign tax debts in Australia and remit those amounts to the foreign state or territory in which those debts arose.

1.18 In certain circumstances, this measure will also allow the Commissioner to take conservancy action, to the extent available under Australian law, in relation to those debts. Conservancy is concerned with preventing a taxpaying entity from dissipating their assets when they have a tax-related liability.

1.19 Finally this measure will treat Australian tax debts collected by a foreign taxation authority that have been remitted to Australia as tax debts collected in Australia.

When a foreign country makes a request to Australia to collect taxes or take measures of conservancy on its behalf

Receiving a request

1.20 Before the Commissioner can collect a foreign debt or take conservancy measures, the Commissioner must first receive from an overseas entity (either a foreign country, a constituent part of a foreign country or an overseas territory) a formal foreign revenue claim.

1.21 Although there are no specific powers, under Australian laws, available to the Commissioner to preserve the assets of an entity for the purpose of that entity being able to meet a tax debt, the Commissioner can apply for a common law remedy such as a *Mareva* injunction. As *Mareva* injunctions are a common law remedy, the Commissioner would need to convince a court of law that a *Mareva* injunction is appropriate and necessary on a case by case basis.

1.22 A ‘foreign revenue claim’ must:

- be made by, or on behalf of a competent authority under that international agreement (eg, for New Zealand, the Commissioner of Inland Revenue or an authorised representative of the Commissioner of Inland Revenue);
- be in accordance with an international agreement (eg, the ‘New Zealand Agreement’ in Schedule 4 of the *International Tax Agreement Act 1953*);
- be made in the approved form;
- specify the amount owed by the foreign country debtor, in Australian dollars (A\$), calculated on the day that the claim was made; and
- be accompanied by a declaration by the foreign competent authority that states that the claim is in accordance with the international agreement that the foreign revenue claim is made under.

[Schedule 1, item 8; section 263-15 in Schedule 1 to the TAA 1953; item 1, subsection 995-1(1) in the ITAA 1997]

Example 1.1

Karen is a taxpayer who is resident in Australia, but has an outstanding tax-related debt in New Zealand. Karen's tax debt is NZ\$100,000. The New Zealand Commissioner for Inland Revenue (NZ Tax Commissioner) wants to recover Karen's debt by making a request to the Australian Commissioner to recover that debt.

The NZ Tax Commissioner would have to convert the New Zealand debt into an A\$ amount, in accordance with the exchange rate on the day that the request is made to Australia.

Between the time that the request was made and when the amount (in A\$) is remitted to the NZ Tax Commissioner, the exchange rate may have changed. However, notwithstanding any appreciation or depreciation of the exchange rate, the amount requested in the foreign revenue claim (in A\$) is the amount that the Commissioner is required to recover.

The NZ Tax Commissioner may refund any excess amounts to Karen if after conversion there is a windfall.

1.23 The foreign revenue claim can be for the conservancy of an amount, the collection of an amount or both the conservancy and collection of an amount.

1.24 Currently under Australian law, conservancy remedies will generally only be granted when they are ancillary to a claim for principal relief, such as debt recovery proceedings. Accordingly, it is expected that most claims for conservancy will be of two types:

- a claim for conservancy accompanied by a claim for recovery of an amount that is currently enforceable in a requesting country; and
- a claim for conservancy accompanied by a claim for recovery of an amount that is not currently, but will become enforceable in the requesting country.

Registration of the request

1.25 If the Commissioner is satisfied that the foreign revenue claim includes all things that are required under this Bill to make it a legitimate foreign revenue claim, the Commissioner *must* register the claim on a Foreign Revenue Claims Register (the Register) within 90 days of receiving the claim. [Schedule 1, item 8; sections 263-20 and 263-25 in Schedule 1 to the TAA 1953]

1.26 Both foreign revenue claims for conservancy and for collection are to be registered on the Register. However, if a foreign country debtor's debt has already been registered for conservancy purposes, a later foreign revenue claim for the collection and recovery of that debt will not double the foreign country debtor's liability. The Register, in this situation, will only record one debt owned by the foreign country debtor.

1.27 The Register will only record liabilities. Any payments or credits the Commissioner receives in relation to a debt that is registered on the Register will not reduce the amount of the debt on the Register. Credits will instead be reflected on the foreign country debtor's running balance account.

1.28 The Register is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003* because it is not of a legislative nature. This is stated in the law to assist readers. [*Schedule 1, item 8; section 263-20 in Schedule 1 to the TAA 1953*]

Consequences of registration

1.29 When the Commissioner registers a foreign revenue claim on the Register, the foreign country debtor's debt becomes a pecuniary liability to the Commonwealth. As the liability arises directly under a taxation law (the TAA 1953), the debt is a tax-related liability under section 255-1 of Schedule 1 to the TAA 1953. [*Schedule 1, items 4 and 8; subsections 250-10(2) and 263-30(1) in Schedule 1 to the TAA 1953*]

1.30 This has the effect that the Commissioner's general recovery rules are triggered and the Commissioner can use any of his recovery powers to collect the liability.

1.31 If the foreign revenue claim is for conservancy only, the Commissioner can take steps to reduce the risk that assets will be dissipated or removed from Australia before the debt becomes due and payable. However, the Commissioner will only be able to take those conservancy measures that are available under Australian laws (eg, to seek a *Mareva* injunction). Australia presently has no special conservancy rules for tax debts.

1.32 As the foreign country debtor's debt is an amount due to the Commonwealth directly under a taxation law, the debt is also a primary tax debt under Part II B of the TAA 1953. This means that the Commissioner can allocate that debt to a running balance account.

Notification of the foreign country debtor

1.33 The Commissioner notifies the foreign country debtor of the particulars of liability if the foreign revenue claim is for the collection of an amount. [*Schedule 1, item 8; subsection 263-30(2) in Schedule 1 to the TAA 1953*]

1.34 After the Commissioner enters the particulars of a foreign revenue claim on the Register, the Commissioner can serve the particulars of the claim on the foreign country debtor. If the Commissioner has accepted the claim for the purposes of collection (ie, not conservancy), the Commissioner would normally serve these particulars promptly.

1.35 The Commissioner may also notify the foreign country debtor of foreign revenue claims for conservancy only. The fact that a notice has to be served for the debt to become due and payable will not detract from the Commissioner's ability to apply for a *Mareva* injunction.

1.36 However if the Commissioner has accepted the foreign revenue claim for conservancy purposes but the debt is not yet enforceable in the requesting country, the Commissioner is not required to serve notice to the foreign country debtor. Indeed, the standard *Assistance in collection* Article will not permit Australia to collect a debt that is not enforceable in the requesting foreign state or territory.

1.37 The normal rules of giving (or serving) notice of liability by the Australian Taxation Office will apply. If the foreign country debtor is absent from Australia and does not have an agent in Australia, the Commissioner can serve the notice of liability to an address in a foreign state or territory. [*Schedule 1, item 5; section 255-40 in Schedule 1 to the TAA 1953*]

1.38 The amount of the foreign revenue claim becomes due and payable 30 days after the particulars of the claim have been received by the foreign country debtor or on a later date as specified in the notice. [*Schedule 1, item 8; subsection 263-30(2) in Schedule 1 to the TAA 1953*]

1.39 If the taxpayer fails to pay the amount after it becomes due and payable, 'general interest charge' will apply on any unpaid amounts. [*Schedule 1, items 2 and 8; subsection 263-30(3) in Schedule 1 to the TAA 1953 and subsection 8AAB(5) in the TAA 1953*]

1.40 Although the amount does not become due and payable until a period after notice of the particulars have been received by the foreign country debtor, the debt becomes a pecuniary liability to the Commonwealth when the claim is registered. The Commissioner can, for example, invoke the recovery powers about collection from third parties under Subdivision 260-A in Schedule 1 to the TAA 1953, unless the

relevant international agreement provides that the claim cannot be collected.

Amending the Register

1.41 If after registration, the Commissioner concludes that a foreign revenue claim that is on the Register should not be on the Register, the Commissioner can remove that foreign country debtor from the Register provided that the Commissioner first obtains the agreement of the foreign competent authority. [*Schedule 1, item 8; paragraph 263-35(2)(a) in Schedule 1 to the TAA 1953*]

Example 1.2

Vivian has assets in Australia and an unpaid tax debt in New Zealand. The NZ Tax Commissioner makes a foreign revenue claim, requesting the Commissioner take steps to recover an amount of A\$50,000 from Vivian. The foreign revenue claim is in the correct form and is a valid claim.

The declaration attached to the foreign revenue claim, also in the correct form, identifies Vivian as the taxpayer who has the outstanding tax debt in New Zealand.

As both the request and the declaration are in the correct form, the Commissioner registers the particulars of the NZ Tax Commissioner's claim against Vivian on the Register.

However, after some investigation, it is later discovered that the named tax debt in New Zealand is the result of identity theft.

In a situation like this, after informing the foreign competent authority and obtaining their agreement, the Commissioner will be allowed to remove Vivian's particulars from the Register. Vivian will be taken to have never been liable to pay that amount.

1.42 If after registration the Commissioner receives advice from the requesting foreign competent authority that the amount to be recovered from the foreign country debtor should be reduced, the Commissioner can amend the Register to reflect the reduction. [*Schedule 1, item 8; paragraph 263-35(2)(b) in Schedule 1 to the TAA 1953*]

1.43 If there is a minor administrative error in relation to the register (eg, name spelt incorrectly), the Commissioner may correct that error so long as the Commissioner first obtains the agreement of the foreign competent authority. [*Schedule 1, item 8; subsection 263-35(1) in Schedule 1 to the TAA 1953*]

1.44 The foreign country debtor, after receiving the details of a foreign revenue claim, can apply to the Commissioner to have their details removed from the Register. If the Commissioner is satisfied with the foreign country debtor's explanation, the Commissioner may remove the foreign country debtor from the Register, *without* obtaining the agreement of the foreign competent authority. *[Schedule 1, item 8; subsections 263-35(3) and (4) in Schedule 1 to the TAA 1953]*

1.45 If the Commissioner decides to remove the details of a foreign country debtor from the Register as a result of an application by the foreign country debtor or because the foreign country debtor should never have been registered, it will be as if the foreign country debtor was never required to pay that amount, including any amounts of general interest charge that may have accrued, in relation to a foreign revenue claim. *[Schedule 1, item 8; subsections 263-35(4) and (5) in Schedule 1 to the TAA 1953]*

1.46 If the Commissioner receives advice from the foreign competent authority that the amount to be recovered from the foreign country debtor's debt should be reduced, it will be as if the foreign country debtor was never required to have paid that extra amount. *[Schedule 1, item 8; paragraph 263-35(2)(b) and subsection 263-35(6) in Schedule 1 to the TAA 1953]*

1.47 If all or a portion of a foreign revenue claim is paid by a foreign country debtor and the Commissioner subsequently either removes that foreign country debtor from the Register or reduces an amount included on the Register, such amount as was overpaid by the foreign country debtor will be subject to interest on any overpayments. *[Schedule 1, items 9 and 10; subsection 3(1) and section 3C in the Taxation (Interest on Overpayments and Early Payments) Act 1983]*

Evidence

1.48 In proceedings for recovery of a foreign revenue claim, the Commissioner may produce an evidentiary certificate. The evidentiary certificate may state any of the following (in addition to any of the matters already permitted to be set out in an evidentiary certificate):

- that a foreign revenue claim has been made by a foreign competent authority;
- that the foreign revenue claim has complied with all the requirements that it must meet under the relevant international agreement that the foreign revenue claim was made under;
- that the claim had been registered;

- that, as at the date of the certificate, whether the Commissioner has received advice from a foreign competent authority as to the reduction or discharge of the debt; and
- the particulars of any reduction or discharge in the amount of the debt, if the Commissioner did receive advice from a foreign competent authority.

1.49 An evidentiary certificate will be prima facie evidence of the matter in a proceeding to recover an amount or in proceedings with respect to conservancy. This means that once the Commissioner produces a valid evidentiary certificate, the onus is on the foreign country debtor to prove that the contents of the evidentiary certificate are incorrect. *[Schedule 1, items 6 and 7; section 255-45 in Schedule 1 to the TAA 1953]*

What if the foreign country debtor disputes their liability?

1.50 The *Assistance in collection* Article in the international agreement will normally provide that proceedings about the existence, validity or amount of a revenue claim of a contracting state shall not be brought before the courts or administrative bodies of the other contracting state (eg, see Article 27(6) of the New Zealand Agreement). Consequently, if the foreign country debtor considers that they have a legitimate legal argument that they are not required to pay the foreign tax debt, the matter must be litigated and resolved in the country in which the tax debt arose, under the laws of that country. Those arguments cannot be raised in proceedings in Australia for recovery of a registered foreign revenue claim.

Remittance of collected amounts

1.51 If the Commissioner recovers any of the amounts from a foreign country debtor with respect to a foreign revenue claim, the Commissioner must pay that amount to the relevant foreign competent authority or another entity on behalf of that competent authority.

1.52 The Commissioner may also pay any amounts collected from the foreign country debtor in relation to general interest charges in accordance with any arrangements the Commissioner has with the relevant foreign competent authority. *[Schedule 1, item 8; section 263-40 in Schedule 1 to the TAA 1953]*

When Australia makes a request to a foreign country to collect taxes on Australia's behalf

1.53 The reciprocal nature of Article 27 of the OECD Model means that while the Commissioner can be required to collect taxes on behalf of

an overseas entity, foreign competent authorities can also be required to collect Australian tax-related debts on behalf of Australia.

1.54 The legal and administrative frameworks that the overseas entities use to reflect their obligations will be up to those overseas entities, however the foreign competent authority will be required to remit to the Commissioner any monies collected pursuant to an *Assistance in collection* request.

1.55 Although the Commissioner may be required, under the law of an overseas entity, to make the *Assistance in collection* request in a foreign currency, the amount remitted to the Commissioner from the foreign competent authority may be in A\$.

1.56 If an amount is remitted to the Commissioner in a foreign currency, as a result of the Commissioner making an *Assistance in collection* request, before that amount can be allocated to the foreign country debtor's running balance account as a 'credit', the amount must be converted into an A\$ amount. [*Schedule 1, item 3; section 8AAZA (definition of 'credit') in the TAA 1953*]

1.57 After conversion to an A\$ amount, the whole of the A\$ amount may be allocated as a credit to the foreign country debtor's running balance account in order to reduce the outstanding debt in relation to which the *Assistance in collection* request was first made.

1.58 As a result of appreciation or depreciation in the exchange rate in the intervening period between when the *Assistance in collection* request was made and the amount was remitted, the credit may or may not completely offset the initial debt.

1.59 The normal rules in Part II B of the TAA 1953 about payments and credits will apply.

Application and transitional provisions

1.60 These amendments apply to claims for assistance in collection of foreign debts made after the day on which this Bill receives Royal Assent, provided that the relevant international agreement under which this request has been made, has entered into force. [*Schedule 1, item 11*]

Chapter 2

Exchange of information

Outline of chapter

2.1 Schedule 2 to this Bill amends the *International Tax Agreements Act 1953* and the *Taxation Administration Act 1953* (TAA 1953). This chapter explains the legislative framework giving effect to Australia's current and future treaty obligations to exchange information on tax matters with other jurisdictions.

Context of amendments

2.2 Exchange of information generally operates to allow the tax administration of one country to request taxpayer information from the treaty partner for the purposes of carrying out the tax treaty or for administering the country's domestic tax laws.

2.3 Australia's previous treaty practice has been to exchange information only in relation to the taxes covered by a treaty (generally income tax including petroleum resource rent tax, fringe benefits tax and any identical or substantially similar taxes imposed under the federal law of Australia).

2.4 Consistent with the Organisation for Economic Co-operation and Development (*OECD Model Tax Convention on Income and on Capital* (OECD Model), the New Zealand Protocol provides for the exchange of information on an expanded range of taxes.

2.5 Therefore, this Bill provides a statutory legal basis for giving effect to Australia's obligations to gather and exchange tax information under future international agreements. In addition, this Bill codifies current practice in relation to existing international agreements.

Summary of new law

2.6 Schedule 2 to this Bill provides the legislative framework to facilitate the gathering and exchange of tax information under an obligation in an international agreement. That legislative framework will:

- allow the Commissioner of Taxation (Commissioner) to utilise existing information gathering provisions to meet those obligations. For example, domestic information gathering powers are contained in sections 263 and 264 of the *Income Tax Assessment Act 1936* (ITAA 1936);
- ensure that the exchange of information in accordance with the terms of an international agreement will not constitute a breach of a secrecy provision of a taxation law prohibiting the Commissioner or an officer from making a record of, or disclosing, information; and
- codify the Commissioner's ability to gather and exchange information regardless of whether such information is required by the Commissioner for domestic tax purposes.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
This measure facilitates exchange of information in respect of Australia's current and future tax treaties, tax information exchange agreements, and other international agreements dealing with tax matters by enabling the Commissioner to exercise existing information gathering powers for the purpose of meeting an obligation under an international agreement.	No express equivalent, although the Commissioner may rely on existing legislative measures dealing with the collection of information and evidence to meet an obligation under an international agreement.
The new law provides a single exception, in place of and in addition to existing provisions, which ensures that the disclosure of information under an international obligation will not be a breach of a secrecy provision.	Various provisions, for example sections 3C and 355-5 of the TAA 1953 which provide exceptions to the secrecy provisions allowing Australia to meet its obligations under the Timor Sea Treaty.

Detailed explanation of new law

Use of information gathering provisions

2.7 The Commissioner or an authorised representative may use the information gathering provisions contained in the various laws administered by the Commissioner for the purpose of gathering information to be exchanged pursuant to an international agreement. *[Schedule 2, subsection 23(1)]*

2.8 The law is not intended to create a separate information gathering power in itself. Rather, it provides an express link to existing information gathering provisions to allow the Commissioner to exchange information to the widest possible extent in accordance with an obligation the Commissioner has pursuant to an international agreement.

Example 2.1

The Commissioner, in accordance with an international agreement, receives a request for information and documents concerning a property developer's claim for input tax credits on the purchase of commercial residential property. Where the Commissioner is not in possession of the requested material (eg, a tax invoice recording the transaction), it may be gathered through the use of the Commissioner's powers contained in sections 353-10 and/or 353-15 of the TAA 1953.

Example 2.2

The Commissioner, in accordance with an international agreement, receives a request for information and documents concerning a tax which is levied by another jurisdiction but has no Australian equivalent. In these circumstances, it may be gathered through the use of any of the information gathering provisions at the Commissioner's disposal.

Gathering and disclosing information is not a breach of taxation secrecy law

2.9 To date, exchange of information in Australia's international agreements generally extended to income tax only. Secrecy provisions preventing the disclosure of information relating to income tax are contained in section 16 of the ITAA 1936.

2.10 Section 16 of the ITAA 1936 is overridden for the purpose of *Exchange of information* Articles in Australia's international agreements by virtue of section 4 of the *International Tax Agreements Act 1953*. Section 4 incorporates the Assessment Acts (*Income Tax Assessment*

Act 1936 (ITAA 1936) and *Income Tax Assessment Act 1997* (ITAA 1997) into the *International Tax Agreements Act 1953* and requires the latter Act to override the former Acts to the extent of any inconsistency between the two. As a result, treaties contained in the *International Tax Agreements Act 1953* override section 16 of the ITAA 1936 and information can be exchanged in relation to income tax.

2.11 The incorporation of the ITAA 1936 and the ITAA 1997 into the *International Tax Agreements Act 1953* ensures that the disclosure of information, when discharged by the Commissioner or a duly authorised officer thereof, in accordance with the international agreement is not a breach of the secrecy provisions in the ITAA 1936.

2.12 Similar secrecy provisions preventing the disclosure of information exist in the various other tax Acts administered by the Commissioner. For example:

- section 45 of the *Superannuation Guarantee (Administration) Act 1992*; and
- sections 3C and 355-5 of the TAA 1953.

2.13 In addition, subsection 23(2) of this Bill ensures that the gathering and disclosure of information by a duly authorised officer of the Commissioner, falls within the performance of that officer's duties as an officer. In these circumstances, there is no breach of a secrecy provision of a taxation law covered by an international agreement. [*Schedule 2, subsection 23(2)*]

A domestic tax interest is not required

2.14 Section 23 codifies expressly the Commissioner's power to gather and exchange information regardless of whether or not there is a domestic interest in the information sought. [*Schedule 2, subsection 23(3)*]

2.15 This is consistent with OECD standards on the exchange of information.

2.16 In most instances, a domestic tax interest will also exist because the provision of information to a foreign revenue authority may result in information relevant to the taxpayer's Australian tax position (even if it merely confirms the accuracy of the assessment). There are cases, however, where this is not the case and the exchange is purely for the purpose of the other revenue authority.

The meaning of an ‘information gathering provision’

2.17 An information gathering provision encompasses the various powers to access and powers to obtain information and evidence conferred under Acts administered by the Commissioner. For example, the powers available in respect of indirect tax matters contained in sections 353-10 and 353-15 of the TAA 1953 are information gathering provisions for these purposes. *[Schedule 2, subsection 23(4)]*

The meaning of an ‘international agreement’

2.18 For the purposes of this provision an international agreement encompasses:

- an agreement given the force of law under the *International Tax Agreements Act 1953*; or
- some other agreement which allows for the exchange of information on taxation matters to which Australia and any of the following:
 - another country or a constituent part of a foreign country; or
 - an overseas territory,are a party.

[Schedule 2, subsection 23(4)]

2.19 For example, an agreement falling within the second category would be a tax information exchange agreement which is not a Schedule to the *International Tax Agreements Act 1953*.

Chapter 3

The Protocol with New Zealand

Outline of chapter

3.1 Schedule 3 amends the *International Tax Agreements Act 1953*. This chapter explains the rules that apply in the Protocol to amend the existing tax treaty with New Zealand — Agreement between the Government of Australia and the Government of New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (the Agreement).

Context of amendments

3.2 The extension of the wine equalisation tax rebate to New Zealand wine producers exporting to Australia made it desirable to amend the Agreement to cover administrative matters relating to the rebate and to other taxes generally. The Protocol achieves this by extending the scope of the exchange of information provisions to all federal taxes administered by the Commissioner of Taxation (Commissioner) and to all New Zealand taxes.

3.3 The Protocol also provides for trans-Tasman assistance in collection of taxes and includes an obligation that New Zealand will enter into negotiations to lower withholding taxes on dividends, interest and royalties, should New Zealand reduce these taxes in a future tax treaty with another country to levels below those in the existing Agreement. These amendments reflect the importance both Australia and New Zealand place on closer economic and administrative relations.

Summary of new law

- 3.4 The Protocol will:
- closely align the *Exchange of information* Article in the Agreement to the new Organisation for Economic Co-operation and Development (OECD) standard, including expanding the range of taxes in respect of which information may be exchanged to all Australian federal taxes administered by the Commissioner and all New Zealand taxes;

- insert a new Article into the Agreement providing for assistance in the collection of cross-border tax debts; and
- insert a new ‘most favoured nation’ provision into the Agreement which will ensure that Australia will have access to lower withholding taxes on dividends, interest and royalties should New Zealand reduce these taxes in a treaty with another country to levels below those in our current treaty.

Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Closely aligns Article 26 (<i>Exchange of information</i>) to the new OECD standard. The effect of the changes is to expand the range of taxes to which the Article applies and to clarify that bank secrecy laws do not limit the exchange of information.	In the case of Australia, the taxes to which the current <i>Exchange of information</i> Article apply are: <ul style="list-style-type: none"> • the income tax; • the resource rent tax (in respect of offshore projects relating to exploration for or exploitation of petroleum resources); • the fringe benefits tax; and • any identical or substantially similar taxes imposed under the federal law of Australia.
Inserts a new Article 27 (<i>Assistance in collection of taxes</i>) into the Agreement which authorises and requires Australia and New Zealand to provide assistance to each other in the collection of cross-border tax debts.	No equivalent.
Inserts a new ‘most favoured nation’ provision into the Agreement which will ensure Australia will have access to lower withholding taxes on dividends, interest and royalties should New Zealand reduce these taxes in a treaty with another country to levels below those in our current treaty.	No equivalent.

Detailed explanation of new law

Article 1 of the Protocol

Amends Article 2 of the Agreement — Taxes covered

3.5 Article 1 of the Protocol expands the range of taxes covered for purposes of *Exchange of information* and *Assistance in collection* Articles by inserting a new paragraph 3 into Article 2 (*Taxes covered*) of the Agreement.

3.6 The new paragraph specifies the taxes to which Article 26 (*Exchange of information*) and Article 27 (*Assistance in collection of taxes*) will apply. The taxes to which these Articles apply are, in the case of Australia, all federal taxes administered by the Commissioner, and in the case of New Zealand, all taxes. [*Article 2, new paragraph 3 of the Agreement*]

Article 2 of the Protocol

Substitutes new Article 26 of the Agreement — Exchange of information

3.7 The Protocol will substitute a new Article 26 (*Exchange of information*) into the Agreement that closely aligns the information exchange provisions to the new OECD standard. The new Article 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 Commissioner is obliged to obtain information for New Zealand tax authorities regardless of whether Australia has a domestic tax interest in the information sought.
- Bank secrecy laws do not limit the exchange of information.

Foreseeably relevant information

3.8 New 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 (*Persons covered*) of the Agreement, and may therefore cover persons who are not residents of Australia or New Zealand.

3.9 The standard of foreseeable relevance is intended to ensure that information may be exchanged to the widest possible extent. However, competent authorities 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.

[New Article 26, paragraph 1 of the Agreement]

3.10 The change in wording to a 'foreseeably relevant' standard reflects the wording in Article 26 of the 2005 *OECD Model Tax Convention on Income and on Capital* (OECD Model) and no difference in effect is intended.

Taxes to which this new Article applies

3.11 Under the former Article, the information that could be requested and exchanged between the two countries was limited to information in relation to taxes specified in paragraphs 1 and 2 of Article 2 (*Taxes covered*) of the Agreement. In the case of Australia these taxes are:

- the income tax;
- the resource rent tax (in respect of offshore projects relating to exploration for or exploitation of petroleum resources);
- the fringe benefits tax; and
- any identical or substantially similar taxes imposed under the federal law of Australia; and

in the case of New Zealand, taxes covered by paragraphs 1 and 2 are:

- the income tax;
- the fringe benefits tax; and
- any identical or substantially similar taxes imposed under the law of New Zealand.

3.12 Under the new provision, the range of taxes for which information may be requested and exchanged has been expanded. In the case of Australia, the Australian competent authority¹ can now request and obtain information concerning all federal taxes administered by the Commissioner from their counterpart in New Zealand. This means, for

¹ 'Competent authority' means in the case of Australia, the Commissioner or an authorised representative of that Commissioner. In the case of New Zealand, the 'competent authority' is the Commissioner of Inland Revenue or an authorised representative of that Commissioner.

example, that information concerning indirect taxes (ie, the goods and services tax) may be requested and obtained from New Zealand.

3.13 Similarly, in the case of New Zealand, the New Zealand competent authority can now request and obtain information concerning taxes of every kind and description imposed under its tax laws, from the Australian competent authority.

Use of exchanged information

3.14 The purposes for which the exchanged information may be used and the persons to whom it may be disclosed, are restricted consistent with the former Article and the approach taken in the OECD Model. 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. *[New Article 26, paragraph 2 of the Agreement]*

No domestic tax interest required

3.15 When requested, a country is required to obtain information 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. *[New Article 26, paragraph 4 of the Agreement]*

Limitations

3.16 The country requested to provide information under this Article is not obliged to provide such information where:

- it would be required to carry out administrative procedures incompatible with its own law or the administrative practice, or those of the country requesting the information; or
- such information is not obtainable within the limitations imposed under its domestic law or in the normal course of administration by the competent authority in that country or the country requesting the information. Australia is not obliged, for example, to use police powers to obtain information requested by New Zealand, although information gathered in that way which is in the possession of the Commissioner may be exchanged.

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

3.17 Also, in no case is the country receiving the request obliged to supply information under this Article that would:

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

[New Article 26, subparagraph 3(c) of the Agreement]

Information held by banks, other financial institutions, nominees etc

3.18 This new paragraph ensures that paragraph 3 of this Article cannot be used to prevent the exchange of information held by banks, other financial institutions, nominees etc. The addition of this paragraph should not be interpreted as suggesting the previous treaty did not cover the exchange of such information. Inclusion of paragraph 5 merely clarifies Australia's current treaty practice, and reflects recent changes to Article 26 (*Exchange of information*) of the OECD Model. *[New Article 26, paragraph 5 of the Agreement]*

Article 3 of the Protocol

3.19 The Protocol inserts a new Article 27 (*Assistance in collection of taxes*) in the Agreement. As a consequence, Article 3 is required to renumber existing Articles 27 (*Diplomatic agents and consular officers*), 28 (*Entry into force*) and 29 (*Termination*) as Articles 28, 29 and 30 respectively.

Article 4 of the Protocol

Inserts new Article 27 of the Agreement — Assistance in collection of taxes

Assistance in collection of revenue claims

3.20 The new Article 27 (*Assistance in collection of taxes*) authorises and requires Australia and New Zealand 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 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 New Zealand. The form of the assistance is set out in paragraphs 3 and 4 of Article 27 (*Assistance in collection of taxes*). *[New Article 27, paragraph 1 of the Agreement]*

3.21 The term *revenue claim* is defined for the purposes of this Article to mean an amount owed in respect of taxes referred to in Article 2 (*Taxes covered*) of the Agreement (as amended by Article 1 of the Protocol). A revenue claim may cover any New Zealand tax, or any Australian federal tax administered by the Commissioner, but only insofar as the imposition of such taxes is not contrary to this Agreement or any other instrument in force between Australia and New Zealand. It also applies to interest, administrative penalties and costs of collection or conservancy related to such amount. [*New Article 27, paragraph 2 of the Agreement*]

3.22 This Article will apply from the date agreed in an exchange of notes through the diplomatic channel. [*Article 6, paragraph 3 of the Protocol*]

3.23 Consistent with the intention noted in the OECD Model Commentary on the equivalent Article, requests for assistance in collection of revenue claims that arise before Article 4 of the Protocol enters into effect may be accepted, as long as such assistance is provided after the treaty has entered into force and the provisions of this Article have become effective.

Enforceable revenue claims

3.24 Assistance in collection will only be provided by Australia in relation to a revenue claim that is enforceable in New Zealand. Similarly, New Zealand 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.

3.25 Paragraph 3 of this Article regulates the way in which the revenue claim of the requesting country is to be collected by the requested country. Other than in relation to time limits and priority (see paragraphs 3.29 to 3.32), 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. [*New Article 27, paragraph 3 of the Agreement*]

3.26 Where a request from New Zealand concerns a tax that does not exist in Australia, Australia will follow the procedure applicable to a claim for a similar Australian tax or any other appropriate procedure if no similar tax exists.

Measures of conservancy

3.27 Paragraph 4 of this Article enables Australia or New Zealand to 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.

3.28 If requested to do so by New Zealand, 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 their associates from dealing with certain assets. *[New Article 27, paragraph 4 of the Agreement]*

Time limits

3.29 Paragraph 5 of this Article provides that 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. *[New Article 27, paragraph 5 of the Agreement]*

3.30 This paragraph follows the OECD Model provision, but has no practical effect at this time, since neither Australia nor New Zealand currently imposes a time limit on the collection of a revenue claim.

Priority of claims

3.31 Paragraph 5 of this Article also provides that the rules of Australia and New Zealand 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.

3.32 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. *[New Article 27, paragraph 5 of the Agreement]*

Restriction on judicial and administrative proceedings

3.33 Paragraph 6 of this Article ensures that 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 a New Zealand revenue claim.

[New Article 27, paragraph 6 of the Agreement]

Change in circumstances

3.34 Paragraph 7 of this Article deals with the situation where the conditions in paragraph 3 or 4 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. An example of such a situation would be where a request for assistance in collection has been made by New Zealand, but the revenue claim ceases to be enforceable in New Zealand prior to its collection by Australia.

3.35 Where the relevant conditions in paragraph 3 or 4 of this Article are no longer satisfied, paragraph 7 requires the competent authority of the requesting country to promptly notify the competent authority of the requested country of that fact.

3.36 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. *[New Article 27, paragraph 7 of the Agreement]*

Limitations

3.37 Paragraph 8 of this Article contains certain limitations to the obligations imposed on the country which receives a request for assistance. The requested country is permitted to refuse the request for assistance where those limitations apply.

3.38 The first limitation is that the requested country 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. *[New Article 27, subparagraph 8(a) of the Agreement]*

3.39 However, subparagraph 8(a) of this Article does not prevent Australia from applying administrative measures to collect a

New Zealand revenue claim, even though invoked solely to provide assistance in the collection of New Zealand taxes.

3.40 Subparagraph 8(b) limits the application of this Article 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. *[New Article 27, subparagraph 8(b) of the Agreement]*

3.41 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. *[New Article 27, subparagraph 8(c) of the Agreement]*

3.42 Under subparagraph 8(d) of this Article either country may 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. *[New Article 27, subparagraph 8(d) of the Agreement]*

3.43 The final limitation allows either country to refuse to provide assistance if it considers that the taxes with respect to which assistance is requested are imposed contrary to generally accepted taxation principles. *[New Article 27, subparagraph 8(e) of the Agreement]*

Article 5 of the Protocol

Inserts a most favoured nation clause in to the Agreement

3.44 This Article provides most favoured nation status to Australia vis-à-vis New Zealand. Should New Zealand reduce withholding taxes on dividends, interest and royalties in a treaty with another country to levels below the rates prescribed in the *Dividends, Interest and Royalties* Articles of this Agreement, the Government of New Zealand will inform the Government of Australia without undue delay and will commence negotiations with a view to providing the same favourable treatment to Australia. *[Article 5 of the Protocol]*

3.45 This will assist in ensuring that Australian investors will not be at a competitive disadvantage vis-à-vis investors from other treaty countries in the event that New Zealand agrees to lower withholding tax rate limits in another treaty.

Article 6 of the Protocol

Date of entry into force

3.46 This Article provides for the entry into force of the Protocol. The Protocol will enter into force on the date of last notification by diplomatic note that the domestic requirements to give the Protocol the force of law in the respective countries have been completed. The Protocol forms an integral part of the Agreement. *[Article 6, paragraphs 1 and 2 of the Protocol]*

3.47 In Australia, enactment of the legislation giving the force of law to the tax treaty, along with tabling the treaty in Parliament, are prerequisites to the exchange of diplomatic notes.

Date of application for Australian taxes

3.48 The provisions of the Protocol will have effect from the date of entry into force of the Protocol. The extension of the exchange of information provisions to a broader range of taxes under the new Article 26 (*Exchange of information*) will apply to requests for exchange of information received on or after the date of entry into force of the Protocol. However, information that may be exchanged under such requests may relate to transactions that predate the entry into force of the Protocol.

Date of application for Article 27 (Assistance in the collection of taxes)

3.49 Notwithstanding that the Protocol enters into force on the date of last notification, Article 4 of the Protocol, which inserts a new Article 27 dealing with assistance in collection of taxes, will have effect only from the date agreed in a subsequent exchange of notes through the diplomatic channel. *[Article 6, paragraph 3 of the Protocol]*

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