The implications of the Multilateral Convention and the Foreign Account Tax Compliance Act: An Australasian perspective

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Global initiatives to combat cross-border tax avoidance and evasion have focused upon ways in which revenue authorities can gather and share information to ascertain whether their residents are engaged in unacceptable tax practices. Two recent initiatives that address these issues from contrasting perspectives are the Organisation for Economic Co-operation and Development’s revitalised Multilateral Convention for Mutual Administrative Assistance in Tax Matters, and the United States Government’s controversial enactment of the Foreign Account Tax Compliance Act (FATCA). While there is an emerging literature examining each of these initiatives and their associated implications broadly, there is a dearth of analysis from an Australasian perspective. With both Australia and New Zealand recently ratifying their signing of the Multilateral Convention, and both countries negotiating an intergovernmental agreement under the FATCA, these two important “global” initiatives have implications for this part of the world.

<blockquote>Something has happened in the world of global financial institutions. Governments appear to be willing to cooperate in promoting transparency of financial information to promote tax compliance. The reporting “jinni” is out of the bottle and he is not returning.1</blockquote>

INTRODUCTION

Following the global financial crisis, the pressure from governments to collect outstanding taxes, especially from residents’ offshore bank accounts, has risen dramatically. Initiatives include further efforts by the Organisation for Economic Co-operation and Development (OECD) to encourage expansion of the Global Forum on Tax Administration while concurrently expanding the network of Tax Information Exchange Agreements (TIEAs) and bilateral double tax agreements (DTAs). A notable feature of this new emerging environment of enhanced regulation is a series of global initiatives designed to facilitate the efforts of revenue authorities to collect outstanding taxes.

This article seeks to examine the impact of two such initiatives, namely the revitalised Multilateral Convention for Mutual Administrative Assistance in Tax Matters2 from the OECD, and the controversial enactment of the Foreign Account Tax Compliance Act (FATCA) as part of the

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Hiring Incentives to Restore Employment Act (HIRE Act) in 2010 by the United States (US) Congress. In particular, it focuses on the intergovernmental agreements component of the FATCA.

The article utilises document analysis and a review of the emerging literature to assess the potential impact of these two major developments in international taxation. It is policy focused and takes a critical realist perspective with respect to both the “global” initiatives reviewed and the decisions of Australia and New Zealand (NZ) to become signatories to them. While examination of the Multilateral Convention and the FATCA from European and US perspectives is extensive, there is a dearth of analysis from an Australasian perspective. Australia, in particular, plays a major role within the OECD, and both Australia and NZ are seeking to negotiate an intergovernmental agreement with the US with regard to the FATCA.

The OECD’s initiative, while coming into effect in 1995, had failed to gather more than a handful of signatories, a factor attributable to its failure (along with its limited applicability and absence of any practical significance). The Multilateral Convention, which acts as a form of support structure underpinning numerous bilateral DTAs and TIEAs, became “globally” relevant with the amending protocol, which brought it into line with current international standards on transparency and exchange of information. As at 30 June 2014, 66 signatories/jurisdictions have signalled their commitment to the Multilateral Convention (including all of the G20 countries, China and NZ), with 37 signatories to date having ratified the Multilateral Convention.

In relation to the Multilateral Convention, Australia ratified this on 30 August 2012, with the entry in force from 1 December 2012. Hence, these are very relatively early days for Australia, so this commentary will be more in the form of predictions rather than analysis of observable events. With NZ only ratifying in November 2013, the agreement recently took effect on 1 March 2014. Given their closely shared business, environmental and geographical locations, expectations are that the potential impact will be similar, although Australia being the much larger economy, the quantum of the impact should be greater.

Estimates of the loss of tax revenue to the US resulting from offshore tax abuse stand at $US100 billion per annum. Furthermore, estimates suggest that funds managed through offshore bank accounts approximate $US7.8 trillion (over 6% of global wealth). The FATCA, as one of a series of provisions in the HIRE Act, is a US initiative to combat tax evasion by US persons holding assets in offshore bank accounts and through other offshore intermediaries. The FATCA also reflects the difficult political environment caused by the deferred prosecution by the US of Swiss-based UBS. These provisions (together with a third provision that requires additional reporting by US investors in foreign investment companies) were designed to close down loopholes and increase tax compliance generally by requiring investors to report and pay taxes on their income from US sources. However, projections suggest these provisions will raise revenue to offset the cost of tax incentives contained in the HIRE Act to encourage job creation. According to Grinberg, the FATCA represents an evolutionary step in the international tax system.

In brief, the FATCA obligates foreign financial institutions (generally offshore banks, private equity and hedge funds, and other foreign financial institutions, known as FFIs) to enter into agreements with the Internal Revenue Service (IRS), disclosing the identities of US persons who hold...
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accounts or interests in such FFIs. The failure by an FFI to comply with these rules will result in a 30% withholding tax on all (or a portion) of payments made to the FFI. This includes US-source dividends, interest, and capital gains from the sale of US shares and securities (and certain other payments that are not generally relevant to private equity or venture capital funds) by the FFI. One of the myths about the FATCA is that it is a tax; Majure and Sontag emphasise that FATCA is not a tax but a mechanism to make it easier for the IRS to audit income and assets that would remain hidden offshore.8 Thus, essentially, the FATCA was designed not so much to collect tax but rather to compel FFIs and other entities to disclose on an annual basis information about US account holders who may not be complying with US tax reporting rules. It was to apply to payments made to FFIs from 1 January 2014 with a phased application over the following next three years. The application date was pushed back six months to 1 July 2014.9

ANALYSING THE MULTILATERAL CONVENTION AND THE FATCA

Multilateral Convention

By way of background, Eccleston observed that the League of Nations advocated for what is a forerunner to the Multilateral Convention:

The international tax regime … has been designed to protect the sovereign right of nation states to make tax law. A consequence of this regime, with its network of bilateral DTAs, is that there is a need for high-level administrative cooperation in order to ensure that firms and individuals with international sources of income are not subject to either conventional double taxation or double non-taxation. Given this context, it is not surprising that informal administrative co-operation dates back the first DTAs with the League of Nations developing a draft Treaty on Mutual Administrative Assistance on Matters of Taxation in 1928.

As early as 1927, the International Chamber of Commerce dismissed the League of Nations Draft Treaty on Mutual Administrative Assistance in Tax Matters as “an extension beyond national frontiers of an organised system of fiscal inquiry” and “an organised plan of attack on the taxpayer”.10

The original OECD Multilateral Convention was open for members of the CoE and the OECD to sign in January 1988. Given the secrecy underlining the drafting process for the agreement, the scope for entry of reservations, and the limited number of signatories, it is unsurprising that the Multilateral Convention failed to make inroads into greater tax co-operation.11

With little traction over the ensuing years, as indicated by the delayed date of commencement of 1995 and a minimal number of signatories, and the rise of the G20, a major revision to the Multilateral Convention emerged. In April 2009, the G20 member nations called for action to make it easier for developing countries to secure the benefits of the new co-operative tax environment, including a multilateral approach for the exchange of information.12 The OECD and the CoE

8 Majure KT and Sontag MR, “FATCA: Myths, Mysteries and Practical Perspectives” (2012) 64(4) The Tax Executive 315 at 315. Majure and Sontag also emphasise that the FATCA applies to non-financial companies, and that payment of the 30% withholding tax will not necessarily be a solution, along with a number of other key practical matters. See also Hiring Incentives to Restore Employment Act 2010 (HR 2487), s 501 inserting new s 1471 into the IRC.
developed a Protocol amending the Multilateral Convention to bring it into line with the international standards on the exchange of information for tax purposes. Importantly, the Multilateral Convention was until then only open to members of the OECD and of the CoE but, from June 2011, it became open to all countries.

The Multilateral Convention is not overly long at 32 articles (similar in length to the OECD’s Model Tax Convention on Income and Capital but addressing much more focused issues). The agreement promotes international tax co-operation, providing for exchange of information, service of documents, joint audits, and assistance in collection of tax debts (which is not present in many of Australia or NZ’s DTAs). While seeking to achieve these aims, the Multilateral Convention simultaneously requires signatories to protect taxpayer information from misuse and respect the rights of taxpayers.

Pross and Russo, both of the OECD, have provided a comprehensive overview of the Multilateral Convention, observing that the range of taxes covered is broad (importantly it extends beyond income tax to wealth taxes such as estate and gift duty, general consumption taxes (such as GST/VAT) and excise taxes. Consequently, the Multilateral Convention’s coverage, unless reduced by reservations entered by a signatory, will extend beyond that of DTAs/TIEAs. Pross and Russo then considered the forms of assistance covered and in relation to matters of cost, recognising that on a bilateral basis the competent authorities (the co-ordinating bodies within each signatory party) determine the basis for applying the sharing of costs, with a procedure provided in the agreement for more costly cases.

Specific benefits from being a signatory to the Multilateral Convention include the following:

- it provides a single umbrella for multi-party co-operation;
- it covers “all” taxes including indirect taxes, plus assistance in recovery of taxes;
- it can be used for multilateral simultaneous tax examinations covering both direct and indirect taxes;
- it can serve as an umbrella for multilateral exchange of information (such as for Joint International Tax Shelter Information Centre (JITSIC)-type initiatives);
- it can be used for regional co-operation, for example, an industry-wide exchange, simultaneous tax examinations, or joint audits;
- with VAT/GST fraud and avoidance schemes becoming increasingly global, and DTAs generally not covering exchange of information for VAT/GST purposes, the Multilateral Convention can be used to combat international VAT/GST evasion and avoidance; and
- it is a flexible instrument, for example, by allowing for later withdrawal of reservations.

However, an agreement is only as good as the extent to which it limitations do not apply. The limitations in the Multilateral Convention are extensive but these limitations are subject to exceptions (that is, a domestic tax interest requirement or bank secrecy cannot be a valid domestic law limitation to the obligation to provide assistance under the Multilateral Convention). Information gathered must remain confidential and used only in accordance with the purposes for which it was provided and/or as provided for in the Multilateral Convention. There is also the potential for co-operation to occur on more than a bilateral basis when information may of benefit to a third party. Reservations

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14 OECD Multilateral Convention, n 2, Arts 21-22.
16 Pross and Russo, n 15 at 363.
17 This list is based on a presentation given by Martine Milliet-Einbinder about the Multilateral Convention to the ATAF EOI Technical Conference (Kampala, Uganda, 2012).
18 See Pross and Russo, n 15 at 363-365.
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are limited to specific issues, and if a jurisdiction wishes to make further reservations then it should not ratify (or it probably should not have been a signatory).

Over the last few years, it is clear that with taxpayers operating on a global basis, tax authorities have looked to move from bilateral to multilateral forms of co-operation, and from exchange of information on request to other closer forms of co-operation, such as the spontaneous exchange of information. The Multilateral Convention aims to be both effective and practical in assisting revenue authorities in this regard. Not surprisingly, the number of signatories is increasing as more governments seek to increase their share of "global" tax revenues. In June 2013, the G20 endorsed the Multilateral Convention as the basis for the OECD's desired standard of automatic exchange of information.  

In terms of becoming a signatory, Art 28 of the Model Convention specifies that if a country is interested in becoming a party it must first request an invitation. The existing signatories to the Multilateral Convention then make a decision by consensus as to whether they will invite that country to become a signatory. Assuming a positive response, the Multilateral Convention will then enter into force after signature, ratification, deposit of the instrument of ratification and notification of any reservations by that country.

A co-ordinating body, comprising representatives of the competent authorities of signatory countries, monitors the implementation and development of the Multilateral Convention, under the guidance of the OECD. This co-ordinating body can recommend actions expected to advance the general aims of the Multilateral Convention. For instance, the co-ordinating body acts as a forum for the study of new methods and procedures to increase international co-operation in tax matters. It may also recommend revisions or amendments to the Multilateral Convention. Importantly, countries that have signed but not yet ratified, accepted or approved the Multilateral Convention are entitled to be represented at the meetings of the co-ordinating body in the capacity of observers (similar to potential members of the OECD).

An important provision from a taxpayer’s perspective is Art 21 of the Model Convention (as amended by the Protocol). This Article provides for protection of persons and sets limits to the obligation to provide assistance, and specifies that nothing in the Multilateral Convention is to affect the rights and safeguards that national laws have secured to persons. Furthermore, it sets out these safeguards and limitations to the obligation to supply information and provide administrative assistance. Nevertheless, its multilateral nature permits sharing of taxpayers’ information with a wider group of countries than under a bilateral agreement such as a DTA.

While this all suggests that the Multilateral Convention is largely a positive development and offers many benefits, signatories (and taxpayers) need to be aware of various features. First, upon ratification, a signatory may be the subject of request for information from any one of the other signatories, thereby adding additional costs and the need for potentially extensive resources to fulfil those requests. Secondly, a number of signatories may have entered reservations or their domestic law may restrict the effectiveness of an information request. Thirdly, in the situation where a jurisdiction has a TIEA with a signatory, they will need to consider the relative scope and effectiveness of the method by which they seek to obtain information. Finally, signatories need to consider whether the Multilateral Convention’s broader scope for information than a DTA is sufficient, or whether a DTA should be entered into.

Looking at the provision for exchange of information under the Multilateral Convention, these are more extensive than a typical TIEA, where exchange of information only upon request (within the scope of the agreement) is permitted. The Multilateral Agreement provides for exchange of information on request and spontaneous exchanges.

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19 OECD, A Step Change in Tax Transparency: OECD Report for the G8 Summit (2013). The G8 comprises Canada, France, Germany, Italy, Japan, Russia, the UK and the US.
information in several formats, including upon request, automatically and spontaneously. It also provides for assistance in the recovery of tax. Importantly, the Multilateral Convention extends beyond the request for information to combat evasion and avoidance, but for the provision of information where a signatory is seeking confirmation of particular details.

**Australia and New Zealand**

On signing and ratifying the agreement, Australia gained 12 new treaty partners as of August 2012, and NZ gained 14 new treaty partners from November 2013. Exchange of information and related agreements have seen the flow of funds from Australia to jurisdictions such as Jersey, Liechtenstein, and Switzerland reduce dramatically over the last few years. Importantly, the Multilateral Convention is not a substitute for DTAs because its coverage is more restricted (despite there being a wider variety of taxes included, such as capital gains and consumption taxes) in that information exchange, assistance in the recovery of debts and servicing of documents are the focus of the Multilateral Convention. On the other hand, DTAs that are based on the OECD Model Convention, in addition to exchange of information (Art 26), provide specific mechanisms for avoiding double taxation of income (Arts 23A-23B) in respect of various forms of income, provide a mechanism to determine the share of taxation on the income of a taxpayer, as well as for providing assistance in the collection of taxes (Art 27).

Australia is a major player internationally with respect to relationship it has with other jurisdictions, highlighted by Australia's role as Chair of the Global Forum on Transparency and Exchange of Information for Tax Purposes; the OECD Tax Crime Forum; and Vice Chair of the OECD’s Forum on Tax Administration.

Australia signed the Multilateral Convention in November 2011, ratifying it in August 2012, with the agreement taking effect with regard to Australia from 1 January 2013. Assistant Treasurer David Bradbury emphasised that this was a further sign of Australia’s commitment to international cooperation, although it also reflects a G20 recommendation for all of its members to sign the Multilateral Convention. Ratifying the agreement, according to the Australian Treasury, would have an “ongoing unquantifiable but small increase in revenue”. This would suggest that the Multilateral Convention in itself would not be a significant source of additional revenue for the Australian Government.

The report recommending that the Australian Federal Parliament ratify signing the agreement, stated that use of the Multilateral Convention would enhance the Commissioner of Taxation’s ability to seek assistance over a broader range of taxes beyond that of income tax under DTAs and TIEAs. Furthermore, this would extend to a more extensive range of countries, including some with which Australia does not have a DTA or TIEA. Adoption would not require any specific legislation. The report includes an interesting comment comparing the Multilateral Convention to TIEAs:

22 See OECD and Council of Europe, Status of the Convention on Mutual Administrative Assistance in Tax Matters and Amending Protocol (2014). As of 17 July 2014, 67 jurisdictions had signed the Multilateral Agreement, plus another 15 were signatories by extension (total 82), with 56 of these jurisdictions having ratified or being bound by the Multilateral Agreement (68%).

23 See Quigley B, Tax Administration in a Global Environment, Presented to the ICAA Conference (November 2012). Importantly, Switzerland signed the Multilateral Agreement on 15 October 2013, Liechtenstein on 21 November 2013, and Jersey effectively having the Multilateral Agreement apply to it from 1 July 2014 through extension by the UK.


25 Bradbury D, Australia Ratifies Multilateral Tax Cooperation Agreement, Media Release No 114 (5 October 2012). The media release refers to a date of application of 1 December 2012.


28 Thomson, n 27, p 29.
Although this Convention is open to all countries to sign, most of the countries who have signed the TIEAs are not party to this Convention. However, the exchange-of-information standards in both the TIEAs and the Convention are very similar. In practical terms, it makes very little difference which agreement is utilised. Both are used and they can operate in parallel.29

The above statement fails to recognise that the powers provided to the ATO through the Multilateral Convention, DTA and TIEA are not the same. As discussed earlier, the Multilateral Convention has the most extensive scope for exchange of information compared to a TIEA, but it cannot operate to eliminate double taxation as provided through a DTA. In the context of their review of the ATO’s investigatory powers and practices, Dirkis and Bondfield noted that this forms part of a growing evolutionary approach to expanding the Commissioner’s powers (buttressed by its expanding TIEA network and the wider Art 26 of the OECD’s Model Tax Convention on Income and on Capital).30 Nevertheless, with such a range of information sources, it will require considerable resource within the ATO to manage such a complex and resource-intensive armoury.

On 31 October 2012, the Minister of Revenue announced that NZ had signed the Multilateral Convention. One may speculate that this decision follows encouragement from Australia as a G20 member, especially Australia’s commitment of 5 October 2012 to ratify. The then Minister of Revenue Peter Dunne saw the signing of the Multilateral Convention as “one more nail in the coffin for tax evasion”.31

The Foreign Affairs, Defence and Trade Committee (FADTC) released its report on the Multilateral Convention on 9 August 2013.32 It recommended that the NZ Parliament take note of its report, highlighting that the Multilateral Convention provides a means of significantly increasing NZ’s ability to detect and prevent tax avoidance and evasion without the cost and resources that would be required for a bilateral agreement. Furthermore, the FADTC noted that, as a signatory, NZ has some mechanisms available to avoid working with particular countries should it wish to do so. NZ can oppose other countries’ entrance into the Multilateral Convention, and it can also refuse information requests (for example, on human rights grounds). The FADTC observed that there are also safeguards in the Multilateral Convention, including that a country does not have to comply with a request if it is at variance with that country’s law or if the request will lead to discrimination. In November 2013, NZ Minister of Revenue Todd McClay announced that NZ had completed all the steps of ratifying its signature to the Multilateral Convention, bringing this agreement into force on 1 March 2014, 14 months after Australia. The Minister stated that ratification “will help Inland Revenue chase down evaders by requesting information from other tax authorities”.33

One major consequence of being a partner to the agreement is the increase in jurisdictions for which each country will have information-sharing opportunities even without the existence of a DTA (and perhaps a TIEA). Australia has sent letters to those countries that have signed the Multilateral Convention, but who do not have a DTA with Australia, to determine their interest in negotiating a memorandum of understanding on the exchange of automatic data34 (but not as far as a DTA/TIEA).

29 Thomson, n 27, p 30 (emphasis added).
31 Dunne P, NZ Signs Multilateral Convention, Media Release (31 October 2012). See also OECD and CoE, n 22; McClay T, NZ Ratifies Multilateral Tax Convention, Media Release (22 November 2013).
33 McClay, n 31.
Twenty-seven jurisdictions, namely Albania, Azerbaijan, Brazil, Burkina Faso, Cameroon, Columbia, Croatia, Cyprus, El Salvador, Estonia, Faroe Islands, Gabon, Georgia, Ghana, Greenland, Guatemala, Iceland, Kazakhstan, Latvia, Lithuania, Moldova, Morocco, Nigeria, Saudi Arabia, Slovenia, Tunisia and Ukraine, all of whom are signatories to, or are intending to sign, the Multilateral Convention, are not part of either Australia or NZ’s DTA/TIEA networks. This suggests a much broader network for the revenue authorities in Australasia to call upon for administrative assistance, although it is unclear whether Australia and/or NZ will seek to enter into negotiations for a DTA with any of these jurisdictions. With most of these signatories, it is unlikely that a DTA will be sought, as most are not major trading partners with either Australia or New Zealand. A potential candidate for a DTA could be Brazil, being a member of the BRICS nations and having a fast growing economy. With the Multilateral Convention having more extensive powers and scope than a TIEA, there would appear to be no justification for seeking a TIEA with any of these jurisdictions.

**Foreign Account Tax Compliance Act**

The emerging literature on the FATCA, unsurprisingly, is US-focused, highlighting the implications for non-US financial institutions; when originally enacted, there was no indication of the intergovernmental agreement (IGA) approach. Indeed, when first enacted, there were no US Treasury Regulations to assist such institutions in ascertaining their obligations and the implications should they not comply with the FATCA. The US Treasury released proposed regulations in February 2012, accompanied by a Joint Statement from France, Germany, Italy, Spain and the UK signalling an intention to develop a compliance solution for the FATCA. The Joint Statement indicates that the policy objective of the FATCA is to achieve reporting and not to collect the 30% withholding tax from foreign financial institutions. Consequently, the US Government was open to an IGA approach to improve international tax compliance and developed a Model IGA. The main benefit of the IGA is its ability to address jurisdictional and legal problems associated with the FATCA’s extensive reach into foreign jurisdictions. The Model IGA’s intention is to keep compliance costs as low as possible for financial institutions, with the aim of working towards achieving common reporting and due diligence standards. It also eliminates the obligation of each foreign financial institution to enter into a separate agreement with the IRS in order to be compliant with the FATCA. The Model IGA also sets out a possible framework for negotiating an IGA. There are two versions of the Model IGA, namely Model 1 (reciprocal and nonreciprocal versions, which Denmark, Ireland, Mexico, Spain and

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35 Brazil, Russia, India, China and South Africa.
36 Guidance is available from the US IRS website (http://www.irs.gov), including details about the necessary forms to be filed (Form 8938).
38 US Treasury Department, Joint Statement from the United States, France, Germany, Italy, Spain and the United Kingdom regarding an Intergovernmental Approach to Improving International Tax Compliance and Implementing FATCA (2012).
39 US Treasury Department, n 38, Art 4. On 26 July 2012, a Model IGA was released by the US Treasury. A second Model IGA was released later in 2012 and is the current model for negotiating IGAs.
40 US Treasury Department, n 38, Art 6.
42 US Government, Model Intergovernmental Agreement to Improve Tax Compliance and to Implement FATCA (2012). This Model Agreement is extensive, setting out a sizeable number of definitions the timing and manner of exchange of information, the application of FATCA to financial institutions, collaboration on compliance and enforcement, a mutual commitment to continue to enhance the effectiveness of information exchange and transparency, and the process by which the IGA is ratified and how it may be terminated. There is an extensive appendix containing due diligence obligations for identifying and reporting on US reportable accounts and payments to certain non-participating financial institutions. For further details, see Berk B, Mann CD, Farah E and Weiss BM, “Treasury Releases Model Agreement for an Alternative FATCA Framework” (2012) 129(10) Banking Law Journal 923.

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the UK have signed) and the later Model 2 (which Switzerland has signed).43 Other negotiating jurisdictions thus have a choice upon which to base their negotiations for an IGA.44 Taylor et al aptly observed:

<blockquote>One critical element raised by both Model I and Model II is how foreign governments implement their side of the agreement. Will the implementing rules in the local legislation be broadly similar across jurisdictions signing up to either model? More importantly, will compliance and enforcement of the rules be broadly similar?45</blockquote>

Under an IGA, the non-US jurisdiction (referred to as a “partner jurisdiction”) may enter into a reciprocal agreement with the IRS to adopt local laws under which FFIs will identify and report information about US accounts to the partner jurisdiction tax authority. The partner jurisdiction’s government will then pass that information on to the IRS. The result is that a FFI complying with local laws in a jurisdiction with a reciprocal-type agreement will have complied with the FATCA withholding and reporting requirements. As an alternative, the partner jurisdiction can enter into a non-reciprocal agreement by which it agrees to both direct and enable FFIs to register with the IRS and report information regarding its US accounts directly to the IRS (this will not avoid the potential conflict of laws issue).46 An FFI located in a jurisdiction with this type of agreement must still enter into an FFI agreement with the IRS and comply with the FATCA regulations, except to the extent modified by the IGA. Furthermore, according to de Clermont-Tonnerre and Ruchelman:

<blockquote>A global financial institution that does business in many jurisdictions could, along with its affiliates, be subject to the FATCA statutory provisions and also several different IGAs, which may have separate rules (unless possibly each IGA has a most favored nation clause similar to that in the UK IGA). This could cause massive compliance headaches and unnecessary expense for global financial institutions, unless such institutions attempt to apply a single – most stringent – procedure that would comply with all the different IGAs in place. Anecdotal information indicates that, at least in theory, the Treasury Department has a “one size fits all” approach for IGAs. This limits negotiation to the reciprocal and the non-reciprocal versions of the Model 1 IGA and to the Model 2 IGA.47</blockquote>

Tanenbaum48 suggests that FFIs might like the Model I IGA since it does not involve entering into an agreement with the IRS and it eliminates direct reporting by FFIs to the US. On the other hand, Model 1 places much more of the cost and administrative burden on the foreign government. Furthermore, Tanenbaum observes that a key difference between the Model 1 and Model 2 IGAs is that the Model 1 IGA contemplates specific account information being given to the foreign

43 Reciprocity is optional under Model 2; this model also requires the jurisdiction’s FFIs to report directly to the IRS. Under a reciprocal IGA the US and its FATCA partner share information about each other’s tax residents who hold financial accounts in the other jurisdiction. Under the non-reciprocal version, only the US would receive the information. For a discussion of the Swiss IGA, see Parillo KA, “Switzerland and the US Sign FATCA Agreement” (2013) 69 Tax Notes International 715, which observes that the Swiss IGA deviates from aspects of the Model 2 IGA, including the absence of a commitment to work with other countries to develop a common model for automatic information exchange.

44 Deloitte provide a succinct comparison of the Model 1 IGA, Model 2 IGA and the Final FATCA Regulations; see Deloitte (US), Comparison of IGA Model Agreements to Final FATCA Regulations (2013). Deloitte’s analysis highlights some significant differences between the two versions of the Model IGA that indicates that subsequent actions based on these IGAs will differ to as degree (this is unable to be assessed at this time).


46 See further de Clermont-Tonnerre and Ruchelman, n 1 at 81-82. According to the authors, “[a] system is also under consideration for use by jurisdictions that have neither a Tax Information Exchange Agreement in place with the United States nor a comprehensive income tax treaty containing an exchange of information provision”.

47 de Clermont-Tonnerre and Ruchelman, n 1 at 82.

government with no need to obtain the account holder’s consent, whereas the Model 2 IGA requires consent to be obtained since the FFI directly reports to the IRS. Whatever Model IGA applies, the IRS will be aware of specific account holder information, with the only question being “when”. Thus, overall whether Model 1 or Model 2 is preferred overall will depend upon the country, the composition of its financial institutions, and the associated regulatory burden (and administrative costs).

On 9 May 2013, the US Treasury released five new Model IGAs, along with four accompanying annexes. The choice of model IGAs now provides for three versions of what was previously known as the Model 1 IGA: a reciprocal Model 1A Agreement where there is an existing TIEA or DTA; a non-reciprocal Model 1B Agreement where there is an existing TIEA or DTA; and a non-reciprocal Model 1B Agreement, where there is no TIEA or DTA. The Model 2 IGA now has two versions, namely a Model 2 Agreement where there is an existing TIEA or DTA and a Model 2 Agreement where there is no TIEA or DTA. In part, this new development indicates a move by the US potentially to incorporate the IGA negotiation process into its TIEA and DTA programs, an issue that has been recently discussed in the emerging literature. The updated Model IGAs are not substantially different to the earlier versions but reflect the existence of the Final Treasury Regulations. The new model Annex 2 should enable negotiations to speed up because it now accounts for the vast majority of entities.49 Further versions of the Model IGAs were released on 12 July 2013 which incorporate further developments, including the implications of the delayed start date,50 and others on 4 November 2013.

In relation to which is preferable between the Model 1 and Model 2 IGAs, Somare and Wöhrer concluded that while the information to be reported under the FATCA is the same in both models, the different procedures make the administrative burden and associated costs under Model 1 higher, encouraging some jurisdictions to go with Model 2. However, in the light of the OECD’s standard based on automatic exchange of information, it is anticipated that those jurisdictions that have not negotiated an IGA as yet will more likely seek to negotiate a Model 1 IGA.51

Prior to release of the Model IGA, the US Treasury also issued joint statements with Switzerland and Japan concerning their approach to compliance, with a gradual move away from reporting to the IRS to that of each foreign financial institution reporting to its own tax authority.52 From July 2012, the way forward became clear, namely the IGA approach. The FATCA will now take effect from 1 June 2014 with a phased in application over the next three years.

<group>Emerging literature</group>

Focusing on its technical operations, Dizdarevic provided an excellent overview of the FATCA prior to the release of the Model IGA.53 She emphasised that the FATCA has as one of its aims the raising of tax revenues for the US, primarily through assisting in detecting offshore tax evasion. It also seeks

52 See US Statement of 21 June 2012 with respect to each of Switzerland and Japan. It is important to note that the Joint Statement with Japan differs to that with Switzerland since Japan will not direct that its FFIs conclude FFI agreements with the IRS. Rather, Japan will direct and enable its FFIs to “register” with the IRS and confirm their intention to comply with official guidance issued by Japan that is consistent with the obligations of FFIs under FATCA; see Tanenbaum E, “Here They Come: FATCA Intergovernmental Agreements” (2012) 41 Tax Management International Journal 623.
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to deter future tax evasion through the steep penalty of 30% for withholding non-disclosure. This represents a departure from the traditional use of information reporting and withholding. Dizdarevic observed that the FATCA implements traditional goals of encouraging compliance in three different ways: coercing compliance through withholding; creating disincentives; and failing to consider the impact on existing treaties.54

Morse suggests that the FATCA contains a number of remarkable innovations that push existing law and practice in several ways.55 First, the FATCA broadens the scope of payments that are subject to disclosure and the 30% withholding beyond that covered in existing agreements. Secondly, its requirement for disclosure of accounts, regardless of whether they generate US source income or are held at an affiliate of a participating FFI, broadens the existing concept of source withholding. Thirdly, the FATCA does not allow FFIs to rely on documentation provided to them that asserts clients’ residences or tax ownership exist in the materials provided in connection with the account. Fourthly, the FATCA does not presume that a corporation is a taxpayer and beneficial owner.

Morse also observes that the US will require support from other jurisdictions for the FATCA to work and be enforceable; that is, it requires foreign government support.56 Other key issues remain the relative complexity of its provisions and the issue that the US does not share account holder information with other jurisdictions in the same way that it is expecting them to under the FATCA.57 Thus, there is no real surprise in the Joint Statement between the US and several jurisdictions of the IGA alternative emerging.

Cunningham observes that the FATCA had the potential to severely impact on existing US obligations towards foreign entities in jurisdictions in which the US had a DTA or TIEA. It could call into question whether the US would honour its obligations under such agreements, and give rise to double taxation, something that DTAs seek to avoid. A further concern over the IGA approach is that these agreements may vary significantly from the Model IGA, leading to multiple systems for cross-border foreign financial institutions to be aware of in relation to each partner government.58

Turning the focus to the longer-term impact of the FATCA, including the IGA component, Harvey suggests that its success may depend upon whether the US can convince other countries to adopt a similar system, or join with it in developing a multilateral FATCA system.59 Retaining the unilateral approach of FATCA is not likely to be successful; hence, some form of multilateral approach is desirable, which could bring benefits to both the US and the other nations. Harvey recommends in this regard:

<blockquote>Multi lateral action could take many forms. For example, the United States could work through the OECD to obtain a global consensus. However, such an effort could take many years (if not decades) to accomplish. One alternative is for the United States to approach other major countries individually about jointly addressing offshore accounts. Again, there are various options.60</blockquote>

54 Dizdarevic, n 54 at 2989.
55 Morse SB, "Ask for Help Uncle Sam: The Future of Global Tax Reporting" (2012) 57 Villanova Law Review 529. In another article, Morse raises the notion of employing an expressive law strategy to articulate that the norm under FATCA is one with reputation content such as "good banks tell the truth." This would include seeking other jurisdictions to adopt this norm; see Morse SB, “Tax Compliance and Norm Formation under High Penalty Regimes” (2012)44(3) Connecticut Law Review 675.
56 Morse (CLR), n 55 at 542.
57 Morse (CLR), n 55 at 546.
60 Harvey (VLR) n 59 at 495.
The IGA initiative has also been important in regard to the conflict of laws issues raised by the FATCA. Conflict of laws refers to situations where the ultimate outcome of a legal dispute depends upon which jurisdiction’s laws are to be applied, as well as the courts’ manner of resolving the conflict between those laws. In the context of the FATCA, this US initiative creates a direct conflict with the secrecy and other obligations that FFIs have with the jurisdiction in which the account is held.

In a NZ legal context, the Law Commission has commented in relation to conflict of laws, primarily within the context of private law rather than as between states:

New Zealand conflict of laws rules address the four broad issues that arise where a dispute involves a foreign element:

- whether the New Zealand court can exercise jurisdiction to hear the dispute;
- whether the New Zealand court will exercise jurisdiction, or will decline to do so and leave the dispute to be resolved in the courts of another country;
- by reference to which country’s laws the various issues in the dispute will be resolved – this is referred to as the question of “choice of law”; and
- whether a foreign judgment will be enforced in New Zealand, or recognised by the New Zealand courts as determinative of a dispute or of some issues in a dispute.

On the interaction between conflicts of law and international law, Little observes:

Both disciplines track each other in important ways. For example, classic international law doctrines include theories of jurisdiction (jurisdiction to adjudicate, jurisdiction to prescribe, and jurisdiction to enforce), that dovetail closely with the tripartite nature of Conflict of Laws (personal jurisdiction, choice of law, and judgments). Both Conflicts and international law regulate the same basic problems: How far does a court’s adjudicative power reach? What are the appropriate circumstances under which one jurisdiction’s policies should dominate another? When is it appropriate for a jurisdiction to impose its resolution of a dispute on another jurisdiction? Yet, while these two subjects could inform and guide each other on these issues, discussion of the overlap between the two is largely absent: the relationship between Conflict of Laws and international law remains elusive. One important task for Conflict of Laws thinkers therefore is to situate Conflicts doctrines within and/or alongside the broad scope of international law. Both disciplines would stand to benefit from the effort.

Examining the FATCA in relation to the OECD’s initiatives, Soriano argues that it undermines the OECD’s policy of exchange of information upon request. It is also a relatively cost-efficient mechanism for the US Government, but places large costs on third-party reporting intermediaries. The biggest issue will be the confrontation between the FATCA’s legal provision and those of the other jurisdiction, giving rise to conflict of laws issues. Soriano suggests that the US Treasury came to its senses, recognised the serious conflicts caused by the FATCA, and devised the IGA approach, which would solve a number of compliance issues, simplify practical implementation, and reduce costs. Importantly, it becomes another step towards automatic exchange, and in some way puts some mutual exchange obligation on the US. Through the Joint Statement, the FATCA ceased to be unilateral.
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Nevertheless, the IGA still leaves concerns over data protection. Only a few countries are fully
involved (but the list is growing), and few IGAs may be in place before 1 July 2014. Soriano
concludes:

<blockquote>We cannot expect an immediate multilateral convention requiring automatic
information exchange, but step by step it is possible to improve the current legal and
operative framework and to transit toward a new model, based on the automatic exchange of
information. It will not be perfect but better than the current one.65</blockquote>

Heiberg comments in relation to this conflict of laws issue that the FATCA:

<blockquote>overrides any conflicting provisions contained in current income tax treaties.
The United States’ policy concerning treaty override provides that the treaty is superior if it
is implemented after a law, but the law is superior if it is implemented after the treaty.
FATCA requires greater information reporting than current tax treaties.66</blockquote>

Without an IGA, the FATCA approach may force some FFIs to undertake the 30% withholding
due to confidentiality requirements within their own jurisdictions. They will face high compliance
costs related to the new technology and staffing, and an administrative burden through additional
reporting. Indeed, Heiberg suggested that the FATCA may be detrimental to the US through a
reduction in investment (and withdrawal of investments) in the US.67 However, the IGA approach
does not solve every concern. For example, where a FFI operates in a number of jurisdictions, an IGA
will only assist that FFI with its FATCA obligations and reduce the legal issues it faces for those
jurisdictions that have an IGA with the US. The FATCA will apply in the pre-IGA environment for
that FFI in the jurisdictions that do not have an IGA with the US.

Heiberg suggests that a multilateral agreement could mitigate the potential unintended
consequences of the FATCA. It could reduce the practical effect of the treaty override and conflict of
foreign law. This new information exchange regime would benefit more than one country and may
reduce the burden on FFIs. It would also prevent governments from adopting a reciprocal withholding
tax or conflicting reporting measures. The FATCA will also reduce the incentive for foreign financial
institutions to divest from the US as the number of signatories grows.68 Heiberg has reviewed the
moves since February 2012 with the publication of the Treasury’s Draft Regulations, the Joint
Statement and subsequently the Model IGA. Her analysis suggests a reduction in many of the
concerns is possible while maintaining the goals of the FATCA.

Coder suggests that while the intention of the IGA approach was to limit the scope of reporting
obligations for FFIs using a risk-based approach, the downstream burdens of the FATCA reporting
may reduce these benefits.69 Using the UK IGA as the basis for the analysis, HM Revenue and
Customs’ (HMRC) policy lead for the FATCA, Malcolm White, observed that the global
intermediary identification number (GIIN) is a good result. The GIIN will cast a wide net as outlined
in the final regulations under the FATCA. According to White, the IGA sets a new standard of
automatic information exchange that will flow two ways. This in turn presents opportunities for new
unilateral and bilateral agreements. White also suggests that countries will create their own versions
of the FATCA to enable them to benefit from enhanced information exchange. Negotiating more
IGAs should reduce the problems associated with pass-through payment withholding. Being the first
country to negotiate an IGA, the UK is somewhat of a pioneer in ironing out issues as well as setting
the agenda for other countries. Unsurprisingly, many countries have consulted with the UK as part of
their decision to enter into negotiations with the US for an IGA. HMRC also expects non-compliance
with the IGA to be due to minor administrative failures rather than significant non-compliance
leading to a sanction under the IGA.

65 Soriano, n 63 at 553.
66 Heiberg, n 5 at 1703.
67 Heiberg, n 5 at 1705.
68 Heiberg, n 5 at 1706-1707.
Writing in early 2013, Behrens argued that FATCA will not survive (at least in its current form) and that solutions for reform are needed. While he accepts that the goals of FATCA are laudable, “using it as a means of achieving a reduction in offshore tax evasion is destined to fail”. In addition to traversing the major developments and implications of FATCA, Behrens commented with respect to the IGAs that they will lead to a plethora of differing agreements:

These multilateral treaties negotiated directly between governments represent a shift in FATCA implementation. While not envisioned as part of the 2010 law, the agreements are now seen as a more practical way to implement FATCA. However, there is still no way to avoid the fact that potentially 190 different intergovernmental agreements would need to be negotiated between the United States and foreign governments to ensure global FATCA compliance.

Behrens’ predictions have yet to produce any fruit, with the FATCA operational with a substantial number of concluded IGAs and in-substance IGAs as at 30 June 2014.

Are IGAs constitutionally valid? Christians seriously questioned the legal pedigree of IGAs in her thought-provoking analysis of the state of play in early 2013. She examined the options, concluding that the IGAs are not treaties, nor congressional-executive agreements, nor treaty-based agreements, and therefore must be sole executive agreements. These are agreements made by the US President without congressional authorisation. Christians observed that this is “a tenuous status in US treaty-making that raises serious doubt about whether IGAs in fact bind the US as a matter of law”.

Christians writes that sole executive agreements are extremely controversial in US law, with constitutional lawyers arguing that such agreements will be either rejected outright as a viable alternative to treaties and congressional-executive agreements, or will be allowed (albeit reluctantly) as a viable mechanism for administrative or routine matters. She states:

Using a sole executive agreement to serve as an alternative to direct FATCA implementation thus creates a tremendous amount of uncertainty, and unnecessarily so when it is clear that other, more viable alternatives exist in law, namely, treaties and congressional executive agreements. This puts the IGAs, and therefore Treasury and the IRS, in a precarious position.

Christians suggests that the dubious legal status of the IGA means that while ratification of such agreements by other jurisdictions will make them good law in those partner countries, the agreements might not actually be good law in the US. This raises a further question of whether these partner countries are aware of the potential risk that such agreements may be subject to constitutional change in the US and what impact this will have on their operation. Christians questions how the US sign can IGAs in good faith when the US Treasury is exposed to constitutional challenge. The solution would be to ensure that IGAs go through an appropriate ratification process within the US to avoid this exposure.

In contrast, Morse argues that the FATCA IGAs do bind the US Government, at least in the form of administrative guidance. She outlines how the IGAs address the potential lack of enforceability of the FATCA. Morse reviews the case law concerning TIEAs and how the FATCA IGAs support the US’s treaty obligations. She argues that the courts should conclude that “the IGAs bind the US government and require the government to offer the withholding tax relief set forth in the

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70 Behrens F, “Comment: Using a Sledgehammer to Crack a Nut: Why FATCA Will Not Stand” (2013) Wisconsin Law Review 205. On 13 May 2103, US Senator Rand Paul introduced a bill to the US Senate to repeal the FATCA. While the bill is unlikely to be successful, this is further evidence of the growing concern over the impact of the FATCA.

71 Behrens, n 70 at 236.

72 Behrens, n 70 at 216.


74 Christians, n 73 at 567.

75 Christians, n 73 at 567.

76 Christians, n 73 at 568.
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agreements”.77 Indeed, Morse posits that the FATCA IGAs may be brought into future tax treaty ratification rounds to “cement the position that the IGAs are valid and enforceable congressional executive agreements or treaty interpretations”.78

This review of key issues in the FATCA literature, from a predominantly US perspective, sets the scene for examining how the FATCA will have an impact in Australia and NZ.

<group>Australia and New Zealand</group>

Commenting on developments in Australia, Assistant Commissioner Bruce Quigley observed that the FATCA is a “game changing piece of legislation that will have a global impact”.79 He also stated in relation to Australia’s decision to explore an IGA and the future environment:

<blockquote>The Australian Government is exploring the feasibility of an intergovernmental agreement with the US, with the aim of minimising compliance costs for Australian institutions while enhancing the existing tax cooperation arrangements. For tax administrators worldwide, FATCA has the potential to offer a framework for a truly multilateral approach to transparency over the longer term.</blockquote>

The Australian Treasury supported the signing of an IGA with the US Government and undertook dialogue, with the Australian Tax Office (ATO) providing the oversight of administering such an agreement. Industry received an invitation to consider the pros and cons of Australia entering into an IGA with the US Government under the FATCA, as an alternative to individual agreements between Australian financial institutions and the IRS.81 An examination of ways to recover costs complementary to the existing Australia-US DTA was undertaken.82 The matter of whether superannuation will be included was discussed. It would be surprising, assuming that the FATCA is here to stay and is not challenged constitutionally in the US, that financial institutions would prefer more costly individual agreements than reporting to the ATO. Australia announced that it had commenced formal discussion for an IGA under the FATCA on 7 November 2012,83 signing a Model 1 IGA on 28 April 2014. Legislation to give effect to Australia’s obligations under the intergovernmental agreement received Royal Assent on 30 June 2014.84

New Zealand has been somewhat slower, following Australia’s lead once again with respect to the FATCA. Nevertheless, both completed the full implementation process on 30 June 2014. The then Minister of Revenue Peter Dunne announced on 25 October 2012 that the NZ Government was seeking to enter an IGA with the US Government,85 and NZ concluded a Model 1 IGA, signing the

78 Morse, n 77 at 247. Morse’s argument has merit with the 9 May 2013 release of new Model IGAs by the US Treasury that provide options depending upon whether the jurisdiction has an existing TIEA or DTA with the US; see discussion further below.
79 Quigley, n 23.
80 Quigley, n 23.
81 Financial Services Industry Partnership (ATO and Australian Industry), Draft Minute, David Allen and Peter Rowe (23 August 2012).
agreement on 12 June 2014. Legislation to give effect to New Zealand’s obligations was given Royal Assent on 30 June 2014.86

Philipsen, commenting in early 2012, observed that the FATCA would have widespread implications for NZ FFIs, which are similar to those of other countries.87 These include substantial compliance costs for very little gain for these FFIs, conflicts with laws within NZ (including the Privacy Act 1993), and risks to financial stability due to unworkable withholding provisions. Since the FATCA is technically "voluntary" for non-US institutions and not required under NZ law, the Privacy Act will apply, necessitating signed consent from each customer. Without such consent, the institution will need to close the account or withhold funds. Philipsen noted that the NZ Bankers Association is working with its Australian counterpart, along with Canada and UK, to ascertain how to make the withholding process more workable. A further suggestion is to amend NZ’s DTA with the US.

Dunne acknowledged the compliance cost implications of the FATCA, stating that the NZ Government is “very aware of compliance cost issues and looking at how we can minimize any burden”.88 He went on to observe that the “FATCA is part of New Zealand’s commitment as a good global citizen to doing its bit to clamp down on tax evasion and an important way of doing that is through tax information exchange agreements that we regularly enter into”. However, he did not offer any details on how this minimisation of compliance costs will be achieved. PricewaterhouseCoopers (PwC) suggested that the IGA should reduce compliance costs in the long term because it means NZ financial services companies will be dealing with and reporting to NZ Inland Revenue (IRD) rather than the IRS.89 PwC observed that an IGA will also benefit a limited group of small NZ financial services companies if IRD can successfully negotiate specific exemptions from the FATCA. PwC also said that it does not expect the upfront compliance requirements and associated upfront costs to change dramatically from those in a non-IGA environment.

An examination of both Australia’s and NZ’s IGAs reveals that many investment vehicles are specifically exempt from FATCA reporting obligations, reducing the potential compliance costs overall.90 Nevertheless, for any investment account of an FFI that holds accounts that come within Annex I, the reporting obligations (through the ATO and IRD respectively) will mean significant compliance costs for these entities, although these should be considerably less than in a non-IGA environment. The FATCA is expected to cost the NZ Government around NZ$12 million over the next five years: NZ$5 million in the first year, and about NZ$1.7 million annually thereafter.91 Estimates of the compliance costs for FFIs are not known, although many organisations may seek to pass on these costs to their customers, or where possible, absorb the costs.

The jurisdictions of Algeria, Azerbaijan, Belarus, Brazil, Bulgaria, Cabo Verde, Colombia, Croatia, Cyprus, Dominica Republic, Estonia, Georgia, Greenland, Iraq, Israel, Kosovo, Kuwait, Latvia, Lithuania, Moldova, Montenegro, Nicaragua, Panama, Paraguay, Peru, Qatar, Serbia, Slovenia, Turkmenistan, Ukraine and Uzbekistan are not part of either Australia’s or NZ’s DTA/TIEA network. It is interesting to observe that many jurisdictions are what would be typically described as tax havens under the OECD’s measure but which have entered into TIEAs with the US and/or other jurisdictions.

90 See Annex II of the Australian and NZ IGAs.
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As at 30 June 2014, a sizeable number of signed IGAs (41) have been concluded under the FATCA (36 Model 1A IGAs and five Model 2 IGAs), plus a further 61 in-substance agreements (53 Model 1A and eight Model 2). Thus by early 2015 there should be over 100 IGAs in operation: 89 Model 1A (87%); and 13 Model 2 (13%).

It is interesting to note that China has concluded an in-substance IGA under Model 1. This is critical to the future “success” of the FATCA. In contrast, Hong Kong has concluded an in-substance Model 2 IGA, which is in keeping with its “reluctance” to go beyond the minimum with respect to information exchange.92

The US Treasury’s International Tax Counsel expressed optimism for completing most of the work by the commencement of 2014. Measures were put in place to move IGAs under negotiation to signature, and expedite the process for countries that were exploring options to commence and conclude their negotiations so as to enable the signing of an IGA.93 Additional resources were allocated to moving the process onwards, with the US Treasury issuing a notice such that if a jurisdiction has signed an IGA by 1 January 2014 (later extended to 30 June 2014), then the IGA will be treated as in effect at that date, even if it has yet to be ratified. The concerted effort appears to have paid off, with the backlog of negotiations cleared, and over 100 IGAs concluded by signature or in substance by the commencement of the FATCA on 1 July 2014.

<DIV>IMPLICATIONS FOR AUSTRALASIA

One could raise the question of why should Australia and NZ be concerned about such “global” developments, when both are relatively small players on the global investment scene? A related question is why should an Australasian perspective warrant separate analysis to the current literature that focuses on an US perspective? Addressing the first question, while Australia and NZ are relatively “small” from a world perspective, initiatives of the OECD affect both countries, and the reach of the FATCA includes FFIs operating in Australia and NZ. With regard to the related question, an Australasian perspective will complement the existing literature from a non-US and European perspective, with both initiatives creating obligations and providing opportunities for this part of the world.

More specifically, Australia plays a major role within the OECD and other forums (such as JISTIC), and the Australian Government, through the ATO, has a close relationship with the IRS in many areas, including tax administration information sharing. Furthermore, the FATCA has serious implications for Australia’s FFIs should there be no IGA, necessitating that each provide the necessary information to the IRS or face the implications of the 30% withholding tax on certain accounts. NZ is an even smaller player, but as a long-standing member of the OECD, it works closely with this global body. It is also frequently a follower of Australia with respect to international tax developments, and its FFIs face similar issues with the FATCA if there is no IGA in place.

Turning to the Multilateral Convention, both Australia and NZ have gained new partners for which neither (or at least one) does not currently have a DTA or TIEA in place. Does this suggest that Australia and NZ should be pursuing DTAs or TIEAs with their jurisdictions, or should each rely on what the Multilateral Convention offers? A third (perhaps preferable) option would be a mixed response, under which, in several cases, DTAs should be pursued (mainly by NZ) where these jurisdictions are significant trading partners, necessitating the wider scope of a DTA over the limited scope of the Multilateral Convention (which is revenue authority rather than taxpayer focused). In that regard, NZ is seeking to expand its DTA network selectively although there is no public statement at the time of writing concerning whether it will be seeking to negotiate a DTA with any of these jurisdictions. An initial assessment would indicate few, if any, of these nations are significant trading and investment partners for NZ. In some instances, there may be little need for either Australia or NZ to do anything, given the minimal likelihood of information sharing, and greater


transparency with these jurisdictions, other than ensuring Australia and NZ meet their obligations under the Multilateral Convention.

The Multilateral Convention, with its growing number of signatories (over 60), is now emerging as a potentially valuable addition to the administrative powers of the ATO and IRD, buttressing the largely domestic-focused legislative powers supplemented by the array of DTAs and TIEAs. Importantly, the Multilateral Convention expands the scope of the revenue authorities’ information-gathering powers by including GST/VAT; something that is not currently within the scope of any of Australia or NZ’s DTAs/TIEAs. For Australia, given its more extensive involvement in tax administration organisations globally, the Multilateral Convention is potentially less significant in itself than is the case for NZ, where the Multilateral Convention opens up jurisdictions for exchange of information requests that NZ would be unlikely to seek to conclude a DTA. That said, as a member of the G20 Australia had an “obligation” to be a signatory and subsequently to ratify the Multilateral Convention.

Regarding the FATCA, it would fair to suggest that both Australia and NZ were slower to appreciate its implications for their financial institutions that would need to comply with the FATCA’s obligations. Indeed, from an outsider’s perspective, closer attention to the FATCA emerged within Australasia with promulgation of the notion of the Model IGA, with a number of counties, including the UK, entering into a bilateral IGA with the US under the FATCA. Then, as the waiting list grew and the initial deadline to the commencement of the first phase of the FATCA approached and passed (1 January 2013 – later pushed out to 1 July 2014), momentum for tangible action grew.

Lickess and Cheung identified that, notwithstanding the potential for tax authorities to combat tax evasion and base erosion, the success of the Multilateral Convention and the FATCA will depend upon the successful implementation by governments, including those of Australia and NZ, as well as financial institutions, of “processes to enable them to undertake the necessary due diligence processes and report the required information”.

Given this expectation, an important issue raised in the discussion above comes to the fore, namely the debate over whether IGAs are constitutionally robust in the US. Should jurisdictions such as Australia and NZ be concerned about whether, through entering into an IGA under the FATCA, they may become parties to a constitutionally questionably agreement? Even if this is arguably an issue for the US to resolve, what might be the implications of these IGAs if they are subject to challenge and found to be wanting? Possibly the remedy is as simple as some form of congressional approval regardless of whether the constitutional issues are tested and whether the concerns raised have any real merit. Perhaps it is all a storm in a teacup. Nevertheless, should these academic musings gather momentum, will this require the US Congress to become involved through ratifying such agreements entered into by the US President? In the current “fiscal cliff” environment in the US, would Congress actually be able to agree to the need to ratify such agreements? Is ratifying these IGAs a partisan issue or one that is bipartisan in that it is for the benefit of the US and its international relationships? Furthermore, will this situation require in some way the involvement or endorsement of the approach by the OECD or other international organisation to give the IGAs more global “credence”?

With regard to constitutional matters, on 11 August 2014, a constitutional challenge was brought against the Canadian Government over its agreement to comply with the FATCA, alleging that the Canadian Government has exceeded its constitutional powers. The challenge, made by the Alliance for the Defence of Canadian Sovereignty, alleges that the agreement violates the Canadian Charter of Rights and Freedoms because it exposes Canadian citizens to potential US criminal penalties without a hearing, it allows their financial information to be seized without a warrant, and because it discriminates between those defined as “US persons” and others. Further to the alleged Charter violations, it is claimed that the agreement violates the division of federal and provincial powers

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because the Constitution Act 1867 states that provinces have exclusive control over matters involving privacy and property rights.95

The questions raised above are indicative of the uncertainty of this new post-FATCA environment in relation to the IGAs. Even if these agreements prove to be constitutionally robust, will they actually be effective in meeting the aims of the FATCA, which is a much bigger issue from a fiscal perspective? Time will be the arbiter here. The scholarly debate suggests these IGAs may work for the US, but what benefits do the other signatories receive other than to reduce the potential burden on their FFIs, (the lesser of two “undesirable situations”, in that this is preferable to a non-IGA environment)? One critical issue is the extent to which the US will reciprocate the information sharing to signatories to these IGAs. Early indications are that there are some positive developments in this area.

<div>CONCLUDING OBSERVATIONS</div>

The period from late 2011 to mid-2014 has seen significant developments in international tax administration, including the “coming to life” of the OECD’s Multilateral Convention, and recognition of a need for a government-to-government approach to dealing with the significant obligations imposed under the FATCA. This latter development led to the emergence of a Model IGA, which has two versions. Both of these initiatives have received attention in the literature, with appreciably more concerning the FATCA, although dominated by a US perspective on its implications. Perhaps part of the reason for the lower level of interest in the Multilateral Convention is that it has been in place for some time and is less invasive in its coverage. Importantly, apart from members of the G20, becoming a signatory to the Multilateral Convention is voluntary, with membership gradually increasing.

In contrast, the FATCA initially was a unilateral approach but one with enormous fiscal and legal implications for FFIs throughout the world. While entering into an IGA with the US is, strictly speaking, “optional”, the fiscal costs and potential conflict of laws issues associated with the FATCA ensure that its impact is unavoidable. With the IGA approach, the obligations on FFIs have been made more palatable, but there remain constitutional concerns (from a US perspective at least) over its validity.

The Multilateral Convention for most of its existence was a “lame duck”, with only a handful of signatories. Indeed, without the 2010 Protocol it probably would not have become a valuable aid for assisting revenue authorities in their efforts to reduce cross-border tax evasion and avoidance, and foster greater international tax co-operation. It has received renewed attention as the OECD actively promotes its global standard of automatic exchange of information, initially to be adopted by its members and potentially the standard that will be expected for Global Forum members (to be facilitated through DTAs and TIEAs), and new signatories to the Multilateral Convention.

In contrast, the FATCA reflects a unilateral and largely single minded focus on satisfying US desires, initially very invasive and costly, but subsequently softened slightly through the creation of the IGA mechanism. Thus the FATCA, while initially a US issue that affected FFIs with clients that have US financial interests, has fast become a global issue – with implications for Australia and NZ. This arises through the development of the Model IGA, promoted by the US following the Joint Statement in February 2012, which brings into play governments in countries that wish to reduce the burden that the FATCA will place on their financial institutions through entering an IGA with the US. The IGAs will not completely relieve financial institutions of their burden; they will still need to report to their country’s revenue authority, which will then provide information to the US. The IGA should also reduce the potential for a conflict of laws between the US and the other jurisdiction over the provision of confidential information. Furthermore, the FATCA (more so now with the IGA...

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initiative) may significantly alter information exchange and transparency in the future, especially if
the IGA leads to new global standards or reinforces the OECD’s emerging standard of automatic
exchange of information. Should this eventuate, it will place pressure on the OECD and potentially
expose further the deficiencies in the TIEA approach, as highlighted by Soriano and Sawyer.96

One major difference between the Multilateral Convention and the FATCA is that the latter will
be compulsory for providing information, while the former will be “voluntary” to a degree in that
obligations will depend upon what each signatory has agreed to. Nevertheless, the FATCA remains a
bilateral instrument via the IGA, whereas the Multilateral Convention has the advantage of offering a
multilateral platform for information exchange.97 The requirements under the FATCA, especially
under an IGA, are more extensive than under the OECD’s Multilateral Convention. Other than the
specifically excluded FFIs and investments covered in Annex II of each IGA, the extensive nature of
information that must be provided under the FATCA98 is greater than that under the Multilateral
Convention or a DTA/TIEA. It also comes with the threat of a 30% penalty for non-compliance; such
a threat does not exist under the Multilateral Convention or under a DTA/TIEA. A rescinding of an
agreement may be the outcome for an intentional failure by a party to meet its obligations under a
DTA/TIEA. The Multilateral Convention is silent on what may happen in such circumstances,
although a member that willfully refuses to meet its obligations may be “encouraged” to denunciate
the agreement.99

Another point of contrast is the manner in which the Multilateral Convention was developed and
operates – it has as its hallmark co-operation and a degree of choice for nations in terms of whether
they wish to become signatories. It has also served to broaden the impact of the OECD’s global
standard for the automatic exchange of information. In contrast, the FATCA is inherently a unilateral
decision by the US to impose itself on other citizens and various FFIs outside of the US, leading to
the inevitable compromise through the IGA mechanism. Collectively, both developments are
extending the traditional reach of OECD members beyond their major trading partners to jurisdictions
usually viewed as unco-operative in their collective drive to reduce evasion, base erosion and profit
shifting. In terms of a closer alignment between the Multilateral Convention and the FATCA, the
OECD’s report to the G8 sets out how it sees the potential for developing a standardised automatic
exchange model developed from the FATCA Model 1A IGA and recent bilateral agreements. Figure 1100
sets out the OECD’s proposal:

[insert figure 1 here]

However, given the more extensive application of the FATCA with regard to information to be
reported (and consequences for failure to report), this scenario appears to be more extensive than the
manner in which the OECD’s emerging standard of automatic exchange operates. Nevertheless, the
FATCA (and the IGA approach) appears to have expedited the process of moving towards a global
automatic exchange of information, and has therefore “assisted” the OECD with its endeavours in this
regard.

An interesting observation is the extent to which the US would need to use its DTA with
Australia or NZ for information exchange in relation to a US citizen, given what it should be
receiving under its FATCA IGA. This should not be interpreted to mean that the US will not also use
its DTAs to supplement information received under the FATCA. Australia and NZ, on the other hand,

96 See Soriano, n 63; Sawyer A, “The OECD’s Tax Information Exchange Agreements: An Example of (In)effective Global
97 “Automatic Information Exchange – a New Global Standard?”, International Tax Review (1 July 2012). See also Wheater J,
98 See for example Arts 2 and 3 of the Australian IGA, specifying the obligations to obtain and exchange information on
reportable accounts, and time and manner for exchange, respectively. See also Annex 1 of the Australian IGA.
99 OECD Multilateral Convention, n 2, Art 31.
100 OECD, n 22, p 15.
would be expected to continue to use their respective DTA with the US to request information from the US concerning their taxpayers and tax liabilities of US citizens in their own jurisdictions.

In many areas of international taxation, NZ is a follower rather than a leader, taking notice of steps taken by Australia, as indeed it did with regard to the Multilateral Convention and the FATCA. However, with Australia’s prominent role in the OECD and other international tax administration areas (including being part of the G20), it has been “encouraged” to go down the path of signing and ratifying the Multilateral Convention, and to conclude an IGA under the FATCA, lest it feel the outcry from its financial institutions with clients holding US interests.

The Multilateral Convention will add additional obligations on both Australia and NZ to explore their relationship with signatories for whom they do not have a DTA or TIEA. New Zealand will need to follow suit now that it has ratified the Multilateral Agreement. In relation to the FATCA, this evolving initiative may lead to wider global changes with respect to information exchange and transparency, in addition to that promoted by the OECD. Thus, there remain many areas for future research as these important new international developments evolve.

In relation to the Multilateral Convention, there is scope to analyse the impact of these decisions when information concerning use of the agreement is made public. With regard to the FATCA, future research could include an examination the impact of the Australian and NZ IGAs on FFIAs and the respective revenue authorities, and whether there is a constitutional challenge to the basis on which the IGAs have been undertaken by the US President. As time passes this seems much less likely to occur, but the Canadian challenge to the FATCA is one to watch.

This article has a number of limitations, the most important being the comments reflect those of an “outsider”, rather than someone closely involved with the OECD’s Multilateral Convention, and subsequent ratification decisions, along with the concluded FATCA IGAs. However, this could be seen as an advantage; an outsider is often more able to offer a critical realist’s perspective without the limitations of secrecy and restrictions on publicly commenting on matters of national importance associated with one’s occupation, particularly as a government official. A more significant limitation is that these are emerging developments and their full impact is yet to come. Consequently, when data on their use by the revenue authorities is available, it will then be reviewable.