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UNITED KINGDOM FREE TRADE AGREEMENT NEGOTIATIONS

Submission by UK-Australia Contractors Group

Executive Summary

- Her Majesty's UK Revenue and Customs, (HMRC or the UK Revenue) have sought to recover alleged UK tax debts from former UK contractors now living back in Australia.
- HMRC have sought to do this even though the tax liabilities are still disputed and under contest in the United Kingdom. HMRC have sought to do this even though purported UK tax debts (or even proved UK tax debts) are not enforceable in Australian Courts.
- By sending letters to Australian residents demanding payment of money, it appears that HMRC has involved itself in the apparent crime of extortion, demanding money with menaces when there was no legal basis for enforcing HMRC's demands in Australia.
- Subsequently, HMRC sought to enlist the assistance of the Australian Taxation Office in the collection of these purported UK tax debts by having the ATO put the disputed UK HMRC tax claims on the Foreign Claims Register, so that the ATO could issue a demand in the ATO's name - but for the benefit of HMRC.
- This was also illegal.
- The ATO purported to act under the 2012 OECD Multilateral *Convention on Mutual Administrative Assistance in Tax Matters* (the *OECD Convention*).
- However, the purported UK tax debts in many cases preceded the *OECD Convention* by many years, going back to the 1990s. The attempt by HMRC to get the ATO to use the *OECD Convention* on its behalf was clearly illegal retrospectivity.
- The ATO attempt to use the *OECD Convention* for HMRC's benefit relied on the 2006 Australian legislation introducing a Foreign Claims Register and which clearly contemplated a specific bilateral agreement between Australia and each country.

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- It is fundamentally objectionable that an agency of the Commonwealth Government should be acting as an agent of an overseas government or a foreign power where the Australian facing demands from the ATO on behalf of a foreign power has no means of disputing the basis of the alleged foreign tax debt in Australian Courts.
- While it may be accepted that the United Kingdom is a friendly and kindred country, the implications of the abuse of the 2012 *OECD Convention* by HMRC and the ATO may not have gone unnoticed by less friendly countries.
- The OECD Convention has over 90 signatories, being countries ranging from Albania to Vanuatu, and notably including Russia and China.
- On the approach taken by the ATO for HMRC, if the ATO were presented with a demand from any foreign power ranging from Albania, through China, Russia, et cetera the ATO would have no option but to enforce the demand against the purported Australian tax debtor.
- It is already well known that some foreign governments have sought to enforce large money demands against Australian residents and have intimidated Australian residents into complying with those demands. The ABC *Four Corners* program has documented several examples and the Senate has established a Committee on foreign interference in Australia.
- Given the diverse and multicultural nature of Australian public sector employment, it can be expected that some persons facing such intimidating demands from the ATO on behalf of foreign governments could be employed in, or have relatives employed in, sensitive positions in Parliamentary offices or in Australian Government Departments such as Defence, Immigration, Treasury, Prime Minister and Cabinet, as well as in State Government Departments or in contractors undertaking, for example, IT work for governments.
- Do the Australian Federal and State Governments and Parliaments really want to create a situation whereby foreign governments are assisted by the ATO in suborning Federal and State civil servants (for example, from migrant families or with relatives from migrant families) into acting as agents of foreign powers?
- As a matter of law, as well as common prudence in the interests of national security, it is essential that Australia make abundantly clear to the United Kingdom - and to every other country - that:
 - (1) any assistance in tax collection under the *OECD Convention* is subject to specific legislation by the Federal Parliament embodying a specific article on mutual assistance in tax collection in the relevant bilateral tax agreement and legally incorporated by Act of Parliament into the *International Tax Agreements Act 1953*;

- (2) assistance is not automatic but subject to national interest considerations;
- (3) Australians can dispute the legal and factual basis of the alleged tax liability as with any other tax demand by the ATO and such foreign claims are fully reviewable by the AAT and the Courts as to their merits or *bona fides*.

UNITED KINGDOM FREE TRADE AGREEMENT NEGOTIATIONS

Submission by UK-Australia Contractors Group

Background

Many Australian contractors have worked in the UK, whether in the IT industry or other industries. Many contractors were employed and hired out by third parties rather than directly by the ultimate UK employers (which included government bodies such as the NHS and local authorities) where the third parties were companies located, for example, in the Isle of Man and relying on the United Kingdom - Isle of Man tax treaty. At the time it was the general view of UK legal counsel (which appeared to be shared by the UK government agencies also participating) that these arrangements were perfectly lawful and appeared to have been accepted by Her Majesty's United Kingdom Revenue and Customs Commissioners (HMRC).

Be that as it may, eventually HMRC decided to change its mind and sought to raise and enforce tax assessments retrospectively years later, for very large sums, against the individual contractors working for third party employers as above. The size of some HMRC back tax claims can be gauged by the fact that some UK contractors have committed suicide, been forced to sell their homes or have gone or are going bankrupt.

Many such contractors were Australian expatriates. Naturally, these new HMRC assessments have been disputed and continue to be disputed by relevant parties.

All that, of course, is a matter for the UK and not a matter in which any Australian Government is interested in *per se*.

However, the story does not end there.

HMRC actions in Australia

Extraordinarily, the UK Revenue then purported to seek to demand payment of these UK tax debts as if they were debts owing in Australia. HMRC has sent letters of demand since at least 2015 to Australians who had now returned to Australia, demanding payment for what are called Accelerated Payment Notices (APNs) which are designed to circumvent the UK Court processes retrospectively by enforcing payment of disputed income tax in advance of final legal decision.

HMRC ignored Australian law

You will be aware that foreign tax debts are not enforceable within Australia, save as may be provided by Australian law. It has been an established rule of law for centuries, called the Revenue Rule, that no country enforces another country's tax laws.

Lord Mansfield CJ said: "One nation does not take notice of the revenue laws of another", *Planché v Fletcher* (1779) 1 Doug. 251 at 253. The rule was re-affirmed by the House of Lords in *Government of India v Taylor* [1955] AC 491. In that case, Lord Keith of Avonholm stated the rule to be that "in no circumstances will the Courts directly or indirectly enforce the revenue laws of another country". The Revenue Rule has been consistently followed by the

High Court and is consistent with the rule of public (or private) international law is that domestic Courts will not enforce a foreign penal or public law: *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30 at 40-42 per Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ; *Permanent Trustee Co (Canberra) Ltd v Finlayson* (1968) 122 CLR 338 at 345-346 per Barwick CJ, McTiernan, Kitto, Menzies, Windeyer and Owen JJ.

The reason for the rule is obvious. Taxation is the act of a sovereign power and if a place is not a district or colony, that sovereign's writ does not run there. The rule has even been applied between Australian states, so that New South Wales tax debts could not be enforced in the ACT. It is basic international law that one country does not seek to enforce its tax laws inside the territorial boundaries of another jurisdiction. That also applied to self-governing colonies within the British Empire which were treated as "foreign" to each other for fiscal purposes. Hence, since the grant of self-government to the Australian colonies, starting with New South Wales Constitution Act of 1855, UK taxes and tax debts have not been enforceable or able to be collected in Australia.

The basic principle is very clear. Taxes are granted in favour of the Crown by a local legislature. Australians residents do not get to vote in UK elections on UK taxes and UK residents do not get to vote on Australian taxes.

No authority under the Foreign Judgments Act

There is no provision in the *Foreign Judgments Act* which permitted HMRC to seek to enforce foreign tax claims in Australia.

In the case of *Pattenden v Commissioner of Taxation* [2008] FCA 1590 at para 95 it was stated "So far as the United Kingdom is concerned, the consensus between the parties was that, though provision is made by and under the *Foreign Judgments (Reciprocal Enforcements) Act 1933* (UK) for the registration of, materially, judgments of this Court or of the Supreme Court of a State, an exception prevails in respect of "a sum payable in respect of taxes or other charges of a like nature" (see s 1(2)). That being so and having regard to *Government of India v Taylor* [1955] AC 491, it was common ground that a judgment obtained here in respect of a revenue debt could not be enforced in the United Kingdom." That the *Foreign Judgments Act* would be of no assistance to Her Majesty's UK Revenue and Customs Commissioners, is acknowledged by the Australian Taxation Office at paragraph 36 of Practice Statement Law Administration PS LA 2011/13 on "Cross border recovery of taxation debts".

The UK Revenue ought also to know, and doubtless does know, that it is a criminal offence under Australian law to demand money with menaces such as threatening penalties or fines when in fact the alleged tax debt is not enforceable in Australian Courts. The crime of extortion notably occurs when a public official threatens a person by demanding money without lawful authority (e.g. now enacted as section 249K of the NSW *Crimes Act*). We note that, at least since 1986, there would not be any Crown immunity available to any UK Revenue and Customs Commissioner who sets foot in Australia and who had caused such demands to be made by post in Australia.

HMRC had no authority under the UK-Australia Double Tax Agreement

Unless there is an enforceable tax treaty in place between Australia and the UK, neither country can enforce its taxes or tax debts in the other or expect the other country to assist it in doing so. But there is no provision in the UK-Australia Double Tax Agreement (UK DTA) which permitted the UK Revenue to make money demands in Australia as HMRC did. Turning to the UK-Australia double taxation agreement (*Australian Treaty Series* [2003] ATS 22), which entered into force on 17 December 2003, one sees that it does **not** have an article which provides for the mutual collection of taxes. Even if it had, any demand for payment would have to be made by the ATO, not by HMRC.

HMRC treated Australia law with contempt

The actions of HMRC in making such demands for money with menaces were outrageous and the UK Customs and Revenue Commissioners thereby showed an extraordinary contempt for Australians and Australian laws, State and Federal. That has been pointed out by some of our members to the UK Revenue and Customs Commissioners. We are not aware of any reply from the Commissioners seeking to justify their conduct.

The letters sent to Australian residents by HMRC demanding money from Australians were thus totally obnoxious and show an underhanded and untrustworthy approach by the UK authorities to their international legal obligations and the jurisdictional limits on their authority.

In short, one questions whether the UK authorities can be trusted to keep treaties in good faith.

Accordingly, before entering into any Free Trade Agreement (FTA) with United Kingdom, Australia should insist on proper respect from the UK tax authorities for Australia's sovereign rights, Federal and State laws and the rights of Australians.

ATO collaboration in subsequent UK Revenue abuse of the OECD Convention

Nor does the story end there. It appears that the Australian Taxation Office was induced to connived at, and turn a blind eye, to the ignoring by the UK Revenue of the UK Double Tax Agreement with Australia and went on to collaborate with HMRC in an abuse of an international convention.

Notwithstanding the absence of any provision in the UK Australia Double Tax Agreement (DTA) for mutual assistance in the collection of Australian and UK taxes, the ATO appears to have sought to bypass Australian law at the behest of the UK Revenue. The ATO asserted that the *OECD Convention on Mutual Assistance in Tax Matters* (signed by Australia in 2012 but not enacted into law by Parliament) permits the ATO to collect UK taxes under Division 263 of Schedule 1 of the *Taxation Administration Act 1953*.

This was less than accurate, at the least.

Division 263 was enacted by Parliament in 2006 and was inserted into Schedule 1 of the *Taxation Administration Act 1953*. Division 263 provides a mechanism for the collection of foreign revenue claims by the Commissioner of Taxation. Technically, the foreign tax office approaches the Commissioner of Taxation and asks him to recognise the foreign tax debt. If the Commissioner accepts the request, he places the foreign tax debt on the Foreign Revenue Claims Register and the foreign tax debts then becomes a debt due to the Commonwealth of Australia under section 263-30(1) which the ATO can enforce as if it were an Australian tax debt.

However, where a DTA does not include an assistance in the collection of tax article, the Revenue Rule will continue to apply. Hence, the NSW Supreme Court recognised in *Jamieson v Commissioner for Internal Revenue* (2007) 66 ATR 441; [2007] NSWSC 324 that the Revenue Rule is still part of Australian law and Australian Courts will not enforce the tax debts of foreign governments. In particular, the Court recognised that Subdiv 263-A only has effect where there is a DTA in force which contains a specific article relating to the assistance in collection of foreign tax debts.

The Court held that Subdiv 263-A did not apply in the *Jamieson* case because the relevant DTA (the US Convention) did not contain an article dealing with assistance in the tax collection of tax debts.

It is important to note that Division 263 was only introduced into the *Taxation Administration Act* by Act No. 100 of 2006, the *International Tax Agreements Amendment Act (No. 1) 2006*. Accordingly, unless it was explicitly made retrospective, Division 263 would not apply to foreign revenue claims arising in respect of prior tax years. Thus, the Act is expressed to apply from the date of Royal Assent which was given on 14 September 2006.

There the matter should have ended, even for UK tax claims arising after that date because there is no mutual assistance or collection article in the UK tax treaty as envisaged by Division 263.

Faced with this problem, in order to assist HMRC, the ATO tried to pretend that the 2012 *OECD Convention* can be enforced in Australia for any country under the 2006 Division 263 legislation.

This is an abuse of law because not only does such an interpretation to give a retrospective effect to the 2012 *OECD Convention*, it also ignores the fact that the *OECD Convention* has never been enacted into law as such by Parliament. The *OECD Convention* is not attached to the *International Tax Agreements Act 1953* as a Schedule which has been given the force of law in Australia by the Federal Parliament.

The OECD Multilateral Convention

The ATO appears to think that Division 263 was suddenly given much larger scope by Australian accession to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. The ATO states at paras 49 seq. of PS LA 2011/13 on *Cross border recovery of taxation debts* -

“The provisions in the TAA and the ITAA 1997 that facilitate the assistance in collection article in some of our bilateral treaties also apply to our assistance in collection obligations under the Multilateral Convention. The obligations under the Multilateral Convention are generally assumed by the signatories to the convention in respect of each other signatory. Therefore, broadly speaking, as a party to the Multilateral Convention, Australia’s obligation for the recovery of foreign tax debts extends to all other parties to the convention. ... The mutual obligations extend to countries that are existing signatories to the Multilateral Convention, as well as those which later become signatories to the convention from the date the convention comes into effect in that country. ... A foreign state that is a signatory to the Multilateral Convention may also be one with which Australia has a bilateral treaty that includes an assistance in collection article. In such cases, either country is able to make a request for recovery on the basis of either the assistance in collection article in the bilateral treaty or the equivalent article in the Multilateral Convention. The following paragraphs apply to requests made pursuant to the mutual assistance articles in either the bilateral treaties or the Multilateral Convention for the recovery of tax debts.”

That ATO view may originate from a misunderstanding of the National Interest Analysis [2012] ATNIA 2 at para 29 where it is stated “No new legislation is required to implement the obligations that will be imposed on Australia by the proposed treaty action. Australia is able to fulfil its obligations under the Convention under existing legislation, specifically, section 23 of the *International Tax Agreements Act 1953* in respect of exchange of tax information. Similarly, Division 263 of Schedule 1 to the *Taxation Administration Act 1953* applies to any agreement in force between Australia and a foreign country that contains an article relating to assistance in collection of foreign tax debts.”

The ATO view is clearly wrong. It seems an extraordinary proposition that the Parliament has delegated the power to impose taxes to the Commissioner at the behest of any foreign country which may in future accede to the *Convention*. On the Commissioner’s theory, if North Korea signs and ratifies the *OECD Convention* they may proceed to enforce their taxes via the ATO against any of their exiles resident in this country.

The better and time-honoured view seems to be that clear domestic legislation enshrining a double tax treaty with such a clause and giving it the force of law is first necessary and that seems assumed in the last sentence just quoted from the National Interest Analysis, which the Commissioner has apparently chosen to read differently.

What does Division 263 envisage?

It is important to look carefully at the definitions in Division 263 –

263-10 Meaning of foreign revenue claim

A ***foreign revenue claim*** is a claim made to the Commissioner:

- (a) in accordance with an agreement (the ***international agreement***) between Australia and:

- (i) *a* foreign country or a constituent part of a foreign country; or
- (ii) an overseas territory;
(the *overseas entity*); and
- (b) for one or both of these purposes:
 - (i) the recovery by the Commissioner of an amount from an entity (the *debtor*) in respect of taxes imposed otherwise than by an * Australian law (including any associated amounts);
 - (ii) the conserving of assets for the purposes of a recovery of that kind.

Division 263 refers to an agreement between Australia and a foreign country. It does not on its face appear to apply to a multilateral agreement which is an agreement between Australia and many other countries. Section 23 of the *Acts Interpretation Act* cannot be relied upon to change the singular to the plural as regards section 263-10 because that section would not make sense. The whole tenor of the Division is framed in terms of a one to one agreement with a single overseas entity. A foreign revenue claim is made by *one given country*; it is not a demand by *a group of countries*.

Further, the requirement for there to be a precise “one on one” double tax agreement follows from section 263-15 which clearly refers to *a given competent authority under a specific agreement*.

263-15 Requirements for foreign revenue claims

- A * foreign revenue claim must:
- (a) be made by or on behalf of an entity that is, under the relevant international agreement, *the competent authority*; and
 - (b) be consistent with the provisions of that agreement;

Therefore, the correct view is that it is still necessary for a mutual collection procedure to be incorporated in the relevant double tax agreement with the foreign country seeking to enforce its revenue claims within Australia.

If that were not enough, there is no separate enacting legislation to give the 2012 *OECD Convention* any legal effect outside double taxation agreements which are negotiated on a one to one basis and legislated for separately.

It is contrary to reason that an international convention can be adopted into domestic law by legislation which existed years before the treaty was entered into. That would deprive Parliament of the opportunity to consider in detail what legislation it wanted to enact to give effect to a treaty. The ATO interpretation is tantamount to saying that Parliament gave a blank cheque to foreign governments.

In the absence of clear legislation to give the *OECD Convention* domestic effect, the *OECD Convention* does not have the force of law in Australia save for those countries with a specific article in an Australian double tax agreement.

In addition, the *Convention on Mutual Administrative Assistance in Tax Matters* only applies to uncontested tax debts under Article 11(2). It therefore never applied to “tax debts” of the kind which are described as “accelerated payments” by HMRC. Accordingly, HMRC and the ATO were acting in bad faith when the ATO tried to use the Convention to collect APN debts for HMRC.

On top of all that, there is the question of timing. Australia only acceded to the multilateral *OECD Convention* in 2012 and it only entered into force for Australia on 1 December 2012. The National Interest Analysis states at para 4 “The provisions of the Convention will take effect for administrative assistance related to taxable periods beginning on or after 1 January of the year following the one in which the Convention enters into force in respect of Australia, in accordance with paragraph 6 of its Article 28. Where there is no taxable period, the Convention shall have effect for administrative assistance related to the imposition of tax arising on or after 1 January of the year following the one in which the Convention enters into force for Australia.” As the Convention only entered into force for Australia on 1 December 2012, the Convention therefore could not cover UK tax debts for previous years (which was what the ATO at first contended!).

National security implications

There are implications of the ATO’s actions and interpretation of the OECD convention which ought to be deeply troubling to Parliament and this country’s intelligence and defence authorities.

It appears the ATO has been so hellbent on co-operating with foreign tax offices to get them to grab money overseas for the ATO that it has been totally negligent as regards Australia’s national interests. Indeed, the ATO appears to be more loyal to foreign tax offices and owes them allegiance rather than having any allegiance to this country.

At its simplest, allegiance is a two-way street. Australians owe allegiance to the Crown and obey the laws and governments of Australia because our governments acting on behalf of the Crown are meant to protect us in our rights, customs, laws and liberties. We do not expect Australian governments and Australian public servants to act in the interests of foreign powers and harass us for their benefit.

On the ATO’s interpretation of the *OECD Convention*, once it is presented with a duly certified allegedly final tax claim by a foreign tax office, it must place that claim on the Foreign Claims Register and proceed to enforce it as if it were an Australian tax debt and upon collecting the money pay that money to the foreign tax office.

Let us stop and consider the implications of this interpretation by the ATO. The OECD Convention has over 90 signatories, being countries ranging from Albania to Vanuatu, and notably including Russia and China. Thus, if the ATO were presented with a demand from any foreign power ranging from Albania, through China, Russia, et cetera the ATO would have no option but to enforce the demand against the purported Australian tax debtor.

It is already well known that some foreign governments have sought to enforce large money demands against Australian residents and have intimidated Australian residents into

complying with those demands. The ABC *Four Corners* program has documented several examples and the Senate has established a Committee on foreign interference in Australia.

The ATO has no means of knowing or checking whether a foreign tax claim is valid or simply being used as part of some overseas domestic political purge or for other ulterior purposes. In this regard it should be noted that Australia now has many migrants who have come from non-English-speaking backgrounds and are accustomed to totalitarian and repressive governments. Many such migrants have relatives back overseas exposed to central or local political demands and pressures from governmental party officials, whether for personally corrupt purposes or as part of a more sinister “national security” regime. Many migrants or their children have business connections still with the home country or have politically exposed investments back home. For example, many business migrants have outsourced manufacturing back to their home country in order to import goods into Australia.

Over the last 40 years, many such migrants will have children who have married in Australia and have Australian spouses and grandchildren working in public service departments or in private sector contractors handling sensitive government contracts.

It can be expected that some governments may keep tabs on their emigrants and émigré communities and will be seeking to have a good understanding of the local connections of their diaspora communities. It would be naïve in the extreme to think that their national security agencies do not look for ways to find Australian citizens who may assist them with their inquiries as regards the operations of Australian governments.

Most people, quite naturally and understandably, put their family loyalties ahead of their national loyalties. If an Australian married to the son or daughter of an emigrant facing a huge ATO tax demand issued at the behest of a foreign tax office to the father or mother or uncle or aunt of his or her spouse, he or she might be willing to talk to a foreign government official with a view to sorting out the problem. The requests for information might at first seem quite innocuous and a small price to pay for helping out a relative. One does not need a great imagination to understand where it might end.

Persons facing or indirectly affected by such intimidating demands from the ATO on behalf of foreign governments could be employed in, or have relatives employed in, sensitive positions in Parliamentary offices or in Australian Government Departments such as Defence, Immigration, Treasury, Prime Minister and Cabinet, as well as in State Government Departments or in contractors undertaking, for example, IT work for governments.

From the point of view of a foreign intelligence service, what could be more elegant and cost efficient than having your national tax office issue a bogus tax assessment against one of your expatriates and have the ATO work for you in creating the financial pressure that will allow you to suborn him or members of his family into acting in your interests? The victim would even be financing, via the ATO, the cost of his own subversion.

Do the Australian Federal and State Governments and Parliaments really want to create a situation whereby foreign governments are assisted by the ATO in suborning Federal and State civil servants (for example, from migrant families or with relatives from migrant families) into acting as agents of foreign powers?

Conclusion

Given the abuses of treaties by the UK Revenue, and the facts above which show that the UK authorities cannot be trusted, nor can the ATO be relied upon to keep them honest, an Article needs to be inserted into any UK Free Trade Agreement (FTA) declaring that it is noted and acknowledged by the parties that –

1. UK taxes (including any digital tax) are not enforceable in Australia;
2. any future treaty between the UK and Australia altering that position will only have effect and be enforceable in respect of finally determined tax debts arising for tax years after ratification of any such treaty by Parliament;
3. all UK Revenue claims can be contested in Australian Courts; and
4. this above policy applies in a non-discriminatory way in respect of all Australia's international tax agreements.