GLOBAL FORUM ON TRANSPARENCY AND EXCHANGE OF INFORMATION FOR TAX PURPOSES

Peer Review Report Combined: Phase 1 + Phase 2, incorporating Phase 2 ratings

AUSTRALIA

OECD

Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Australia 2013

COMBINED: PHASE 1 + PHASE 2,
INCORPORATING PHASE 2 RATINGS

November 2013
(reflecting the legal and regulatory framework
as at June 2010)

BETTER POLICIES FOR BETTER LIVES

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About the Global Forum

The Global Forum on Transparency and Exchange of Information for Tax Purposes is the multilateral framework within which work in the area of tax transparency and exchange of information is carried out by over 120 jurisdictions which participate in the Global Forum on an equal footing.

The Global Forum is charged with in-depth monitoring and peer review of the implementation of the international standards of transparency and exchange of information for tax purposes. These standards are primarily reflected in the 2002 OECD *Model Agreement on Exchange of Information on Tax Matters* and its commentary, and in Article 26 of the OECD *Model Tax Convention on Income and on Capital* and its commentary as updated in 2004, which has been incorporated in the UN *Model Tax Convention*.

The standards provide for international exchange on request of foreseeably relevant information for the administration or enforcement of the domestic tax laws of a requesting party. Fishing expeditions are not authorised but all foreseeably relevant information must be provided, including bank information and information held by fiduciaries, regardless of the existence of a domestic tax interest or the application of a dual criminality standard.

All members of the Global Forum, as well as jurisdictions identified by the Global Forum as relevant to its work, are being reviewed. This process is undertaken in two phases. Phase 1 reviews assess the quality of jurisdictions' legal and regulatory framework for the exchange of information, while Phase 2 reviews look at the practical implementation of that framework. Some Global Forum members are undergoing combined – Phase 1 plus Phase 2 – reviews. The ultimate goal is to help jurisdictions to effectively implement the international standards of transparency and exchange of information for tax purposes.

All review reports are published once approved by the Global Forum and they thus represent agreed Global Forum reports.

For more information on the work of the Global Forum on Transparency and Exchange of Information for Tax Purposes, and for copies of the published review reports, please refer to www.oecd.org/tax/transparency and www.eoi-tax.org.

Executive Summary

1. This report summarises the legal and regulatory framework for transparency and exchange of information in Australia as well as practical implementation of that framework. The international standard which is set out in the Global Forum's Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information, is concerned with the availability of relevant information within a jurisdiction, the competent authority's ability to gain timely access to that information, and in turn, whether that information can be effectively exchanged with its exchange of information partners.

2. Australia has a long history of developing the capacity and international linkages needed to engage in effective exchange of information for tax purposes. It signed its first double taxation agreement (DTA) in 1946 and now has a network of 44 such agreements and 25 Tax Information Exchange Agreements (TIEAs). Over one million Australians currently derive foreign source income which may be subject to tax in Australia and this figure is increasing at approximately 8% – 10% a year. From the perspective of the Australian Tax Office (ATO), increased international cooperation is a defence against international tax avoidance and evasion. Improved exchange of information (EOI) provides it with a better opportunity to understand the activities of Australian taxpayers.

3. With such a long history of exchange of information for tax purposes, the input of its EOI partners into the review process has to be given considerable weight in developing an understanding of Australia's compliance with the standards. Currently about 75% of the requests for exchange of information that are made to Australia come from just seven countries. These same seven countries have remained Australia's major EOI partners for many years. They account for over half of all foreign investment into Australia and receive more than two thirds of all Australian foreign investment. All of them responded to a questionnaire (peer questionnaire) canvassing their views on Australia's implementation of the standards in the context of their bilateral relationships. In addition eight of Australia's top 10 trading partners (some of which are also major EOI partners) responded to the peer questionnaire. In

general, these responses confirm that, notwithstanding some imperfections, Australia's practices with respect to exchange of information are of a very high standard.

4. The Australian legislative and regulatory framework to ensure the availability of information consists of a number of different elements. These include:

- registration requirements for companies, partnerships and certain trusts;
- anti-money laundering (AML) due diligence requirements which are imposed on a range of service providers;
- reporting requirements for tax purposes.

5. With regard to Australia's AML rules, the Financial Action Task Force (FATF) found that Australia's ability to obtain access to information on the beneficial ownership and control of certain legal arrangements such as trusts was insufficient. Moreover company and trust service providers have still not been brought within the scope of Australia's AML rules although it is planned to include them.

6. While the FATF found deficiencies in the availability of information on trusts it acknowledged that the ATO has better access to information in relation to trusts as a result of the requirement for trusts to submit tax returns. Annual returns are required from Australian resident trusts and foreign trusts with Australian income. The return must stipulate who the beneficiaries are and the share of income for each beneficiary. The ATO also has comprehensive powers to request additional information when required.

7. More importantly, no issues were raised in relation to the availability of ownership or other information for tax purposes, or the ATO's ability to access it, by Australia's peers in the context of this review. The only substantive issues raised relate to some delays in sending information which had been requested and absence of status reports after 90 days in the event that a substantive response to the request could not be provided within that timeframe. The ATO has recently taken steps to address both of these issues.

8. The factors that appear to be critical to Australia's EOI performance are as follows:

- its ability to leverage off information that is already within other public service departments and agencies, e.g. information held by the AML and company registration authorities, to which the ATO has direct access;

- the comprehensiveness of the Australian tax system and of the reporting requirements that are imposed on taxpayers;
- a suite of powers to access information which are comprehensive and far reaching; and
- the strong organisational commitment that the ATO has made to ensure that exchange of information works in practice.

9. Australia has been assigned a rating[1] for each of the 10 essential elements as well as an overall rating. The ratings for the essential elements are based on the analysis in the text of the report, taking into account the Phase 1 determinations and any recommendations made in respect of Australia's legal and regulatory framework and the effectiveness of its exchange of information in practice. On this basis, Australia has been assigned a rating of Compliant for each essential element. In view of the ratings for each of the essential elements taken in their entirety, the overall rating for Australia is Compliant.

1. This report reflects the legal and regulatory framework as at the date indicated on page 1 of this publication. Any material changes to the circumstances affecting the ratings may be included in Annex 1 to this report.

Introduction

Introduction and methodology used for the combined peer review of Australia

10. The assessment of the legal and regulatory framework of Australia and the practical implementation and effectiveness of this framework was based on the international standards for transparency and exchange of information as described in the Global Forum's Terms of Reference, and was prepared using the Global Forum's Methodology for Peer Reviews and Non-Member Reviews. The assessment was based on the laws, regulations and exchange-of-information mechanisms in force or effect as at June 2010, other information, explanations and materials supplied by Australia during the on-site visit that took place on 27-28 May 2010, and information supplied by partner jurisdictions. During the on-site visit, the assessment team met with officials and representatives of the relevant Australian public agencies, in particular the ATO and the Australian Securities and Investment Commission (see Annex 4).

11. The Terms of Reference break down the standards of transparency and exchange of information into 10 essential elements and 31 enumerated aspects under three broad categories: (A) availability of information; (B) access to information; and (C) exchanging information. This review assesses Australia's legal and regulatory framework and the implementation and effectiveness of this framework against these elements and each of the enumerated aspects. In respect of each essential element a determination is made regarding Australia's legal and regulatory framework that either: *(i)* the element is in place, *(ii)* the element is in place but certain aspects of the legal implementation of the element need improvement, or *(iii)* the element is not in place. These determinations are accompanied by recommendations for improvement where relevant. In addition, to reflect the Phase 2 component, recommendations are made concerning Australia's practical application of each of the essential elements and a rating of either: *(i)* compliant, *(ii)* largely compliant, *(iii)* partially compliant, or *(iv)* non-compliant is assigned to each

element. An overall rating is also assigned to reflect Australia's overall level of compliance with the standards.

12. The assessment was conducted by an assessment team which consisted of two expert assessors and a representative of the Global Forum Secretariat: Ms. Ruedah Karim, Director, International Affairs and EOI Division, Inland Revenue Board Malaysia; Ms. Sarita De Geus, Senior Policy Advisor International Tax Law at the Directorate-General for the Tax and Customs Administration of the Netherlands Ministry of Finance; and Mr. Dónal Godfrey from the Global Forum Secretariat.

13. The ratings assigned in this report were adopted by the Global Forum in November 2013 as part of a comparative exercise designed to ensure the consistency of the results. An expert team of assessors was selected to propose ratings for a representative subset of 50 jurisdictions. Consequently, the assessment teams that carried out the Phase 1 and Phase 2 reviews were not involved in the assignment of ratings. These ratings have been compared with the ratings assigned to other jurisdictions for each of the essential elements to ensure a consistent and comprehensive approach. The assignment of ratings was also conducted at a different time from those reviews, and the circumstances may have changed in the meantime. Readers should consult Annex 1 for information on changes that have occurred.

Overview of Australia

General information on the economy, legal system and the taxation system

14. About the size of continental United States, Australia is the world's smallest continent and its largest island. It has a population of around 22.5 million people concentrated in a number of coastal cities. Much of the interior is desert although rich in mineral resources.

15. With an internationally competitive advanced market economy, Australia is the world's largest coal exporter and is a globally significant source of minerals such as alumina, bauxite, diamonds, iron ore, uranium and zinc. It is also a major exporter of agricultural products, including cotton, meat, wool, wheat and wine as well as chemical and manufactured products. Its natural resources attract high levels of foreign investment. GDP per capita in 2009 was around USD 39 000.[2]

16. The Australian Constitution establishes a federal system of government, under which powers are distributed between the Federal Government and the States. It defines exclusive powers (investing the Federal Government

2. On 30 June 2010 1 USD = 1.173 AUD.

with the exclusive power to make laws on matters such as defence, external affairs, and immigration and citizenship) and concurrent powers (where both tiers of government are able to enact laws). Australia's States and mainland Territories have independent legislative power in all matters not specifically assigned to the Federal Government. Where there is any inconsistency between Federal and State or Territory laws, Federal laws prevail. Federal laws apply to the whole of Australia. Australia also has a system of local government (e.g. city and shire councils).

17. The High Court of Australia (Australia's supreme court) interprets and applies the law of Australia, decides cases of special federal significance, including challenges to the constitutional validity of laws, and hears appeals (by special leave) from the Federal, State and Territory courts.

18. The Federal Parliament derives its power to enact income tax legislation from the Australian Constitution, specifically under section 51(ii). This section prohibits any federal tax that discriminates between the various States. The Income Tax Assessment Acts provide for the incidence, assessment and collection of income tax. Other tax laws support the indirect tax system.

19. The tax system in Australia is administered by the Australian Taxation Office (ATO), which collects 97% of the Australian government's revenue. The *Taxation Administration Act 1953* (TAA 1953) and the Regulations made under it, contain provisions dealing with the administration of the tax laws by, and the powers of, the ATO.

20. The main sources of revenue are from income tax (under which capital gains are also taxed) and other taxes such as the fringe benefits tax and goods and services tax (GST). The income tax rate for individual taxpayers is a progressive scale up to 45% (plus the Medicare levy) for higher income earners. The company tax rate is 30%. A 10% GST is imposed on the supply of the vast majority of goods and services. The primary revenue collection system for individual income tax is pay as you go (PAYG) withholding. This system requires employers to withhold income tax amounts from individual's salary and other payments. For companies and particular types of income where withholding is not possible, there is the PAYG instalment system which requires entities to pay instalments of income tax on a quarterly or annual basis.

21. Under Australian taxation law, residents are taxed on their worldwide income. A company is resident in Australia if it is incorporated there or it carries on business there and either, its central management and control is in Australia, or its controlling shareholders are resident there. In the case of foreign sourced income, controlled foreign company rules and foreign

investment fund[3] rules may apply to assess foreign income before it is remitted to Australia. For individuals, the definition of resident includes natural persons who reside in Australia, unless the Commissioner is satisfied that either *(i)* they have a permanent place of abode outside Australia, or *(ii)* they have been in Australia continuously or intermittently during more than one half of the Australian year of income but their usual place of abode is outside Australia and they do not intend to take up residence in Australia.

22. Non-residents are normally liable to tax only in respect of Australian source income. Non-residents who receive interest, dividends or royalties are generally taxed under a final withholding tax system. A maximum withholding tax of 30 percent applies to dividends, 30 percent applies to royalties and 10 percent applies to interest, unless they are otherwise reduced by a treaty and/or domestic law variation. In the case of dividends, the 30% maximum withholding rate is reduced to 15% in most of Australia's tax treaties and is further reduced to 5% in respect of non portfolio dividends (and to nil for intercorporate non portfolio dividends in several recent DTAs). Interest on debt arrangements which satisfy a "public offer" test are also subject to a nil rate of withholding tax. For royalties, the 30% maximum withholding rate is reduced to 10% in most of Australia's tax treaties and has been further reduced to just 5% in several recent treaties.

Overview of commercial laws and other relevant factors for exchange of information

23. Australia entered into its first double taxation agreement (DTA) with the United Kingdom in 1946. It signed its first Tax Information Exchange Agreement (TIEA) with Bermuda in 2005. It now has a network of 44 DTAs and 25 TIEAs and continues to expand its TIEA network. The ATO encourages the sharing of information with foreign revenue authorities through spontaneous and automatic exchanges as well as exchange on request.

24. As a member country of the OECD and of the Global Forum, which it currently chairs, Australia is an active participant in discussions on all new developments in areas related to EOI. The ATO also participates in annual Leeds Castle Group meetings, where the Tax Commissioners of Australia, Canada, China, France, Germany, India, Japan, South Korea, the United Kingdom (UK), and the United States of America (USA) meet and is a founding member of the Joint International Tax Shelter Information Centre (JITSIC). JITSIC's aim is to supplement the ongoing work of identifying and curbing tax avoidance and shelters and those who promote and invest in them.

3. On 14 July 2010, legislation to repeal the FIF provisions and deemed present entitlement rules received Royal Assent. This applies to the 2010–11 and later years of income.

The ATO has one Australian JITSIC representative based in London and one in Washington, DC.

25. Legal entities or arrangements available for use in business in Australia include companies, partnerships and trusts. Companies formed in Australia are registered under the *Corporations Act 2001*. In addition to regulating companies the Corporations Act provides, among other things, for the regulation of auditors, liquidators, receivers and managers, promoters of companies, company officers and members and company agents.

26. The Australian Securities and Investment Commission (ASIC) is the independent body responsible for enforcing and administering corporate and financial services law, including the Corporations Act, and has responsibility for consumer protection in relation to investments, life and general insurance, superannuation and banking (except lending).

27. The partnership concept in Australia was developed through the common law. The concepts established at common law have been codified and the regulation of partnerships is provided by State and Territory regulation which also provide rules for determining the existence of a partnership.

28. Private trusts do not need to be publicly registered. Registration with the Commissioner of Taxation is required in the case of charitable trusts and when income is derived by trusts. Managed investment schemes (unit trusts offered to the public) are regulated under the Corporations Act and require to be registered.

Overview of the financial sector and relevant professions

29. Australia has a large and highly developed financial services sector which includes banks, credit unions, building societies, general insurance and reinsurance companies, life insurance, friendly societies and the superannuation industry. The Australian Prudential Regulation Authority (APRA) oversees these industries.

30. Authorised Deposit-taking Institutions (ADIs) are corporations which are authorised to carry on the business of banking under the *Banking Act 1959*. ADIs include banks, building societies and credit unions. All ADIs are subject to the same prudential standards but the use of the words "bank", "building society" and "credit union" is subject to APRA's consent as set out in published guidelines.

31. Australia's banking sector is dominated by just four major banks – the Commonwealth Bank, Westpac Banking Corporation, National Australia Bank and the ANZ Banking Group.

32. APRA supervises regulated superannuation funds, other than self managed superannuation funds (these are supervised by the ATO), and Approved Deposit Funds and Pooled Superannuation Trusts. All of these entities are regulated under the *Superannuation Industry (Supervision) Act 1993*. Superannuation is a pension or payment to a person retiring from full-time work on reaching a legislated age.

33. In addition, APRA supervises general insurers under the *Insurance Act 1973* and life companies (including friendly societies) registered under the *Life Insurance Act 1995*.

34. While service providers to these financial institutions such as lawyers and accountants exist, the financial institutions are required to retain all documents related to their business, and are required to provide this information to the ATO should it be requested. Therefore the ATO is able to obtain information relating to Australian financial institutions directly from the financial institutions.

35. Other Australian Government departments relevant to Australia's financial sector include the Australian Transaction Reports and Analysis Centre (AUSTRAC) whose two main functions are to be:

- Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regulator; and
- Australia's financial intelligence unit, collecting, analysing and disseminating financial intelligence to revenue, law enforcement, national security and other partner agencies in Australia and overseas.

36. The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) is Australia's primary AML/CTF legislation. In broad terms the AML/CTF Act applies to the services provided by financial institutions, gambling service providers, bullion dealers and remittance dealers. The AML/CTF Act requires regulated entities to:

- verify a customer's identity before providing a designated service to the customer;
- report suspicious matters, and certain transactions above a threshold to AUSTRAC;
- report certain international funds transfer instructions, cross-border movements of physical currency above a threshold, and the cross-border movement of bearer negotiable instruments to AUSTRAC;
- keep records relating to customer identification and specified transactions;

- establish and maintain an AML/CTF Program to assess their money laundering and terrorism financing risk, and
- ensure that electronic funds transfer instructions include certain information about the origin of the transferred funds.

37. The AML/CTF Act forms part of a legislative package intended to bring Australia into line with international best practice to deter money laundering and terrorism financing.

38. The AML/CTF Act built on existing obligations imposed under the *Financial Transaction Reports Act 1988* (FTR Act). The FTR Act was developed as a direct response to two Royal Commissions in the 1980s which exposed the links between money laundering, major tax evasion, fraud and organized crime. The main obligations include:

- "cash dealers" are required to report suspect transactions;
- certain domestic currency transactions, and currency transfers to and from Australia, of AUD 10,000 or more are to be reported;
- reporting of international funds transfer instructions, and
- cash dealers are required to verify the identities of account holders or signatories, and to block withdrawals by unverified signatories to accounts exceeding certain credit balance or deposit limits (the FTR Act prohibits accounts being opened or operated under a false name).

39. The FTR Act continues in force and operates parallel to the AML/CTF Act. The FTR Act applies to "cash dealers" who are not "reporting entities" under the AML/CTF Act.

Recent developments

40. In 2009, the ATO launched the *Exchange of Information Committee*. The purpose of this Committee is to provide greater oversight of all forms of international information exchange occurring under Australia's tax treaties (including TIEAs).

41. The Committee provides guidance and strategic business line insights to the EOI Unit thereby ensuring a cohesive approach to the provision of exchange of information services in the ATO. It also provides support and guidance for the business lines in undertaking exchange of information activities.

42. This Committee replaces an earlier Committee solely focused on automatic exchange of information issues.

43. Australia has signed 25 TIEAs, with 8 now currently in force (Gibraltar and Guernsey having done so just recently). More TIEAs are expected to be signed by the end of 2010. Two new DTAs have also been signed with Chile and Turkey that provide for full exchange of information. Recently, three Protocols have been signed to update exchange of information articles in current DTAs with Belgium, Singapore and Malaysia.

44. The ATO recently established an *International Information Centre Hub* ("The Hub") on its intranet which provides a central electronic repository for information relating to international matters. It has been established to enable ATO compliance staff to share strategies and methodologies for actioning automatic exchange of information and Offshore Compliance Program cases.

Compliance with the Standards

A. Availability of Information

Overview

45. Effective exchange of information requires the availability of reliable information. In particular, it requires information on the identity of owners and other stakeholders as well as information on the transactions carried out by entities and other organisational structures. Such information may be kept for tax, regulatory, commercial or other reasons. If such information is not kept or the information is not maintained for a reasonable period of time, a jurisdiction's competent authority[4] may not be able to obtain and provide it when requested. This section of the report describes and assesses Australia's legal and regulatory framework on availability of information. It also assesses the implementation and effectiveness of this framework.

46. The legal and regulatory framework for the maintenance of ownership and identity information is in place in Australia. Further, Australia's exchange of information partners report that responses to requests for exchange of ownership information have been satisfactorily delivered. While there may have been delays on some occasions in responding to requests the availability of information has not been an issue. The ATO has received requests for all types of ownership and identity information from its treaty partners including with respect to companies, partnerships and trusts and

4. The term "competent authority" means the person or government authority designated by a jurisdiction as being competent to exchange information pursuant to a double tax convention or tax information exchange agreement.

there do not appear to have been any instances where ownership and identity information could not be provided.

47. The main business structures used in Australia are companies, partnerships and trusts. Companies, including foreign companies carrying on business in Australia, are required to register with ASIC. The extent to which companies are required to disclose ownership information depends on a number of factors including whether the company has been formed in Australia, is limited by shares, is a proprietary company or an unlisted company.

48. Where the company is a limited company it must provide the identity of its shareholders at registration. Subsequent changes in ownership of proprietary companies are required to be disclosed to ASIC though this requirement is limited to a change in the top 20 members, if a company has more than 20 members. Foreign companies that carry on business in Australia must also be registered, but are not required to disclose ownership information. However, they are required to identify their ultimate parent to the ATO if they derive Australian source income.

49. The share register of an unlisted company must indicate any shares that a member does not hold beneficially. There is no requirement to identify the beneficial owner but the ATO has power to compel nominees to identify persons on whose behalf shares are held. Bearer shares are not permitted.

50. In Australia, partnerships are regulated by the laws of each State and Territory. Limited partnerships must be registered with the relevant State authority. A full list of partners must be provided on registration and subsequent changes notified. Partnerships carrying on business in Australia require to be registered for tax purposes. The annual tax return for partnerships requires the names and other information relating to partners to be disclosed.

51. Australian resident trusts or foreign trusts with Australian income are required to lodge an Australian tax return.[5] An annual tax return must be lodged, irrespective of the amount of income derived by the trust. The return requires the completion of a statement of the distribution of various amounts, including the net Australian income of the trust.

52. Every taxpayer which carries on a business is required to keep adequate records that record and explain all transactions for a minimum 5 years from the date on which the record was prepared or obtained or from the time the relevant transaction or act was completed.

5. Under section 95(2) of the ITAA 1936, a trust is considered resident in Australia if at any time during the income year a trustee is a resident of Australia or the central management and control of the trust is in Australia.

A.1. Ownership and identity information

Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities.

Companies (ToR[6] A.1.1)

53. Companies formed in Australia are registered under the Corporations Act. The most common form of company is one which is limited by shares. There are essentially two main types of limited company:

- public companies which may be listed or unlisted;
- proprietary or private companies (which can have no more than 50 non-employee shareholders) and cannot engage in any activity which requires the lodgement of a prospectus.

54. A company may also be limited by guarantee or unlimited by share capital or it may be a no liability company.

55. There are approximately 1 800 000 companies registered currently, of which about 1 780 000 are proprietary companies. Of the remainder only about 1 500 are listed public companies. The vast majority of companies, around 70%, are registered online by registered agents.

56. Companies incorporated under the Corporations Act are required to register with the ASIC. An application for registration must disclose the following information in relation to shareholders:

- for a company limited by shares or an unlimited company:
  i. the number and class of shares each member agrees in writing to take up;
  ii. the amount (if any) each member agrees in writing to pay for each share;
  iii. whether the shares each member agrees in writing to take up will be fully paid on registration;
  iv. if that amount is not to be paid in full on registration – the amount (if any) each member agrees in writing to be unpaid on each share;
  v. whether or not the shares each member agrees in writing to take up will be beneficially owned by the member on registration.

6. Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information

- for a public company that is limited by shares or is an unlimited company, if shares will be issued for non-cash consideration – the prescribed particulars about the issue of the shares, unless the shares will be issued under a written contract and a copy of the contract is lodged with the application;
- for a company limited by guarantee – the proposed amount of the guarantee that each member agrees to in writing:

  i. whether or not, on registration, the company will have an ultimate holding company;

  ii. if, on registration, the company will have an ultimate holding company – the following:

    c. the name of the ultimate holding company;

    d. if the ultimate holding company is registered in Australia – its Australian Business Number, Australian Company Number or Australian Registered Body Number;

  v. if the ultimate holding company is not registered in Australia – the place at which it was incorporated or formed.

57. There is no requirement to provide information regarding the ultimate owners in the case of a chain of ownership other than in the circumstances of a company limited by guarantee where the ultimate holding company, if any, must be identified. Moreover, ASIC does not verify the registration forms it receives. If the form is compliant ASIC will accept it.

58. Changes in ownership of proprietary companies are required to be disclosed to ASIC by the company (section 178A of the Corporations Act). Section 178B of that Act restricts this requirement to a change in the top 20 members, if a company has more than 20 members. Failure to comply is a strict liability offence pursuant to section 6.1 of the Criminal Code. As a result of the offence being strict liability there is no need to prove elements that would otherwise need to be proved in relation to a person's criminal conduct. These elements include intention, knowledge, recklessness or negligence (section 5.1 of the Criminal Code). Over the past three years there have been a handful of matters dealt with by ASIC in relation to section 178A but these were all finalised prior to the prosecution stage, either through compliance following ASIC enquiries or for other reasons.

59. ASIC is subject to an obligation to "store" information given to it under the laws it administers (section 1274 of the Corporations Act). This obligation is not subject to a time limit.

60. The Corporations Act also requires all companies to maintain a register of shareholders and changes in ownership of companies are required to be disclosed – this includes the name and address of members on registration for public and proprietary companies (section 168). For all proprietary companies, the Corporations Act further requires ASIC to be notified of each and every change or addition to the name and address of the top 20 members for each class of share. Failure to do so also constitutes an offence within the meaning of section 6.1 of the Criminal Code. The register is required to be kept within Australia, specifically at the company's registered office or principal place of business (section 172(1) of the Corporations Act). If the company has a share capital the register must show among other things:

i. the date on which every allotment of shares takes place; and

ii. the number of shares in each allotment; and

iii. the shares held by each member; and

iv. the class of shares; and

v. the share numbers (if any), or share certificate numbers (if any), of the shares; and the amount paid on the shares; and

vi. whether or not the shares are fully paid, and

vii. the amount unpaid on the shares (if any).

61. Significantly, the share register of an unlisted company must indicate any shares that a member does not hold beneficially (subsection 169(5A) of the Corporations Act). Transfers of shares are required to be registered, and it is an offence for the transferee to fail to indicate where it holds shares in a non-beneficial capacity.

62. Ownership information must be kept by a company while the company exists. A company is required to retain ownership information in relation to shareholders who have ceased to be members within the last 7 years (section 169(7) of the Corporations Act). In case of liquidation this period will be 5 years or shorter if the court approves.

Foreign companies

63. If a body created in a foreign country is to carry on business in Australia,[7] it must first register with ASIC as a foreign company under the Corporations Act (Part 5B.2 Division 2) and it must appoint a local agent

7. Carrying on a business in Australia or State or Territory of Australia is defined in section 21 of the Corporations Act 2001.

who must ensure compliance with the requirements of the Corporations Act applying to the foreign body (see below).

64. A foreign company that lodges an application for registration should among other things provide:

i. a certified copy of a current certificate of its incorporation or registration in its place of origin, or a document of similar effect;

ii. a certified copy of its constitution;

iii. a list of its directors containing personal details of those directors that are equivalent to the personal details of directors referred to in subsection 205B(3);

iv. notice of the address of its registered office or its principal place of business in its place of origin, and

v. notice of the address of its registered office under section 601CT.

65. There is no requirement to disclose ownership information for foreign companies carrying on business in Australia under the registration requirements of the Corporations Act.

66. Non-resident companies must also appoint a resident Public Officer, who can be compelled to produce information on behalf of the company.

Regulated activities

67. Banks and insurance companies are regulated by APRA. If they provide financial services they must also hold an Australian Financial Services Licence (AFSL) from ASIC. All AFSL holders are required to notify ASIC of any change in control (defined under section 50AA of the Corporations Act) within 10 days as a condition of their licence (Corporations Regulation 7.6.04(1)(i)).

68. For ADIs, general insurers and life insurers ("financial sector companies"), APRA's Authorisation Guidelines require applicants to submit the names of substantial shareholders (direct and ultimate) and their respective shareholdings and details of any related entities in Australia.

69. Ownership of financial sector companies is governed by the *Financial Sector (Shareholdings) Act 1998* (the FSSA) which limits an individual shareholder or group of associated shareholders in a financial sector company to a 15 per cent stake. A stake is the aggregate of voting power of the individual and associates. The Treasurer may declare that a person with less than 15 per cent of a financial sector company's shares nonetheless has practical control and require the person to take steps to reduce that control

or shareholding. Alternatively, a higher percentage limit may be approved by the Treasurer on national interest grounds. The Treasurer has delegated to APRA the power to approve a higher percentage limit where the assets of the financial sector company are less than AUD 100 million.

Anti-money laundering law

70. Australia's anti-money laundering laws currently cover a range of financial and gambling designated services. A person who provides any one of 54 financial designated services, 2 bullion designated services or 14 gambling designated services to a customer becomes a reporting entity (REs) who incurs reporting and other obligations under the AML/CTF Act. The obligations are:

- **identification and verification**. REs must verify a customer's identity before providing a customer with a designated service. REs must also carry out ongoing due diligence on customers;
- **reporting.** REs must report suspicious matters, certain transactions above a threshold and international funds transfer instructions;
- **developing and maintaining an AML/CTF Program**. REs must have and comply with anti-money laundering and counter-terrorism financing programs (AML/CTF programs), which are designed to identify, mitigate and manage money laundering or terrorist financing risks a reporting entity may reasonably face; and
- **record keeping.** REs must make and retain certain records (and other documents given to REs by customers) for 7 years. The record keeping obligations apply to: transaction and customer-generated documents which are related to the provision of a designated service; records of customer identification procedures; records relating to AML/CTF programs; and records relating to transferred ADI accounts, electronic funds transfer instructions and correspondent banking.

71. The AML/CTF Act covers lawyers and accountants to the extent that they provide designated financial services in direct competition with the financial sector. It does not currently cover some types of professional and business services undertaken by accountants and lawyers or by company formation agents such as acting in the incorporation of a company. A proposal to amend the AML/CTF Act to include additional categories of "designated services" under the Act to address this gap is being considered by the Australian Government. The proposed amendments would capture specified transactions performed by a range of businesses and professions including real estate agents, jewelers, accountants and lawyers. This would include, for

example, advising on and assisting with equity and debt financing and the sale or formation of companies, businesses, partnerships and trusts, or acting as a director, a company secretary, a partner in a partnership, a trustee or a nominee shareholder, or providing a registered office, where these services are provided in the course of carrying on a business.

Tax law

72. Every resident company that derives Australian source income (apart from any non-profit company whose taxable income does not exceed AUD 416 or any non-profit association, organisation, institution, society or club, the income of which is exempt under Division 50 of the *Income Tax Assessment Act 1997* (ITAA 1997) or any State/Territory body the income of which is exempt from income tax under the provisions of Division 1AB of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936) or foreign income and every non-resident company that derives Australian source income, is required to lodge a taxation return.

73. There is no requirement to report information on ownership at the time the return is lodged. However, sections 263 and 264 of the ITAA 1936 (see paragraphs 170-172) provide the Commissioner of Taxation with access powers to obtain relevant information including ownership information that is under the control of an individual or entity. Companies are also required to lodge reports that identify the name, address, date of birth and tax file number or Australian Business Number[8] of all shareholders to whom dividends have been paid during a year of income. Australia's PAYG system provides that payers generally withhold tax from interest, certain dividends and royalties paid to non residents. This information is also required to be reported annually to the ATO.

74. Foreign resident companies that derive Australian source income are also required to submit a company tax return. The company tax return requires companies to identify their ultimate parent company and indicate the percentage of foreign shareholding, where this is not less than 10 per cent. A failure to provide this information constitutes an offence under section 8C of the TAA 1953. The access powers available to the Commissioner of Taxation under sections 263 and 264 of the ITAA 1936 apply equally to foreign resident companies as they do for resident companies.

8. Individuals, companies and other entities that carry on business in Australia with an annual turnover of greater than AUD 50 000 are generally required to register for an Australian Business Number (ABN). The ABN is the identifying number for all dealings with the Australian Federal and State taxation authorities and with other regulatory authorities. Entities that do not quote an ABN when they receive payment for many goods and services may have tax deducted by the payer.

Nominees

75. Currently nominees are not required to know the ultimate beneficial owner of shares being held on behalf of another person. Nominees must know who they are acting for but, except in the case of financial service licensees, there is no requirement for them to retain identity information on the persons for whom they act as legal owner. However, as indicated in paragraph 58 above, the share register of an unlisted company must indicate any shares that a member does not hold beneficially and, pursuant to section 264 of the ITAA 1936, the ATO has the power to require a nominee to identify the person on whose behalf securities are held. If a person is unable or unwilling to disclose the identity of the person for whom they act as legal owner they can be subject to penalties for failing to comply with the notice (see paragraph 171). ATO officials have indicated that they have never been asked to provide this type of information by a tax treaty partner.

76. Nominee companies that are financial service licensees are required to maintain clear records of account for assets held on behalf of clients. This requires the recording of direct legal or equitable interests in an asset such as a share. Where assets are held on trust the direct owners would be recorded. Australian law also imposes reporting obligations on all companies in relation to the reporting of dividends to shareholders and PAYG withholding in relation to non-residents.

77. In addition, as the share register only contains the name of the legal holder, section 671B of the Corporations Act requires, amongst other things, the disclosure of the ultimate beneficial holder (because they have the power to vote or dispose of the shares) in circumstances where the person holds at least 5% of the voting shares, and when that interest increases or decreases by 1% or more. Section 654B and section 654C also require the lodgement of substantial holding and shareholding notices during the course of the takeover bids for listed and unlisted companies respectively. These substantial shareholding notices provide an additional source of information on shareholder ownership.

78. Australian trustees, agents or others, who receive interest, certain dividends or royalties on behalf of a non-resident, where withholding tax has not been withheld by the payer, are also required to withhold tax at the relevant non-resident rates. Recipient Australian entities acting on behalf of non-residents are also required to submit a PAYG annual report on withholding from interest, dividend and royalty payments paid to non-residents.

79. As part of the proposed second tranche of reforms to Australia's AML/CTF legislation under consideration by the Australian Government, the term "designated service" is anticipated to be amended to include, among other things:

> *"being, or acting as, a nominee shareholder for a person, where the service is provided in the course of carrying on a business".*

Bearer shares *(ToR A.1.2)*

80. Australian law does not allow for the issuance of bearer shares.

Partnerships *(ToR A.1.3)*

81. At common law, a partnership is usually defined to be the relationship which exists between persons carrying on a business in common with a view of profit. Under Australian income tax law, the definition extends to persons receiving income jointly.

82. In Australia, partnerships are regulated by the laws of each State and Territory. The rules of equity and common law, in so far as they apply to partnerships, are also relevant to the extent that they address areas not covered by legislation. For example, section 1C of the South Australian *Partnership Act 1891* of states:

> *"Except so far as they are inconsistent with the express provisions of this Act, the rules of equity and common law relating to partnership will continue in force."* (see www.austlii.edu.au/au/legis/sa/consol_act/pa1891154/s1b.html#partner)

83. Similar provisions are found in the laws of other Australian States and Territories.

84. Some aspects of the operation of partnerships are also regulated by tax law or the *Corporations Act 2001*. For example, the Corporations Act limits the number of partners in partnership to 20 with certain exceptions for professions such as lawyers and accountants.

85. Three types of partnership are possible:

- general partnerships;
- limited partnerships, and
- incorporated limited partnerships.

86. A general partnership is the basic form of partnership in common law countries, including Australia. All of the partners manage the business and are jointly and severally liable for its debts.

87. A limited partnership must have at least one limited liability member whose liability for the liabilities of the partnership is limited and one general member whose liability in unlimited. Limited partnerships may be formed

only in Australian States. There are no provisions for the formation of limited partnerships in the Australian Capital Territory or the Northern Territory.

88. Incorporated limited partnerships are a specialised type of body corporate with a separate legal identity from its investor partners. The incorporated limited partnership, as a separate legal entity, is responsible for all its debts and obligations, but if it cannot meet these, the general partner must meet the shortfall. The limited partner only has to commit an agreed amount of capital or property and has no additional liability for the debts of the incorporated limited partnership. Incorporated limited partnerships seem to be the preferred entity when applying for registration of a limited partnership for venture capital purposes under federal legislation.

89. Federal law recognises 3 types of limited partnerships – venture capital limited partnership (VCLPs), Australian venture capital fund of funds (AFOFs) and venture capital management partnerships (VCMPs), and provides for their tax treatment as ordinary partnerships. Otherwise limited partnerships and incorporated limited partnerships are treated as companies for tax purposes.

90. Limited partnerships and incorporated limited partnerships must be registered with the relevant State authority under the Partnership Act of the appropriate State. For example, section 50 of the Queensland *Partnership Act 1981* states:

> *"A limited partnership is formed upon registration in the office of the chief executive of a statement in the approved form signed by each person who is to be a partner in the partnership and payment to the chief executive of the prescribed fee."*

91. Similar requirements are made under section 75 of the Queensland Partnership Act for incorporated limited partnerships. Other Australian States have similar requirements in respect of these types of partnerships.

92. A full list of partners must be provided on registration and subsequent changes notified. Registration forms are taken on a self assessment basis with no verification occurring on registration. It is not necessary to disclose the ultimate owners of corporate partners. Generally, a failure to notify changes to the particulars of the registration is publishable by a monetary penalty. Penalties also apply for providing false information. These penalties vary from State to State.

Foreign partnerships

93. There is no specific regulation regarding foreign partnerships.

Tax law

94. In Australia, identity information on partners must be disclosed to the ATO. Although a partnership is not a separate legal entity for tax purposes (with the exception of an incorporated limited partnership), it is required to lodge a tax return where it operates a business in Australia. The annual tax return for partnerships requires the names and other information relating to partners to be disclosed, together with details of any changes in the partnership during the period covered by the return.

95. Each of the partners is also required to lodge an individual tax return in respect of their shares of partnership profits or losses. The Australian taxation law provides for penalties in the event a failure to lodge tax returns and where incorrect returns, statements or declarations are made (see paragraphs 123-124).

96. A foreign partnership carrying on a business in Australia is also required to lodge tax returns. Individual partners in the partnership are also required to lodge returns.

97. Although it is not necessary to disclose the ultimate owners of corporate partners on a tax return, the Commissioner of Taxation may ask for information regarding the ultimate owners. However, there is no independent requirement under Australian taxation law that a partnership must maintain particular types of ownership information.

Trusts *(ToR A.1.4)*

98. Australia is a common law jurisdiction that has a system of trust law. Australian State and Territory law governs trust arrangements and reporting requirements. However, the rules and principles of common law or equity also apply to the extent that they are not inconsistent with State and Territory laws or the instrument creating the trust. There is no central system of registration for trusts as there is for companies. Registration is required if the trust has a business name or if the trust/trustee requires a licence for business activities. For superannuation funds the *Superannuation Industry (Supervision) Act* imposes licensing, record keeping and reporting obligations on superannuation trustees.

99. The general rule in Australia is that any person who has the legal capacity to take and hold title to property in his or her own right has the capacity to hold office as a trustee.

100. There are no State or Territory requirements for trustees to obtain, verify, or retain information on the beneficial ownership and control of trusts. However, the Australian authorities have indicated that a resident trustee of a domestic trust would need to have information on the identity of beneficiaries

in order to carry out his or her duties as a trustee and to enable compliance with Australian tax obligations.

101. Although private trusts do not need to be publicly registered, trust returns must be lodged with the ATO where trustees, that are in receipt of income on trust assets, are assessable on that income. Registration is also required with the Commissioner of Taxation in the case of charitable trusts.

102. Managed investment schemes (unit trusts offered to the general public) are regulated under the Corporations Law and are required to be registered with ASIC. The responsible entity of a managed investment scheme must be a public company and hold a financial services licence.

103. Managed investment schemes must keep a register of members including name and address of each member and date of entry in the register, interest held by each member; and amount paid on the interests. Under section 672DA of the *Corporations Act 2001*, the responsible entity of a scheme must keep the following information:

a. details of the nature and extent of a person's relevant interest in shares in the company or interests in the scheme;

b. details of the circumstances that give rise to a person's relevant interest in shares in the company or interests in the scheme;

c. the name and address of a person who has a relevant interest in shares in the company or interests in the scheme;

d. details of instructions that a person has given about:

   i. the acquisition or disposal of shares in the company or interests in the scheme; or

   ii. the exercise of any voting or other rights attached to shares in the company or interests in the scheme; or

   iii. any other matter relating to shares in the company or interests in the scheme;

e. the name and address of a person who has given instructions of the kind referred to in paragraph (d).

Anti-money laundering law

104. The AML/CTF Act provides that a reporting entity must carry out procedures to verify a customer's identity before providing a designated service to the customer. Currently, trust service providers are not considered to be reporting entities. However, to the extent that a trust is the customer of

a reporting entity, the reporting entity must have information regarding the identity of the trust.

105. Under the Anti-Money Laundering and Counter-Terrorism Financing Regulations 2008 (AML/CTF Regulations) companies which carry on a business of issuing or selling interests in managed investment schemes (MIS) are providing a 'designated service' under the AML/CTF Act.

106. Also as part of the proposed second tranche of reforms to Australia's AML/CTF legislation under consideration by the Australian Government mentioned earlier, it is anticipated that trust service providers will become reporting entities under the Act. Under this proposal, the term "designated service" would be amended to include, among other things:

> *"at the request of a person, being, or acting as, the trustee, or one of the trustees, of a trust, where the service is provided in the course of carrying on a business."*

107. The AML/CTF Act is Australia's primary piece of AML/CTF legislation. However the FTR Act also requires certain information be provided to a cash dealer where an account is opened with that cash dealer.

108. Where the account is held in trust this fact must be recorded as well as the following details:

a. the name and address of the trustee; and

b. the name of each beneficiary under the trust, and

c. if the terms of the trust identify the beneficiaries by reference only to membership of a class – details of the class.

109. Cash dealer is defined under the FTR Act to include a trustee or a manager of a unit trust but not the trustee of a private trust. The FTR Act operates in parallel to the AML/CTF Act. It applies to "cash dealers" who are not "reporting entities" under the AML/CTF Act.

Tax law

110. Section 161 of the ITAA 1936 states:

> *Every person must, if required by the Commissioner by notice published in the Gazette, give to the Commissioner a return for a year of income within the period specified in the notice.*[9]

9. Following the introduction of the *Legislative Instruments Act 2003* this notice is now done by way of a legislative instrument.

111. This notice, which is issued annually, requires taxpayers to lodge returns by 31 October. The notice requires Australian resident trusts or foreign trusts with Australian income to lodge an Australian tax return. The return requires the reporting of the net income of the trust.[10] It also requires the trustee to complete a statement of the distribution of various amounts to each beneficiary. A total of 660 324 trust tax returns were lodged for the 2007 tax year, 689 067 for the 2008 tax year and 652 000 to date in respect of the 2009 tax year. The requirement placed on trusts to lodge tax returns is vigorously enforced. In the two years to June 2010, penalties were imposed on just over 14 000 trusts for failing to lodge an income tax return.[11]

112. There is no requirement to identify settlors on the trust tax return. However, the ATO has indicated that this information is normally available from the trust deed which it would be able to obtain using the powers given in section 264 of ITAA 1936 (see paragraph 171 regarding penalties for failing to comply with a section 264 notice). If it was unable to obtain the information from the trust deed it would seek the assistance of the trustee to provide it with details of the settlor. It also notes that under Australian law the transfer of property into a trust must generally be documented according to the nature of the property. For example, a transferor of shares must deliver a duly executed instrument of transfer to the intended trustee. Moreover, the ATO has stated that it has never been asked to provide information concerning the settlors of a trust.

Foreign trusts

113. There is no prohibition on residents of Australia acting as trustee in relation of trusts formed under foreign laws. These trusts would generally be governed by the laws of the countries under which they are created. However, they are obliged to register for tax purposes where the trustee is in receipt of income on which they are assessable. In this regard, Australia taxes resident trustees in respect of trust income that is accumulated in a trust, irrespective of the source of that income, even if the income is ultimately destined for foreign beneficiaries (although a refund for the tax paid by the trustee would

10. A trust return is not required to be lodged where a foreign trust is only in receipt of interest, dividends or royalty income or certain fund payments from a managed investment scheme which are subject to final withholding tax.

11. As a matter of practice, the existence of a bare trust is generally ignored for the purposes of Australian income tax law. The Commissioner has confirmed that he does not require a genuine bare trust (described by the ATO as a «Transparent Trust») to lodge an income tax return. This is because in this type of trust the beneficiary has an absolute, indefeasible entitlement to the capital and income of the trust and any income will be reported in the beneficiary's returns.

be available to a beneficiary who later receives the foreign source income if they were a foreign resident at the time it was derived). It is not necessary for the settlor or beneficiary of a trust to have an Australian connection to trigger a tax charge.

114. The mechanisms described above, and in particular the extensive lodgement requirements in Australia ensure the availability of information on trusts, whether Australian or foreign law trusts, where significant elements of the trust such as its central management or residence of a trustee are connected with Australia. Nevertheless, it is conceivable that a trust could be created which has no connection with Australia other than that the settlor chooses that the trust will be governed by the laws of an Australian State or Territory. In that event there may be no information about the trust available in Australia. Whilst this situation may theoretically arise because the common law allows jurisdictional choice for resolution of disputes under the trust or contract, it cannot be used to determine a tax liability. In these situations trust information would rest in the jurisdiction where the trustee is located as the relevant records would be situated there.

Foundations *(ToR A.1.5)*

115. There are no legislation or common law principles that permit the establishment of foundations in Australia. The term "foundation" is a categorization used for not for profit entities usually established for charitable purposes.

Enforcement provisions to ensure availability of information *(ToR A.1.6)*

116. Section 168 of the Corporations Act requires a company to set up and maintain a register of members. Transfers of shares are required to be registered, and it is an offence for the transferee to fail to indicate where it holds shares in a non-beneficial capacity (section 1072H). Changes in ownership of proprietary companies are required to be disclosed to ASIC (section 178A of the Corporations Act). Section 178B of that Act restricts this requirement to a change in the top 20 members, if a company has more than 20 members.

117. The failure of a company to keep a register of members, under section 168 is a strict liability offence. The maximum penalty on conviction is 10 penalty units (AUD 1 100), 3 months imprisonment or both. For proprietary companies, a failure by a company to notify ASIC of the changes to a member's share details (section 178A) or a change to a proprietary company's share structure (penalty of 5 penalty units (AUD 550)) and both of these offences are strict liability offences under the Criminal Code (see paragraph 57 above).

118. Foreign resident companies that derive Australian source income are required to submit a company tax return. The company tax return requires companies to identify their ultimate parent company and indicate the percentage of foreign shareholding, where this is not less than 10 per cent. A failure to provide this information constitutes an offence under section 8C of the TAA 1953.[12]

119. Non-resident companies must also appoint a resident Public Officer, who can be compelled to produce information on behalf of the company. The public officer is answerable for everything that is required to be done by the company for tax purposes and if in default is liable for the same penalties. If a non-resident company does not provide information e.g. pursuant to a Section 264 notice the non-resident company is liable via the public officer.

120. The Commissioner of Taxation possesses powers pursuant to sections 263 and 264 of the ITAA 1936, sections 353-10 and 353-15 of the TAA 1953, sections 127 and 128 and the *Fringe Benefits Tax Assessments Act 1986* and sections 76 and 77 of the *Superannuation Guarantee (Administration) Act 1992* that require information held by third parties to be produced.

121. Limited partnerships and incorporated limited partnerships must be registered with the relevant State authority under the Partnership Act of the appropriate State. A full list of partners must be provided on registration and subsequent changes notified. Generally, a failure to notify changes to the particulars of the registration is punishable by a pecuniary penalty.

122. The precise amount of the penalty varies in each State. In New South Wales (NSW) for example, limited partnerships and incorporated limited partnerships must register with the NSW Department of Fair Trading. Section 79 of the NSW *Partnerships Act 1892* states that it is an offence to provide false information on registration of a partnership, the penalty for which is AUD 5 500. Section 56 of that Act provides that if any changes to the details that require to be notified occur, the NSW Office of Fair Trading must be informed within 7 days. A failure to do so incurs a penalty of AUD 1 100. Similar provisions can be found in the laws of other Australian States and Territories.

123. In the case of general partnerships (and limited partnerships) ownership information must be disclosed to the ATO. Where a partnership operates a business in Australia the partnership is required to lodge a tax return. Each partner is also required to lodge an individual tax return.

124. Annual tax returns must be lodged for trusts in the circumstances described in paragraph 108 above. A resident trustee of a domestic trust or

12. Penalties for failure to comply with taxation law are dealt with under section 8E of the TAA 1953 (see paragraph 171 for the quantum of penalties that can be applied).

foreign trust would need information regarding the identity of the beneficiaries to perform his duties as a trustee and enable compliance with Australian tax obligations. The Australian taxation law provides for penalties in the event a failure to lodge tax returns and where incorrect returns, statements or declarations are made.

125. The amount of the penalty for failing to lodge on time differs according to the size of the entity. The penalty for most taxpayers is AUD 110. The penalty for a medium sized taxpayer is AUD 220 and for a large taxpayer AUD 550. The penalty applies every 28 days that a document is late. Should a taxpayer fail to make a statement, the ATO can issue a default notice and impose a penalty of 75% of the default amount.

126. The amount of the penalty for a taxpayer who has made a false or misleading statement depends on the behaviour of the taxpayer. If the taxpayer did not take reasonable care a penalty amount of 25% of the shortfall is applied. If the taxpayer was reckless a penalty amount of 50% of the shortfall is applied. If the taxpayer showed intentional disregard a penalty amount of 75% of the shortfall is applied. The ATO has the ability to adjust (increase or decrease) the amount of the penalty applied based on the following:

- if the taxpayer voluntarily discloses the shortfall before an audit;
- if the taxpayer voluntarily discloses the shortfall during an audit;
- if the taxpayer causes a hindrance to an audit.

Other relevant entities and arrangements

127. Under Australian law a number of entities other than companies, partnerships and trusts can be created. These include building societies, credit unions and friendly societies. A building society is a cooperatively owned organisation established chiefly to lend funds for housing, modelled on similar United Kingdom institutions. A credit union is a financial cooperative which accept deposits from, and provide loans to, their customers (members). Credit unions evolved on the basis of a common bond among members, through employment or community interests; they offer funds for housing and provide consumer finance loans for purchases of items such as cars or boats.

128. Friendly societies in Australia were originally a group of workers who made small periodic contributions to a common fund which could be used when needed for funerals, sickness and so on. Friendly societies first appeared in Australia in 1840 and predate modern social services such as pension schemes and retirement benefits. They were formed on the basis of group interests, such as craft or religion. Contemporary friendly societies offer benefits such as funeral costs, sickness and hospital insurance, hospital cover and sometimes retirement benefits through savings and investments.

Credit unions and building societies are now required to be incorporated under Australian law.

129. There are no indications that these are relevant for exchange of information purposes. In any event the ATO's powers to obtain information would apply should a request for exchange of information be made.

Determination and factors underlying recommendations

Phase 1 Determination	
The element is in place.	
Factors underlying recommendations	**Recommendations**
Nominees that are not financial service licensees are not required to maintain ownership and identity information in respect of all persons for whom they act as legal owners.	An obligation should be established for all nominees to maintain relevant ownership information where they act as the legal owners on behalf of any other person.

Phase 2 Rating
Compliant.

A.2. Accounting records

Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements.

General requirements *(ToR A.2.1)*

130. Section 286 of the Corporations Act requires a company to keep written financial records that correctly record and explain its transactions and financial position and performance; and would enable true and fair financial statements to be prepared and audited.

131. Section 289 of the Corporations Act provides that a company may decide where to keep financial records. However, where records are kept outside of the jurisdiction, sufficient written information about those matters must be kept in the Australian jurisdiction to enable true and fair financial statements to be prepared. The company must give the ASIC written notice of the place where the information is kept. Failure to do so is an offence of strict liability with a penalty equating to AUD 2 750.

132. Under the *Insurance Act 1973*, *Life Insurance Act 1995* and the *Banking Act 1959*, financial sector companies are required to notify APRA of the location of accounting records (for general insurers), company records (for life insurers) and financial records (for ADIs) which must be kept in Australia unless APRA approves otherwise.

133. There are no particular record-keeping requirements for partnerships under Australian partnership law. However, partners must make full disclosure to one another on all matters affecting the partnership. For example, section 28 of the New South Wales *Partnership Act 1892* states:

> *(1) Partners in a firm other than an incorporated limited partnership are bound to render true accounts and full information of all things affecting the partnership to any partner or the partner's legal representatives.*
>
> *(2) An incorporated limited partnership is, subject to the partnership agreement, bound to render true accounts and full information in respect of all things affecting the partnership to any partner or the partner's legal personal representatives.*

134. Each of Australia's States and Territories has similar requirements. These give disclosure of accounting information between the partners the force of law. The ATO is able to access this information using its powers under section 263 and section 264 of the ITAA 1936. While these provisions are broad, it is difficult to determine whether they meets the standard set by element A.2 on their own. However, any partnership liable to tax will also be subject to the accounting requirements for tax purposes.

135. The partnership books must be kept at the place of business of the partnership or principal place of business where there is more than one. This requirement arises under the partnership law of the various States and Territories, e.g. section 27(1) of the Queensland Partnership Act.

136. Australian State and Territory law governs trust arrangements and reporting requirements. For example, in South Australia, the Trustee Regulations prescribe detailed requirements for the records to be kept by trustees, including all tax returns, sales or transfers of trust property, record of insurance, a register of securities etc.

137. All State and Territory laws regulating trusts apply to all trustees, not only those carrying on a business of trustee services. The laws of the six Australian States require trusts to maintain accounting records. For example, section 6 of the Queensland *Trust Accounts Act 1973* states:

> *A trustee shall keep or cause to be kept in written or printed form in the English language such accounting and other records of all trust moneys and of any disbursement or disposal thereof or*

dealing therewith as will sufficiently explain the transactions and true position in regard thereto and enable true and fair accounts to be prepared from time to time and shall keep or cause to be kept those records in such manner as to enable them to be conveniently and properly audited.

138. Similar requirements are found in the laws of New South Wales and South Australia. The statutory requirements in the case of Western Australia and Tasmania apply to trustee companies and there are only limited requirements in the laws of Victoria. Queensland also imposes additional regulatory requirements on trustee companies (e.g. section 64 of the Queensland *Trustee Companies Act 1968* requires trustee companies to give beneficiaries accounts at least once per year).

139. The laws of the Australian Capital Territory and Northern Territory do not have statutory record keeping requirements. However, Australian common law also places a requirement on trustees to maintain records. Where an obligation arises under statute it prevails over any inconsistent common law. Where there is no applicable statute law the common law principles apply. Thus, the common law principles relating to record keeping requirements apply in the two Territories and the other States to the extent that they are not inconsistent with State laws.

140. In some States, the Public Trustee has some supervisory role in relation to inspecting records or auditing of trust accounts (e.g. section 60 of the Queensland *Public Trustee Act 1978* and section 84B of the South Australian *Trustee Act 1936*.)

141. Australian common law places a requirement on all trustees to maintain records. The common law principle on record keeping obligations is that the first and primary duty of every executor or trustee having money in his hands is, an account of his receipts and payments must be kept to be produced to those interested in the account when it is properly demanded.[13] The duty to account represents a necessary incident of the trustee's personal obligations to hold and deal with trust property for the benefit of the beneficiaries.[14] The account must be timely,[15] faithful and accurate and usually supported by documentary evidence.[16]

142. In all States other than South Australia, the relevant trustee legislation provides that a trustee may unilaterally have an audit taken of the trust by a person carrying on the business of an accountant and, in so doing, render certainty in the form and substance of the accounts of the trust.

13. Wroe v Seed (1863) 66 ER 773.
14. Re Simersall (1992) 108 ALR 375.
15. Strauss v Wykes (1916) VLR 200.
16. Christensen v Christensen (1954) QWN 37.

Tax law

143. The requirements of a trustee to file tax returns require the trustee to adhere to the record-keeping and reporting requirements of the income tax laws.

144. The obligation to keep records for tax purposes arises primarily under section 262A of ITAA 1936. This requires every taxpayer (including a company, partnership or trust) carrying on a business to keep records that record and explain all transactions and other acts engaged in by the taxpayer that are relevant for tax purposes including:

- any documents that are relevant for the purpose of ascertaining the taxpayer's income; and
- documents containing particulars of any election, estimate, determination or calculation made by the taxpayer and the basis on which any estimate, determination or calculation was made.

145. This would include, for example, underlying documents such as receipts or vouchers necessary to prove expenditure.

146. While section 262A originally only referred to record keeping by entities carrying on a business, it has been amended on a number of occasions to encompass passive investors and full self-assessment taxpayers such as trustees of various types of superannuation funds who are legally precluded from carrying on a business. Nevertheless its record keeping requirements would not appear to extend to all relevant entities and arrangements in all cases. On the face of it, only persons carrying on a business and other taxpayers that are specifically enumerated are covered and it might not apply, for example, to some trusts that only hold passive investments.

147. However, section 262A itself does not encompass all record keeping situations. Other provisions within the taxation legislation, such as those relating to capital gains also require taxpayers to keep records. For example, section 121-20 of ITAA 1997 requires entities to keep records of every act, transaction, event or circumstance that can reasonably be expected to be relevant to working out whether the entity has made a capital gain or capital loss. Section 121-25(2) provides that the records must be retained until the end of five years after it becomes certain that no capital gains tax (CGT) event (or no further CGT event) can happen such that the records could reasonably be expected to be relevant to working out whether a capital gain or capital loss was made from the event. This is an important provision for entities that are passive investors. If an asset, such as shares, is sold the profit or loss would be determined under the CGT regime. Moreover, there may be PAYG withholding obligations on trustees if amounts of dividends interest or royalties are paid to foreign resident beneficiaries. In these circumstances there are also reporting and record keeping obligations.

148. Taken together the above requirements under taxation law and other Federal laws along with State legislation and common law requirements to keep records, the availability of accounting information is ensured and this allows the ATO to satisfy requests for such information from its tax treaty partners.

Underlying documentation *(ToR A.2.2)*

149. Section 286 of the Corporations Act requires a company to keep written financial records that correctly record and explain its transactions and financial position and performance; and would enable true and fair financial statements to be prepared and audited.

> *(1) A company, registered scheme or disclosing entity must keep written financial records that:*
>
> *(a) correctly record and explain its transactions and financial position and performance; and*
>
> *(b) would enable true and fair financial statements to be prepared and audited.*

150. The section does not address the issue of underlying documents.

151. State and Territory partnership and trust laws are generally silent on the nature of the underlying documents that require to be kept by partnerships and in relation to maintaining underlying documentation. However, general trust law imposes a duty to maintain records and documentation. The nature and the extent of the documentation varies according to the size and nature of the trust. The information required for the effective and efficient management of the trust should be catalogued in a logical and accessible manner and must usually be supported by documentary evidence. Moreover, in the case of South Australia, the *Trustee Regulations 1996* contain very detailed descriptions of the records that a trustee must keep relating to administration of the trust property.

152. In addition to the requirements of section 262A of ITAA 1936 and section 121-20 of ITAA 1997, referred to in paragraphs 141 and 143 above, Section 382-5 of Schedule 1 to the TAA 1953 requires entities to keep records of indirect taxes. The provision requires an entity which makes a taxable supply, GST-free supply, input taxed supply, taxable importation, creditable acquisition or creditable importation to keep records that identify and explain all transactions and relevant acts.

5-year record retention standard (ToR A.2.3)

153. For tax purposes the records are required to be retained for at least 5 years from the date on which the record was prepared or obtained or from the time the relevant transaction or act was completed, whichever is the later. A failure to retain these records is an offence under Australian tax law and a penalty of AUD 2 200 applies.

154. Pursuant to section 286 of the Corporations Act financial records must be retained for 7 years after the transactions covered by the records are completed.

155. An incorporated limited partnership is required to keep records for 7 years under Australian corporations' legislation.

156. Some States' laws impose a record retention requirement period in relation to the records that trustees are required to maintain. This is either 5 or 7 years.

Determination and factors underlying recommendations

Phase 1 Determination
The element is in place.

Phase 2 Rating
Compliant.

A.3. Banking information

Banking information should be available for all account-holders.

Record-keeping requirements (ToR A.3.1)

157. Section 912A of the *Corporations Act 2001* provides the general obligations a bank must meet in order to obtain the financial license from ASIC that is necessary for it to conduct business in Australia. One such obligation is to comply with financial services laws. The definition of financial service laws includes complying with any Australian law that covers conduct relating to the provision of financial services. As such, the record keeping requirements of section 988 of the *Corporations Act 2001* which set out the record keeping requirements of financial service licensees are a condition of the financial licence.

158. Banks and other financial institutions will generally also be designated service providers under the AML/CTF Act. Therefore the record keeping requirements described in paragraph 67 above will apply.

159. Should a bank or other financial institution not satisfy the definition of a reporting entity, but is a "cash dealer" under the FTR Act then the financial institution must retain, for a period of 7 years, the originals of any documents relating to the *operation of accounts* or *customer generated financial transactions*. These include any document:

a. *that relates to one or more of the following financial transactions carried out before the commencement of Division 1 of Part 2 of the AML/CTF Act:*

   i. *the opening or closing by a person of an account with the institution;*

   ii. *the operation by a person of an account with the institution;*

   iii. *the opening or use by a person of a safety deposit box held by the institution;*

   iv. *the telegraphic or electronic transfer of funds by the institution on behalf of a person to another person;*

   v. *the transmission of funds between Australia and a foreign country or between foreign countries on behalf of a person;*

   vi. *an application by a person for a loan from the institution (where a loan is made to the person pursuant to the application); and*

b. *that is given to the institution by or on behalf of the person (whether or not the document is signed by or on behalf of the person).*

160. In addition, record keeping obligations are imposed by section 262A of the ITAA 1936 which requires any person (the definition of which includes banks) to keep records that record and explain all transactions for the purposes of the Act. This section imposes a retention period of 5 years on these types of records.

Determination and factors underlying recommendations

Phase 1 Determination
The element is in place.

Phase 2 Rating
Compliant.

B. Access to Information

Overview

161. A variety of information may be needed in a tax enquiry and jurisdictions should have the authority to obtain all such information. This includes information held by banks and other financial institutions as well as information concerning the ownership of companies or the identity of interest holders in other persons or entities, such as partnerships and trusts, as well as accounting information in respect of all such entities. This section of the report examines whether Australia's legal and regulatory framework gives the authorities access powers that cover the right types of persons and information and whether rights and safeguards are compatible with effective exchange of information. It also assesses the effectiveness of this framework in practice.

162. The majority of requests that Australia receives for exchange of information are responded to without any need to resort to its access powers. Most requests can be answered from information already contained within the ATO or from information readily available to the EOI Unit through the access it has to databases maintained by other Federal and State agencies such as AUSTRAC, ASIC and the Department of Immigration and Citizenship (DIAC).

163. However, the ATO also has comprehensive and far reaching powers to access information for tax purposes which have been expressly extended for use in responding to a request for exchange of information. While it generally seeks to use an informal or cooperative approach in the first instance, these powers are routinely exercised particularly to obtain access to information for exchange purposes which may be unable to be obtained otherwise, e.g. bank information. The powers can be invoked by simply issuing a letter or notice to that effect and members of the ATO's Exchange of Information Unit are authorised to do this. These powers seem to be very effective in practice and they carry significant sanctions for non-compliance.

164. The concept of legal professional privilege (LPP) has been extended in Australia, for tax purposes, by what is called the "accountants' concession". Essentially this extends the concept of LPP to certain advice and advice papers

prepared by external professional accounting advisors who are independent of the taxpayer. Importantly, the concession is not irrevocable and it does not cover papers prepared in connection with the conception, implementation and formal recording of a transaction or arrangement and which explain the setting, context and purpose of the transaction or arrangement. In short it does not protect a person from disclosing the facts and circumstances of a transaction or arrangement.

B.1. Competent Authority's ability to obtain and provide information

Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information).

165. All of Australia's DTAs and TIEAs specify that the Commissioner of Taxation (or an authorised representative) is the Australian competent authority. The Commissioner of Taxation is supported in this role by the three "Second Commissioners" who are also appointed as competent authorities for the purpose of Australia's DTAs and TIEAs, pursuant to section 6D(1) of the TAA 1953. The Commissioner may also delegate his power to act as the competent authority to any person in the ATO who is appointed at "Senior Executive Staff" (SES) level where such delegation is required. For example, such delegation exists in respect of staff working in the London office of JITSIC and this delegation facilitates the flow of tax information amongst JITSIC members.[17]

166. The EOI Unit in the ATO is part of a larger work group (International Relations) managed by an Assistant Commissioner who also has competent authority status. As it is an integral part of the ATO, the EOI Unit has access to a wide range of internal and external data to respond to specific requests for information.

167. Information held within the ATO includes details of all parties interacting with the Australian tax system (such as taxpayers filing Australian income tax returns), ATO issued notices of assessment, employer payment summaries, amount of dividends, interest or royalties paid to non-residents, previous correspondence between a taxpayer and the ATO (including audit records, working papers and results), electoral roll records, government welfare payments made to taxpayers, electronic telephone "white pages" directory and health insurance information.

17. JITSIC member jurisdictions are: Australia, Canada, Japan, the UK, and the US. France, Germany and South Korea are current observers to JITSIC.

168. The ATO has direct access to details maintained on the AUSTRAC database. This database records all international financial transactions, all domestic financial transactions over AUD 10 000 and any suspicious transactions.

169. The ATO also has direct access to a database maintained by ASIC, which records registration details for all Australian Company Numbers, Australian Registered Body Numbers and Australian Registered Scheme Numbers issued by ASIC.

170. In addition, the ATO has direct access to a database maintained by DIAC. This database stores all passenger movements into and out of Australia.

171. The ATO is also able to obtain property and title information, drivers' licence information, and information contained in the registry of Australian Births, Deaths and Marriages. This information has to be requested from the relevant State or Territory Government Agency on an individual basis, which makes it slightly more difficult to obtain a complete Australia-wide position than some other types of information which is centrally held. The ATO has contact officers in place that perform the liaison function with these agencies and the EOI Unit makes use of this corporately organised facility to obtain such information to answer specific EOI requests needing such detail.

172. For information not immediately held or accessible by the ATO, e.g. information held by another Australian agency, other third parties or the taxpayer, a formal access request can be made to the record holder in Australia using statutory access powers which are far reaching. However, before invoking the formal access powers available to the ATO, an informal approach is first taken (wherever possible) to obtain the required information without invoking the ATO's statutory information gathering powers. Sections 263 and 264 of the ITAA 1936,[18] sections 353-10 and 353-15 of the *Taxation Administration Act 1953* (TAA 1953), sections 127 and 128 and the *Fringe Benefits Tax Assessments Act 1986* and sections 76 and 77 of the *Superannuation Guarantee (Administration) Act 1992* provides access for the ATO to any information held by these parties should they need to be invoked. Further, section 23 of the *International Tax Agreements Act 1953* (ITAA 1953) permits the Australian competent authority to use any or all of the ATO's formal access powers to satisfy a treaty partner's exchange of information request.

173. Section 264 of the ITAA 1936 states:

18. Sections 263 and 264 relate to direct taxes. Access powers for indirect taxes are covered by sections 353-10 and 353-15.

> *The Commissioner may by notice in writing require any person, whether a taxpayer or not, including any officer employed in or in connection with any department of a Government or by any public authority:*
>
> *(a) to furnish him with such information as he may require; and*
>
> *(b) to attend and give evidence before him or before any officer authorized by him in that behalf concerning his or any other person's income or assessment, and may require him to produce all books, documents and other papers whatever in his custody or under his control relating thereto.*

174. Failure to comply with this request generates the following penalty amounts:

- a fine not exceeding AUD 2 200 for a first offence; or
- a fine not exceeding AUD 4 400 for a second offence; or
- a fine not exceeding AUD 5 500, and/or imprisonment not exceeding 12 months, or AUD 27 500 for a company, for a third or subsequent offence.

175. These sanctions are dissuasive.

176. Section 263 of the ITAA 1936 which provides for more invasive powers states:

> *"The Commissioner, or any officer authorized by him in that behalf, shall at all times have full and free access to all buildings, places, books, documents and other papers for any of the purposes of this Act, and for that purpose may make extracts from or copies of any such books, documents or papers."*

177. However, although these access powers enable an officer of the ATO to copy or reproduce documents, they do not enable the documents to be removed from the premises.

178. The majority of requests that Australia receives for exchange of information under its DTAs can be responded to from information already contained within the ATO or from information available to the EOI Unit through the access it has to the databases maintained by AUSTRAC, ASIC and DIAC. Timelines for obtaining this type of information are short. Information held by another Federal, State or Territory government or agency can also be quickly retrieved. In some instances it is necessary for the ATO to use its formal information gathering powers. In these cases, 28 days is the usual period set to respond. Many responses are often received earlier than the 28 day maximum time period allowed.

179. Where information needed to respond to a request for information is in the possession or control of a taxpayer or a third party (such as a service provider or a bank) more time may be needed to respond to a request.

180. In the first case, where information is in the possession of a taxpayer, the request will generally be referred to a compliance area of the ATO to obtain the information needed. The EOI Unit has nominated "gatekeepers" for each area of the ATO with which it deals regularly and these gatekeepers assist the EOI Unit refer a request to the team that is most suitable to gather the information which the EOI Unit requires to respond to a requesting country. The gatekeepers also help to ensure that the information that is provided by the compliance area is in a format which can be readily sent to the requesting country.

181. The time the compliance area takes to gather the information and return it to the EOI Unit depends on the area, its current work load, and the complexity of the case. In addition, if the compliance area is required to use their formal access powers to obtain the information, it will generally allow the taxpayer 28 days to comply. The EOI Unit remains in contact with the compliance area until the information is provided.

182. In the second case, where information is in the possession of a third party such as a service provider, the request will generally require the use of formal information gathering powers as the third party might otherwise be in breach of their confidentiality obligations to their customers, e.g. where a financial institution such as a bank is concerned. Generally, 28 days are allowed to respond to one of these requests, but more time may be allowed depending on the complexity of the request. However, the ATO maintains a close relationship with all Australian banks and to facilitate such requests each of the banks has established a designated area whose sole purpose is to provide banking information to Australian Government law enforcement and regulatory authorities. Moreover, where information is required from a financial institution, such as a bank, there is generally no need to involve a compliance area as the powers needed to execute the request are exercised directly by the EOI Unit which sends a formal request for information directly to the bank, pursuant to section 264 of the ITAA 1936.

183. Approximately 75% – 80% of all requests received are dealt with directly within the EOI Unit without the need to involve a compliance area, which obviously facilitates a faster response time. JITSIC delegates directly process a further 10% concerning JITSIC requests made and received by Australia.

Ownership and identity information (ToR B.1.1) and accounting records (ToR B.1.2)

184. For information that is not already held by the ATO, or readily accessible to it, the Commissioner of Taxation is able to use his access powers to obtain ownership, identity and accounting information that is under the

custody or control of an individual or entity for the purpose of satisfying a specific exchange of information request from one of Australia's treaty partners.

185. There are no material restrictions on the ATO's powers to obtain ownership or identity information from public and private entities or from third parties for exchange purpose. Its powers to obtain relevant information are consistent regardless of from whom the information is to be obtained, for example a bank, other financial institution, company, trustee or individual; or whether the information to be obtained is ownership, identity, bank or accounting information. There is also no variation of the powers between instances where the information is required to be kept by a person pursuant to a law, or not. These powers are comprehensive and far reaching and they carry significant sanctions in the event of non-compliance.

Use of information gathering measures absent domestic tax interest (ToR B.1.3)

186. The concept of "domestic tax interest" describes a situation where a contracting party can only provide information to another contracting party if it has an interest in the requested information for its own tax purposes. The ATO's powers are not curtailed by any requirement that the power may only be exercised where there is a domestic tax interest. Section 23 of the ITAA 1953 permits the Australian competent authority to use any or all of the ATO's formal access powers to satisfy a treaty partner's EOI request. Sections 23(1) and (4) provide as follows:

> *"(1) The Commissioner or an officer authorised by the Commissioner may use the information gathering provisions for the purpose of gathering information to be exchanged in accordance with the Commissioner's obligations under an international agreement."*

187. and

> *"(4) In this section:*
>
> ***information gathering provision** means a provision of a taxation law that allows the Commissioner:*
>
> *(a) to access land, premises, documents, information, goods or other property; or*
>
> *(b) to require or direct a person to provide information; or*
>
> *(c) to require or direct a person to appear before the Commissioner or an officer and give evidence or produce documents.*

international agreement *means:*

(a) an agreement given the force of law under this Act; or

(b) some other agreement that allows for the exchange of information on tax matters between Australia and:

(i) a foreign country or a constituent part of a foreign country; or

(ii) an overseas territory."

Compulsory powers *(ToR B.1.4)*

188. The Commissioner of Taxation possesses powers pursuant to sections 263 and 264 of the ITAA 1936, sections 353-10 and 353-15 of the TAA 1953, sections 127 and 128 and the *Fringe Benefits Tax Assessments Act 1986* and sections 76 and 77 of the *Superannuation Guarantee (Administration) Act 1992* that require information held by third parties (including banks and other financial institutions) to be produced.

189. Failure to comply with a requirement under the above mentioned Acts is an offence under section 8C of the TAA 1953 and is punishable on conviction by a fine or imprisonment dependent on the nature of the offence (see paragraph 171). Section 8G of the TAA 1953 provides for the court to make an order under either the TAA 1953 or the *Crimes Act 1914* where a person has been found guilty of an offence under section 8C, in relation to a refusal by the person to comply with the original requirement. Section 8H of the TAA 1953 establishes that it is an offence to fail to comply with a court order, and provides that on conviction further fines or imprisonment may be imposed. The court may also order payment of a further amount where failure was held to be due to an attempt to avoid an amount of a tax liability by the convicted person or another person.

190. The same penalties apply where the information is sought for domestic or foreign tax purposes. Currently there are two cases where the ATO has attempted to gather information from a taxpayer to respond to another jurisdiction's request and the response has been delayed because the taxpayer has not provided the requested information. Prosecution action is being undertaken in regards to both matters to enforce compliance.

Secrecy provisions (ToR B.1.5)

191. The **National Privacy Principles (NPPs)** extracted from the *Privacy Act 1988*[19] state that an organisation must not use or disclose personal information about an individual for a purpose other than the primary purpose of collection unless a number of conditions apply.

192. These NPPs also state that an organisation must take reasonable steps to protect the personal information it holds from misuse and loss and from unauthorised access, modification or disclosure and that an organisation must take reasonable steps to destroy or permanently de-identify personal information if it is no longer needed for any purpose for which the information may be used or disclosed.

193. However, despite these NPPs banks and financial institutions must provide information to tax authorities if requested and required by the ATO in accordance with the tax acts administered by the Commissioner to carry out by law. This includes information gathered by the ATO in response to a request from another country under the tax information exchange provisions in a TIEA or DTA. Section 23 of the ITAA 1953 authorises the ATO to gather information to be exchanged in accordance with the Commissioner of Taxation's obligations under a TIEA or DTA.

194. Among the situations where Australia is not obliged to supply information in response to a request for exchange under a treaty is when the requested information would disclose a confidential communication protected by attorney-client privilege or legal professional privilege (LPP) as it is known in Australia. The concept of LPP has been extended in Australia, for tax purposes, by what is called the "accountants' concession". While recognising that the Commissioner has the statutory power to access most documents, it has been accepted that there is a class of documents which should, in all but exceptional circumstances, remain confidential to taxpayers and their professional accounting advisors.[20]

195. In respect of such documents, the ATO acknowledges that taxpayers should be able to consult with their professional accounting advisors to enable full discussion in respect of their rights and obligations under tax laws and for advice to be communicated frankly. The concession applies only to documents prepared by external professional accounting advisors who are independent of the taxpayer and generally only to "non-source" documents, but may apply to "source" documents in certain cases.

19. See www.privacy.gov.au/materials/types/infosheets/view/6583.
20. See Guidelines to Accessing Professional Accounting Advisors Papers (full text available at www.ato.gov.au).

196. The ATO is able to gain access to these restricted source and non-source documents in exceptional circumstances with the written approval of a Deputy Commissioner or another appropriate SES officer.

197. Source documents include papers prepared in connection with the conception, implementation and formal recording of a transaction or arrangement and which explain the setting, context and purpose of the transaction or arrangement. Traditional accounting records such as ledgers, journals, working papers for financial statements, profit and loss accounts and balance sheets are obvious source documents. Also included are documents comprising the permanent audit file held by a professional accounting advisor while performing a statutory audit. Tax working papers are also considered to be source documents because they are used in assembling and compiling information preparatory to the completion of tax returns.

198. Advice papers prepared by an external professional accounting advisor prior to or contemporaneously with a relevant transaction or arrangement solely for the purpose of advising a client on tax matters may constitute source documents where they represent a record of what has actually occurred, however access to such documents is only sought in exceptional circumstances. These are referred to as restricted source documents. Other advice and advice papers are considered as non-source documents. For example this could include advice produced after a transaction where the advice did not affect the recording of the transaction in the books of account or tax return or advice in relation to transactions that the taxpayer has not and does not intend to put into effect.

199. Australia has on a very few occasions in the past been unable to supply information related to parts of requests where this has been protected by LPP. This has only occurred after the ATO has vigorously vetted the privilege being claimed and have accepted it as being valid. In addition, no EOI cases (or parts of EOI cases) have been rejected on accountants' concession grounds.

200. Further, it should be noted that access to non-source documents can be obtained in exceptional circumstances and that the concession covers only advice papers. It does not protect a person from disclosing the facts and circumstances of a transaction or arrangement. Moreover, this extension of the concept of legal professional privilege to accountants seems not to have raised any issues in practice as the input provided for this review by Australia's peers does not identify any concerns in this area.

Determination and factors underlying recommendations

Phase 1 Determination
The element is in place.

Phase 2 Rating
Compliant.

B.2. Notification requirements and rights and safeguards

The rights and safeguards (e.g. notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information.

Not unduly prevent or delay exchange of information *(ToR B.2.1)*

201. The ATO is not obliged to inform persons that are the subject of requests for exchange of information of the existence of the request or to notify them prior to contacting third parties to obtain information.

202. ATO policies such as the Taxpayers' Charter and the Compliance Model provide the framework within which the ATO operates. The ATO has issued several administrative Rulings on the Commissioner's right of access to records in various circumstances (See *Taxation Determination TD 2002/16, Taxation Ruling TR 2005/9* and *Practice Statement PS LA 2004/14).* Other policies, including the ATO's *Access and Information Gathering Manual* (Access Manual) and specific business line policies, all comply with this framework.

203. The Access Manual describes all judicial decisions that affect in practice the enforcement of the ATO's access to information. Some of the key principles that emerge from these decisions are that the ATO's powers, like all powers, must be exercised in good faith and that the "informal or co-operative approach" should be the norm. The informal or co-operative approach received judicial support in *Federal Commissioner of Taxation v. Citibank* (1989) 20 FCR 403. Lockhart J (at first instance) said:

> *Officers of the Taxation Office do not need to rely on section 263 of the Income Tax Assessment Act 1936 (ITAA 1936) in most cases to obtain copies of documents or a section 264 of the ITAA 1936 to obtain information. In most cases the Taxation Office*

rightly proceeds informally, with the relevant Officer to ask questions, and relying upon the co-operation of the person to whom the questions are put.

204. Nevertheless, there are circumstances where the ATO can use its formal powers first, such as when demanded by the taxpayer, when the *Privacy Act 1988* prevents the release of the information informally, when there is a lack of cooperation from the taxpayer or if there is a reasonable belief that the documents may be destroyed or disposed of.

205. It is mandatory for ATO officials to follow these principles and other principles in the Manual as they are part of ATO policy on access and information gathering. It is rare that applying these principles limit the ATO's ability to exchange information. However, there have been a few instances in the past where Australia has been unable to exchange information because it was protected by LPP (see paragraph 189-195 above).

Determination and factors underlying recommendations

Phase 1 Determination
The element is in place.

Phase 2 Rating
Compliant.

C. Exchanging Information

Overview

206. Jurisdictions generally cannot exchange information for tax purposes unless they have a legal basis or mechanism for doing so. A jurisdiction's practical capacity to effectively exchange information relies both on having adequate mechanisms in place as well as an adequate institutional framework. This section of the report assesses Australia's network of EOI agreements against the standards and the adequacy of its institutional framework to achieve effective exchange of information in practice.

207. In Australia, the legal authority to exchange information derives from bilateral mechanisms: double tax agreements (DTAs), tax information exchange agreements (TIEAs) and additional benefits agreements (ABAs). The DTAs and ABAs are specifically incorporated into Australian domestic law by virtue of the ITAA 1953. There is no specific incorporation of its TIEAs into Australian domestic law; however the Australian competent authority may use its domestic tax information gathering powers to obtain information relevant to EOI requests under TIEAs, by virtue of section 23 of the ITAA 1953.

208. The first DTA Australia signed was with the United Kingdom in (1946), followed by the United States (1953), Canada (1957) and New Zealand (1960). More recently Australia has entered into a new or revised DTA on average every year. To date it has signed a total of 44 DTAs. These include DTAs with its top ten trading partners as shown in the rankings in the table in Annex 2. Currently Australia receives hundreds of specific requests for exchange of information annually, under these treaties.

209. In general, the responses that the assessment team received to the peer questionnaire from Australia's DTA partners suggest that Australia practices in terms of exchange of information are of a very high standard. They highlighted only two areas of concern. First, there have sometimes been delays in providing the information requested by treaty partners and second, Australia has not always provided an update or status report to its DTA partners within 90 days in the event that it is unable to provide a substantive

response within that timeframe. The comments received must be considered in the context that substantive responses were provided to more than 75% of requests within 90 days. It should also be noted that Australia's practice with regard providing status reports has now changed and that automatic reminders will be used to ensure timely status reports.

210. Since January 2009, Australia has signed 21 TIEAs which includes the two most recently signed agreements: with Vanuatu (21 April 2010) and the Marshall Islands (12 May 2010). This brings the total number of TIEAs that Australia has signed to 25. A complete list of the TIEAs signed by Australia, as well as the date of their entry into force is included in Annex 2. Practical experience of the operation of TIEAs is limited given their recent origin.

211. The DTAs and TIEAs which have been signed by Australia in the main follow the terms of the OECD Model, although Australia is in the process of negotiating to bring some of its older DTAs into line with the 2005 update to the OECD Model in respect of the EOI provisions. In respect of confidentiality of tax information, Australia has stringent confidentiality provisions, supported by sanctions. Those provisions apply equally to information relating to EOI requests, and supplement the confidentiality provisions in its EOI agreements.

212. While this report is focused on the terms of its EOI agreements and Australia's practices concerning the exchange of tax information on request, a DTA also allows for exchange of information spontaneously and automatically. Australia engages in spontaneous and automatic exchange of information with its treaty partners and its approach in these areas is relevant to an understanding of the importance that Australia attaches to EOI generally.

213. The ATO began to exchange information automatically in electronic form in 2000. Prior to this automatic bulk exchanges were conducted in paper form. In 2009, it sent out 2 million records to DTA partners on interest, dividends, royalties and non-resident withholding payments in relation to the Australian tax year ended 30 June 2008. In 2009, 14 DTA partners provided the ATO with around 600 000 automatic records.

214. The ATO has a generally non-discriminatory approach to automatic exchange with its DTA partners. Even if it is not in receipt of reciprocal data from a DTA partner the ATO will provide data automatically where the partner indicates it can make use of it. While DTA partners may not engage in automatic EOI for various reasons they may still contribute to the bilateral relationship through cooperating in other forms of EOI and the ATO considers that this broader perspective is more important than a partner's capacity to assist in a specific element of DTA activities.[21]

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21. See ANAO Audit Report No.34 2009–10 The Management and Use of Double Taxation Agreement Information Collected through Automatic Exchange

215. Similarly, spontaneous exchange of information is seen as fostering a spirit of co-operation between tax administrations which may result in the ATO receiving information which is helpful in its own audit work.

216. Australia also participates in simultaneous tax examinations. In addition, Australia's administration of its exchange of information arrangements allows for tax examinations abroad to be carried out with the express permission of the other treaty partner mindful that Australian law does not apply extraterritorially. The ATO conducts these overseas meetings (where warranted) using the competent authority power under the exchange of information articles of its various tax treaties. Simultaneous audits and tax examinations abroad are generally undertaken only in circumstances where it is apparent to the ATO that there will be a significant advantage in conducting these audits compared to normal exchange of information procedures and where the countries involved have common or complimentary interest in the taxation affairs of the taxpayer concerned.

217. A broad perspective on exchange of information was also evident in discussions with ATO officials during the course of the onsite visit including officials in the compliance areas responsible for executing requests for exchange of information. There is a general awareness in the ATO that if it gives a good service to jurisdictions that request information from Australia it may in turn receive a better service when Australia is the requesting jurisdiction. In part this is driven by the recognition that increasing numbers of Australian residents have foreign assets and income and that the overall risk to voluntary compliance in relation to income derived from foreign sources is high. Effective EOI contributes to the ATO's own compliance activities by reducing these risks. Nevertheless, there have been occasions where information has not been exchanged as quickly as possible or as quickly as Australia would have wished because of pressure of work in the EOI Unit or in compliance areas.

C.1. Exchange-of-information mechanisms

Exchange of information mechanisms should allow for effective exchange of information.

Foreseeably relevant standard (ToR C.1.1)

218. The international standard for exchange of information envisages information exchange to the widest possible extent. Nevertheless it does not allow "fishing expeditions", i.e. speculative requests for information that have no apparent nexus to an open inquiry or investigation. The balance between these two competing considerations is captured in the standard of "foreseeable relevance" which is included in Article 1 of the OECD Model TIEA, set out below:

> *"The competent authorities of the Contracting Parties shall provide assistance through exchange of information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by this Agreement. Such information shall include information that is foreseeably relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. Information shall be exchanged in accordance with the provisions of this agreement and shall be treated as confidential in the manner provided in Article 8. The rights and safeguards secured to persons by the laws or administrative practice of the requested party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information".*

219. Australia's treaties are generally patterned on the OECD Model Taxation Convention as regards the scope of information that can be exchanged. DTAs initially signed or amended after 2005 use the forseeably relevant standard e.g. Belgium (2009), Chile (2010), Finland (2006), France (2006), Japan (2008), Malaysia (2009) New Zealand (2009), Norway (2006), Singapore (2009), Turkey (2010). Older treaties generally use the words "as is necessary" in place of "as is forseeably relevant". These terms are recognised in the commentary to Article 26 of the OECD Model Taxation Convention as allowing for the same scope of exchange. The DTA with Germany is a very old one which contains a different formulation but one which Australia considers is equivalent to the forseeably relevant standard. Similarly, Australia's 1980 agreement with Switzerland reflects the previous reservation the Swiss then had to Article 26 of the OECD Model Taxation Convention. As such, the exchange of information article contained in the Australia-Switzerland DTA only relates to matters concerned with the prevention of double taxation and not to tax avoidance or evasion.

220. As regards TIEAs, the TIEA between Australia and Antigua and Barbuda provides in Article 5(9) that the Applicant State must certify information regarding the relevance of the request, as follows:

> *"Where the competent authority of a Contracting State requests information with respect to a matter which relates to a person not resident in the Applicant State, a senior official designated by the Applicant State shall certify that such a request is foreseeably relevant or material to the determination of the tax liability of a taxpayer of the Applicant State. It shall also be established to the satisfaction of the competent authority of the Requested State that such information is foreseeably relevant or material to the administration and enforcement of the tax laws of the Applicant State."*

221. In addition to the requirement to certify this information, the use of the words "tax liability" in these provisions may not cover all of the purposes set out in Article 1. For instance, information relevant to the collection of tax, or the investigation or prosecution of tax matters. In both these regards, this provision may create an additional obligation which could prevent the effective exchange of information in certain very limited instances. This provision's approach to information relating to non-residents is addressed below.

222. Some of Australia's TIEAs[22] require in Article 5 that the Applicant State to provide further information to clarify the connection between the person under examination and the information requested, as follows:

> *"Any request for information shall be formulated with the greatest detail necessary and shall specify in writing: ...*
>
> *The reasons for believing that the information requested is foreseeably relevant or material to tax administration and enforcement of the Contracting State in question with respect to the person identified in subparagraph (a) of this paragraph."*

In respect of all persons (ToR C.1.2)

223. For exchange of information to be effective it is necessary that a jurisdiction's obligations to provide information is not restricted by the residence or nationality of the person to whom the information relates or by the residence or nationality of the person in possession or control of the information requested. For this reason the international standard for exchange of information envisages that exchange of information mechanisms will provide for exchange of information in respect of all persons.

224. All of Australia's DTAs allow for exchange of information with respect to all persons. A treaty with Malaysia which contained restrictions in relation to Labuan was updated in 2009.

225. As noted briefly above, the TIEA between Australia and Antigua and Barbuda provides in Article 5(9) that certain matters shall be certified by the applicant State where they are:

> *"with respect to a matter which relates to a person not resident in the Applicant State"*

226. The ATO does not consider that this provision creates any additional requirement on the Applicant State where it seeks information relating to a non-resident as all exchange of information requests are closely vetted by senior ATO staff prior to despatch.

22. Australia's TIEAs with Antigua and Bermuda; Guernsey; and Jersey.

227. All of the TIEAs concluded by Australia contain a provision concerning jurisdictional scope which is equivalent to Article 2 of the OECD Model TIEA.

Exchange information held by financial institutions, nominees, agents and ownership and identity information (ToR C.1.3)

228. Jurisdictions cannot engage in effective exchange of information if they cannot exchange information held by financial institutions, nominees or persons acting in an agency or a fiduciary capacity. Both the OECD Model Convention and the OECD Model TIEA which are primary authoritative sources of the international standard, stipulate that bank secrecy cannot form the basis for declining a request to provide information and that a request for information cannot be declined solely because the information is held by nominees or persons acting in an agency or fiduciary capacity or because the information relates to an ownership interest.

229. Only Australia's DTAs initially signed or amended by protocol after 2005 include paragraph 26(5) of the OECD Model Taxation Convention, which provides that a Contracting State may not decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person. Australia's policy is to include Article 26(5) in all of its new agreements.

230. Although Australia's older DTAs do not include such a provision, there are no limitations in Australia's laws with respect to access to bank information, information held by nominees, and ownership and identity information. There may be, however, such limitations in place in the domestic laws of some of its treaty partners. In these cases, the absence of a specific provision requiring exchange of bank information unlimited by bank secrecy will serve as a limitation on the exchange of information which can occur under the relevant DTA.

231. The TIEAs concluded by Australia do not allow the requested jurisdiction to decline to supply information solely because it is held by a financial institution, nominee or person acting in an agency or a fiduciary capacity, or because it relates to ownership interests in a person.

232. However, the Australia-Cook Islands TIEA includes a provision in Article 5 that:

> *"Each Contracting Party where it is satisfied there is cause for enquiry shall ensure that its competent authority for the purposes specified in Article 1 of this Agreement, has the authority to obtain and provide upon request:*

(a) information held by banks, other financial institutions, and any person acting in an agency or fiduciary capacity including nominees and trustees;

(b) information regarding the ownership of companies, partnerships, trusts, foundations, "Anstalten" and other persons, including…" [emphasis added]

233. The ATO considers that the effect of the emphasised words just reinforces the need to ensure that such a request for information meets the relevant criteria noting that all requests require there be a cause for enquiry before it can be satisfied.

Absence of domestic tax interest (ToR C.1.4)

234. As explained in paragraph 183 above, the concept of "domestic tax interest" describes a situation where a Contracting Party can only provide information to another Contracting Party if it has an interest in the requested information for its own tax purposes. A refusal to provide information based on a domestic tax interest requirement is not consistent with the international standard. EOI partners must be able to use their information gathering measures even though invoked solely to obtain and provide information to the requesting jurisdiction.

235. All of Australia's DTAs signed or amended by protocol after 2005 contain Article 26(4) of the OECD Model Taxation Convention, obliging the Contracting States to use information gathering measures to exchange requested information without regard to a domestic tax interest. Australia's older DTAs do not contain such a provision. There are, however, no domestic interest restrictions on Australia's powers to access information. The full use of Australia's information gathering powers for tax purposes is ensured in Australia's domestic legislation by section 23 of the ITAA 1953 as noted in respect of Terms of Reference element B 2 above.

236. It is noted however in the case of the DTA with Switzerland that the treaty contains a clause that states:

> *"... shall exchange such information (being information which is at their disposal under their respective taxation laws in the normal course of administration) as is necessary for carrying out the provisions of this Agreement in relation to the taxes which are the subject of this Agreement."*

237. In such cases, Switzerland would be prevented by the DTA's wording from requesting assistance from Australia to satisfy an exchange of information request which does not relate to carrying out the provisions of the DTA and Australia would have no obligation to respond to such a request (although

it is recognised that Switzerland does not currently make such requests of Australia). However, if the DTA was to be updated to reflect minimum international standards for exchange of information, Australia would have no difficulty in fulfilling a Swiss request for information (including that relating to banking information).

238. All of the TIEAs concluded by Australia allow information to be obtained and exchange notwithstanding it is not required for any Australian domestic tax purpose.

Absence of dual criminality principles (ToR C.1.5)

239. The principle of dual criminality provides that assistance can only be provided if the conduct being investigated (and giving rise to the information request) would constitute a crime under the laws of the requested country if it had occurred in the requested country. In order to be effective, exchange of information should not be constrained by the application of the dual criminality principle.

240. None of the DTAs or TIEAs concluded by Australia applies the dual criminality principle to restrict the exchange of information.

Exchange of information in both civil and criminal tax matters (ToR C.1.6)

241. All of Australia's DTAs and TIEAs (apart from its Swiss DTA) allow for exchange of information in connection with both civil and criminal tax matters. However, Article 8(3) of the TIEA between Antigua and Barbuda and Australia includes a provision that:

> *"Information that is provided to the Applicant State pursuant to this Agreement concerning a criminal tax matter shall not be used in connection with any other tax matter without prior written consent of the competent authority of the Requested State…".*

242. This requirement creates a distinction in respect of criminal tax matters which places an additional obligation on the EOI partners which is beyond the international standard as set out in the OECD Model TIEA.

243. With regard to processing of EOI requests which relate to criminal tax matters, the process for managing the request is largely the same as for civil tax matters. One possible difference could be the involvement of the Serious Non-Compliance business line within the ATO, in addition to the EOI Unit. The Serious Non-Compliance business line deals with serious tax offences under Australian law, and in some cases refer matters to other Australian law enforcement or prosecution agencies including the Australian Federal Police,

the Commonwealth Director of Public Prosecutions or the Australian Crime Commission. Such referrals would take place within the confidentiality boundaries pertaining to exchange of information requests which are described below.

Provide information in specific form requested *(ToR C.1.7)*

244. All of the TIEAs concluded by Australia allow for information to be provided in the specific form requested, to the extent allowable under the requested jurisdiction's domestic laws. There are no impediments in Australian law which would prevent the information being obtained in the form for example of an authenticated copy of original document or as a witness deposition. In the case of the latter, such a request may however necessarily affect the speed with which the request could be met.

In force *(ToR C.1.8)*

245. For effective exchange of information to occur, a jurisdiction must have exchange of information arrangements in force. Where agreements have been signed, the international standard requires that jurisdictions must take all steps necessary to bring them into force expeditiously.

246. Of the 44 DTAs which Australia has concluded, only 2[23] are not yet in force.[24] Australia has also concluded 25 TIEAs, 8 of which are currently in force. Of the TIEAs concluded by Australia to date, 21 were concluded since January 2009.

247. The Australian Government endeavours to bring Australia's TIEAs and DTAs into force as soon as possible after signature. All of Australia's proposed treaty actions are considered by the Australian Parliament's Joint Standing Committee on Treaties (JSCOT) before action which binds Australia to the terms of the treaty is taken. Treaties enter into force only after the final exchange of diplomatic notes between jurisdictions notifying each other that have completed their domestic procedures. Australia currently has 15 TIEAs in the JSCOT process which was delayed due to the calling of a Federal election. This will now recommence following the formation of a new Australian Government.

23. The DTCs concluded with Chile, on 10 March 2010; and with Turkey, on 29 April 2010.

24. The EOI Protocols to the treaties with Belgium and Malaysia have not yet entered into force. The Amending Protocol to the DTA with Singapore received Royal Assent on 9 November 2010 and following the exchange of the necessary diplomatic notes on 22 November 2010, the revised EOI arrangements will commence from 22 December 2010.

Be given effect (ToR C.1.9)

248. Australia's DTAs and TIEA additional benefits agreements are specifically incorporated into Australian domestic law by virtue of the ITAA 1953. There is no specific incorporation of TIEAs into Australian law, however the Australian competent authority may use its domestic tax information gathering powers to obtain information relevant to exchange of information requests made pursuant to TIEAs, by virtue of section 23 of the ITAA 1953 (see paragraph 204).

Determination and factors underlying recommendations

Phase 1 Determination	
The element is in place.	
Factors underlying recommendations	**Recommendations**
One of Australia's DTAs does not provide for effective exchange of information.	Australia should renegotiate agreements as necessary so that they provide for effective exchange of information.

Phase 2 Rating
Compliant.

C.2. Exchange-of-information mechanisms with all relevant partners

The jurisdictions' network of information exchange mechanisms should cover all relevant partners.

249. The Terms of Reference provide at footnote 26 that

> *Ultimately, the standard requires that jurisdictions exchange information with all relevant partners, meaning those partners who are interested in entering into an information exchange arrangement. Agreements cannot be concluded only with counterparties without economic significance. If it appears that a jurisdiction is refusing to enter into agreements or negotiations with partners, in particular ones that have a reasonable expectation of requiring information from that jurisdiction in order to properly administer and enforce its tax laws, this should be drawn to the attention of the Peer Review Group, as it may indicate a lack of commitment to implement the standards.*

250. Australia has signed DTAs with 44 jurisdictions as well as TIEAs with a further 25 jurisdictions, a complete list of which are set out in Annex 2. It has DTAs with all of its major trading partners. In addition, Australia's negotiation program for both DTAs and TIEAs is ongoing.

251. Australia has requested TIEAs with a number of other jurisdictions. While most jurisdictions have been receptive and willing to enter into constructive negotiations, a number of jurisdictions have declined the request on the grounds that they will not enter into exchange of information arrangements in the absence of a full DTA, or at least further treaty concessions from Australia such as reduced withholding tax on dividends, interest and royalties. As Australia grants DTAs only to jurisdictions that are major trading partners and maintain a comparable tax system, Australia could not agree to these requests. However, Australia remains willing to enter into TIEA negotiations with these jurisdictions. Australia is also actively committed to concluding TIEAs with a number of jurisdictions on the basis of the OECD Model TIEA.

Determination and factors underlying recommendations

Phase 1 Determination
The element is in place.

Phase 2 Rating
Compliant.

C.3. Confidentiality

The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received.

Information received: disclosure, use, and safeguards *(ToR C.3.1)*

252. Governments would not engage in information exchange without the assurance that the information provided would only be used for the purposes permitted under the exchange mechanism and that its confidentiality would be preserved. Information exchange instruments must therefore contain confidentiality provisions that spell out specifically to whom the information can be disclosed and the purposes for which the information can be used. In addition to the protections afforded by the confidentiality provisions of EOI arrangements, countries with tax systems generally impose strict

confidentiality requirements on information collected for tax purposes. Confidentiality rules should apply to all types of information exchanged, including information provided in a request, information transmitted in response to a request and any background documents to such requests.

253. Each of the DTAs and TIEAs concluded by Australia meet the standards for confidentiality including the limitations on disclosure of information received, and use of the information exchanged, which are reflected in Article 26(2) of the OECD Model Double Taxation Convention and Article 8 of the OECD Model TIEA respectively. These confidentiality requirements are supported by confidentiality provisions in Australian domestic law which include significant sanctions for any breach of confidentiality. Further, in respect of the DTAs, the confidentiality articles in those agreements form part of Australian domestic law as the agreements are scheduled to the ITAA 1953. Finally, there are additional secrecy obligations imposed on public servants in respect of information obtained in the course of employment duties pursuant to the *Public Service Act 1999*.

254. The domestic law confidentiality provisions in the ITAA 1936 apply equally to information obtained in respect of EOI requests. This includes information exchanged on request, as well as to the request itself. These provisions apply not only to ATO officers, but also to any person who obtains tax information in breach of a taxation law. In particular, sections 16(1A), 16(2) and 16(2A) of the ITAA 1936 provide:

> *(1A) For the purposes of this section, a person who, although not appointed or employed by the Commonwealth, performs services for the Commonwealth shall be taken to be employed by the Commonwealth.*
>
> *(2) Subject to this section, an officer shall not either directly or indirectly, either while he is, or after he ceases to be an officer, make a record of, or divulge or communicate to any person any information respecting the affairs of another person acquired by the officer as mentioned in the definition of officer in subsection (1).*
>
> *(2A) Subsection (2) does not apply to the extent that the person makes the record of the information, or divulges or communicates the information, in the performance of the person's duties as an officer.*

255. This secrecy provision is either extended to other tax laws such as the ITAA 1936, or there is a corresponding provision in other tax acts, such as section 3C of the TAA 1953.

256. Penalties for breaches of the secrecy provisions of 100 penalty units or imprisonment for 2 years or both are set out in section 8XB of the TAA 1953.

257. Since 2007, 100 penalty units is equivalent to AUD 11 000 (1 penalty unit = AUD 110). More stringent penalties apply to unauthorised use or disclosure of tax file numbers, which are individual identifying numbers that are allocated to all taxpayers in Australia (see subdivision 8BA of the TAA 1953).

258. Section 23(2) of the ITAA 1953 makes provision for these confidentiality provisions to allow the exchange of information for tax purposes pursuant to a DTA or TIEA:

> *(2) Making a record of, and exchanging, information in accordance with the Commissioner's obligations under an international agreement is not a breach of a provision of a taxation law that prohibits the Commissioner or an officer from making a record of, or disclosing, information.*

259. In addition to these specific secrecy provisions found in tax laws, officers of the Australian Public Service (APS) which includes ATO officers are subject to confidentiality obligations. In particular, section 13 of the Public Service Act sets out the APS Code of Conduct which prohibits an APS employee from disclosing information which the employee obtains in the course of employment where the information was received in confidence. Sanctions for breaches of the Code of Conduct are set out in section 15 of the Act.

260. Confidentiality of exchange of information material is also an important operational issue for the ATO. All competent authority information received under Australia's tax treaties is either received by the ATO's EOI Unit, the Transfer Pricing Practice (which is responsible for the ATO's transfer pricing mutual agreement cases) or via the ATO's JITSIC delegates in Washington, DC or London.

261. Each area applies the "need to know principle" when dealing with other ATO staff or taxpayers or their advisers when handling such material.

262. The two JITSIC delegates ensure that the ATO's EOI Unit is given a copy of all exchanges made and received by them. Close liaison is maintained with the two areas to ensure that records are properly protected (both from a security and confidentiality point of view).

263. The Transfer Pricing Practice maintains similar control over the ATO's transfer pricing mutual agreement procedure cases.

264. Where material is required to be communicated to other ATO officers outside of the EOI Unit and JITSIC, both areas attach a cover sheet (see Annex 5), which clearly states that the information must not be passed on or copied without the prior consent of the EOI Unit.

265. This cover sheet also directs the reader to 2 ATO Practice Statements. One practice statement covers limitations on the use of the material in regard to older tax treaties that do not cover indirect taxes. The other covers what to do if the information is requested as part of a Freedom of Information request.

266. In the case of the Transfer Pricing Practice, MAP competent authority cases are added to the ATO's corporate work recording database (known as Siebel). Competent authority matters are locked down to only those case operatives and competent authorities that are working on the particular matter and these cannot be viewed by non-authorized ATO staff.

All other information exchanged *(ToR C.3.2)*

267. The confidentiality provisions in Australian domestic law which are set out above and which protect information provided in response to an exchange of information request, apply equally to protect the request for information itself and includes background documents provided by an applicant State, as well as any other information relating to the request such as communications between the exchange of information partners in respect of the request.

Determination and factors underlying recommendations

Phase 1 Determination
The element is in place.

Phase 2 Rating
Compliant.

C.4. Rights and safeguards of taxpayers and third parties

The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties.

Exceptions to requirement to provide information *(ToR C.4.1)*

268. The international standard permits requested parties to not supply information in response to a request in certain identified situations. Among other reasons, information is not required to be provided where it would disclose confidential communications protected by the attorney-client privilege. Attorney-client privilege is a feature of the legal systems of many countries.

269. However, communications between a client and an attorney or another admitted legal representative are, generally, only privileged to the extent that the attorney or other legal representative acts in his or her capacity as an attorney or legal representative. Where attorney-client privilege is more broadly defined, it does not provide valid grounds on which information can be declined to be provided in response to a request. In Australia the concept of attorney client or legal professional privilege (LPP) has been extended by what is called the "accountants' concession". As explained in paragraphs 189–195 above the accountants' concession extends the concept of LPP to certain advice and advice papers prepared by external professional accounting advisors who are independent of the taxpayer.

270. To date this extension of LPP to accountants has not raised any problems in practice. Nevertheless, the assessment team considers the effect of the accountants' concession on exchange of information in practice should be monitored by the ATO on an ongoing basis. The EOI Unit should maintain a record of all EOI cases in which the accountant's concession is claimed together with an analysis of its effect in each case on the EOI Unit's ability to respond the relevant request, e.g. whether this has affected its ability to provide the information requested in whole or in part.

271. In Australia's TIEA with Antigua and Barbuda, Article 5 includes the following words which are not found in the OECD Model:

> *Art 5(5). Each contracting State shall ensure…[it] has the authority to obtain and provide upon request: information held by banks, other financial institutions… (not including information that would reveal confidential communications between a client and an attorney, solicitor or other legal representative where the client seeks legal advice), or information respecting ownership interests…* [emphasis added]

272. The effect of the emphasized words is unclear. In the ATO's view they just serve to reinforce the standards already set out in Article 7. The words refer only to attorney-client privilege to the extent of legal advice, and as framed, they only apply to certain types of information. As they are additional to the provision in Article 7 which addresses attorney-client privilege, the substantive effect of their inclusion is probably not significant.

273. In some of Australia's TIEAs,[25] Article 7 includes a provision that the Requested State may decline to assist where:

> *the Applicant State has not pursued all means available in its own territory, except where recourse to such means would give rise to disproportionate difficulty".*

25. Australia's TIEAs with Antigua and Barbuda; Dominica; and Jersey.

274. Under the OECD Model TIEA, the requirements set out in Article 5 for a valid request requires an Applicant State to make a statement to this effect. In contrast, this provision may create a discretion in favour of a Requested State, providing an additional basis on which the requested State may decline to assist. Further, this would also be on the basis of a view formed by the requested State that the Applicant State had not so pursued all means available to it. In the view of the ATO, however, the meaning of these words is the same as those in Article 5 of the OECD Model TIEA.

Determination and factors underlying recommendations

Phase 1 Determination
The element is in place.

Phase 2 Rating	
Compliant.	
Factors underlying recommendation	**Recommendation**
The effect of the accountants' concession on exchange of information in practice should be monitored by the ATO on an ongoing basis.	The EOI Unit should maintain a record of all EOI cases in which the accountants' concession is claimed together with an analysis of its effect in each case on the Unit's ability to provide the information requested.

C.5. Timeliness of responses to requests for information

The jurisdiction should provide information under its network of agreements in a timely manner.

Responses within 90 days (ToR C.5.1)

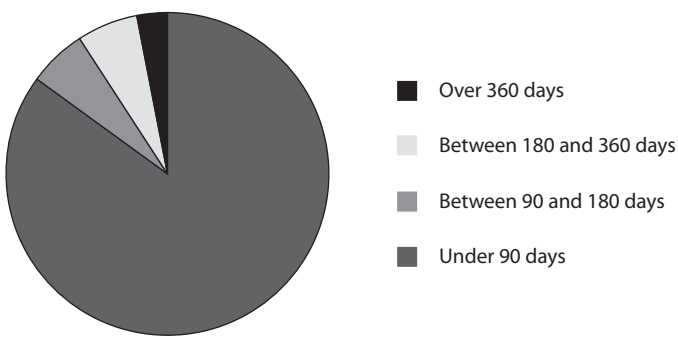
275. In order for exchange of information to be effective, the information needs to be provided in a timeframe which allows tax authorities to apply it to the relevant cases. If a response is provided but only after a significant lapse of time, the information may no longer be of use to the requesting authorities. This is particularly important in the context of international cooperation as cases in this area will be of sufficient importance if they have warranted making a request.

Requests made to Australia from EOI partners

276. There are no specific legal or regulatory requirements in place in Australia which would prevent Australia from responding to a request for information by either providing the information or a status update, within 90 days of receipt of the request.

277. In practice Australia responds to the vast majority of requests it receives within 90 days. The pie chart below which covers a 3 year period to December 2009 summarises the frequency with which Australia has responded to specific requests made to the EOI Unit within 90 days, between 90 and 180 days, between 180 and 360 days or over 360 days. When a response involves a complex request, it is usual for an interim response to be sent to the requesting jurisdiction providing them with whatever information may be quickly available.

Breakdown of specific requests made to ATO during period from 1 January 2007 to 31 December 2009



278. As already indicated, one of the issues raised in the peer questionnaires were the delays in getting information from Australia. The assessment team was provided with an analysis of cases which took more than 90 days to respond to in respect of EOI partners that made this observation. The analysis reveals a number of common factors as follows:

- cases that take longer than 90 days sometimes relate to complex cases, or require the opening of an audit or taxpayer interview to gather the requested details. This was also acknowledged in some of the responses received to the peer questionnaires;

- there have been occasional delays due to the workload in the EOI Unit or in the compliance areas responsible for actioning a request; and
- there have been delays in getting information from some other Australian Government agencies. This problem has now been addressed as the EOI Unit has had direct access to the relevant Agency's database since mid 2009 and this access is currently utilised. Further, some minor delays have been caused by difficulties in obtaining property acquisition and disposal information from the relevant State and/or Territory agencies in a timely manner. This has now been addressed in respect of property holdings held by the Australian Capital Territory Government where direct electronic access is now possible.

279. It is important to acknowledge that these cases are exceptions. Australia receives hundreds of requests for exchange of information each year the vast majority of which are responded to quickly. They do not point to a systemic problem. Where problems of this nature have arisen, e.g. getting information from other Australian Government agencies or finding the right area to execute requests, they have been addressed. They do however point to the need to ensure that the EOI Unit is adequately resourced at all times and that the compliance areas ensure that EOI requests are adequately prioritised.

280. The assessment team discussed this issue with a number of ATO officials during the course of the onsite visit including officials in the compliance areas responsible for executing requests for exchange of information. It was clear from these discussions that there is a general awareness in the ATO that if it provides a good service to countries that request information from Australia it may in turn receive a better service when Australia is the requesting country. Compliance area officials also considered that they have the resources they need to provide a good service and that the support they receive from the EOI Unit is of a high order. It was also clear that the introduction of the "gatekeeper" system had improved the processing of requests by ensuring they were directed to the appropriate team within compliance areas at the outset and that the information coming back was in the correct format.

281. As a general rule the benchmark used by the ATO has been the former Pacific Association of Tax Administration[26] standard which stipulated that less complex cases should be completed within 3 months while more difficult cases should normally be completed within 6 months. Where a request is referred to a compliance area the EOI Unit would then negotiate a deadline for the provision of information within this range. Nevertheless

26. PATA previously consisted of 4 countries – Australia, Canada, Japan and the US.

the assessment team was struck by the fact that while there may be deadlines negotiated for the provision of information by the compliance areas there are no performance indicators for EOI related work in the compliance areas.

282. Currently, the EOI Unit monitors individual cases through a database called the "Monitor". In this way it seeks to ensure that no significant time has passed since an action was last taken on any case, even if this means simply issuing a reminder letter or phone call to the party it is awaiting further information from, for example, a bank, a compliance area of the ATO, or a treaty partner. This ensures that although a case may be "aged" it is continually being reviewed. On a few occasions, work has been reallocated to a different audit team to complete where unacceptable delays might otherwise occur because a particular compliance area is under exceptional pressure with other case work.

283. The assessment team discussed the issue of developing performance indicators for EOI in compliance areas with ATO officials. Their view was that these might not add value because of the controls that the EOI Unit already exercised and because of the already strong EOI culture throughout the ATO.

284. Nevertheless, the EOI Unit is working towards having future requests placed on an ATO system called Siebel. This is a case management system used throughout the ATO, which has been adopted in the last few years. It will allow international requests to be designated to compliance staff in a similar fashion to any other domestic compliance activity, which will include the ability to measure performance.

285. The other issue highlighted by the responses to the peer questionnaires is that Australia has not always provided an update or status report to its DTA partners within 90 days in the event that it is unable to provide a substantive response within that time. The Australian authorities acknowledge that it had not been the practice of the EOI Unit to provide status updates such as this in the past. They have, however, recently amended their practices to allow such notifications in cases where they are unable to provide the requested information within 90 days.

286. The EOI Unit's Monitor has a feature that allows a reminder to be set at selected dates. Upon creating a case this feature will be used to automatically set a reminder three months after the creation of the case. This reminder will trigger the EOI Unit operative to send a status report to the requesting jurisdiction.

287. Moreover, Australian officials point out that regular informal contact is made with many of their EOI partners and plenty of opportunities exist to give informal feedback as to the progress of specific cases. On occasions a telephone conference will be arranged with competent authorities and the respective country auditors to resolve matters that seem to have become stalled.

Organisational process and resources *(ToR C.5.2)*

288. There are three main areas within the ATO which are routinely involved in the exchange of information for tax purposes. These are the EOI Unit, the Transfer Pricing Practice, and JITSIC. The EOI team deal with all forms of information exchange – both incoming and outgoing (including automatic and spontaneous exchange of information matters). The Transfer Pricing Practice carries out transfer pricing mutual agreement cases under exchange of information powers, and JITSIC is responsible for both incoming JITSIC exchange of information requests as well as requests made by Australia to its JITSIC partners.

289. Within the EOI Unit, there are 7.5 full time staff members which includes four senior ATO operative staff. The EOI Unit is within the International Relations section of the "Large Business and International" business line. In addition to the provision of regular ATO technical and administrative support, the EOI Unit is supplemented with a standalone computer system which permits secure email encryption on a separate internet network to the remainder of the ATO computer network. The EOI Unit also works closely with the other sections of the ATO, particularly the Compliance and Law business lines as well as the Data Matching and Integrity Unit. Each of these sections has a nominated EOI "gatekeeper" appointed. These gatekeepers provide a direct contact point for the EOI team which ensures that assistance and information is provided through a consistent and efficient process.

Process for managing incoming EOI requests

290. The ATO's EOI Unit maintains an extensive spreadsheet of all Australian tax treaty partners competent authorities contact details. Once a request has been received in the EOI Unit from one of these treaty partners, the request is handed to the manager of the EOI Unit, who signs and dates the request as a record of receipt.

291. The request will then be checked to ensure that it is legally valid, and that it refers to the correct taxes covered by the relevant tax treaty.

292. Once the request has been verified as being valid, the manager of the EOI Unit will allocate the matter to an EOI Unit operative and have a case created on the EOI Unit's database (if one does not already exist), and ask the administrative assistant to prepare a hard copy folder to store the request and subsequent documentation in. The manager will also check what response is required, e.g. is it something that requires specialist work or requires a taxpayer interview or audit to obtain the necessary information, then the case will be referred to the appropriate area of the ATO to prepare the response.

293. Where the matter is something that the EOI Unit can respond to without the need for it to be referred to another area of the ATO, the case is passed to one of the EOI case officers to draft a response.

294. In addition, the EOI Unit strives to ensure that any requests made by the ATO to another jurisdiction will pass similar vetting tests carried out by other countries' competent authority. In this way, the EOI Unit acts in a quality assurance role for all ATO outgoing non-transfer pricing competent authority requests.

295. Australia was involved in the development of the OECD's manual on Implementation of Exchange of Information Provisions for Tax Purposes, and relies on this manual to guide its internal procedures for managing EOI requests. This manual is complemented by "Law Administration Practice Statements" (LAPS) which set out the ATO's processes and rules for exchanging information with EOI partners. For example, LAPS 2006/09 outlines the process an ATO officer must follow when referring work to the EOI Unit. These LAPS are publicly available (including to Australia's EOI partners) on the ATO's website.

296. Requests to Australia from its EOI partners are managed using the Monitor database established specifically for EOI work recording purposes. In this database, all requests are recorded, the progress of the request is updated and the final outcome and 'closing' of the particular EOI request is recorded.

297. In addition to the electronic record in the Monitor database which records the progress of a request, a paper file is maintained in line with the file-tracking system which is used across all units in the ATO. A separate spreadsheet recording file numbers and file title names of the request is also maintained by the EOI Unit's administrative assistant. Each file is allocated a security classification, for which the minimum rating applied to an EOI request file is "In-Confidence". There are two additional higher levels of classification which may be used in particular circumstances – "Protected" or "Highly Protected". Approximately 10% of the EOI requests handled by the EOI Unit are classified as Protected or Highly Protected files. ATO staff are required to have had the relevant security clearance approval in respect of these files. In addition, the paper files which have been classified as Protected or Highly Protected are maintained in secure file safes.

EOI training

298. When ATO officers join the EOI Unit, they do not undergo any formal training program in respect of EOI. On the other hand, they receive extensive on-the job training and are closely monitored by senior staff during their initiation period.

299. The EOI Unit provides training to other ATO staff which includes a focus on how the work of other areas within the ATO can complement and assist the EOI Unit. This includes training provided to JITSIC delegates as well as to the Transfer Pricing Unit who are involved in specific, complex EOI requests. The EOI Unit also maintains an 'eWiki' page on the internal ATO resources site, which includes information on the EOI Unit and includes documents from the training provided to other units, as well as information on how the unit manages incoming requests as well as the process for other units to prepare an outbound request for information from one of Australia's EOI partners.

300. Australia also participates from time to time in international meetings in the area of EOI including the Global Forum and its Peer Review Group, the OECD's Working Party 10 as well as the TIES Sub-Group. This involvement ensures that Australia's competent authority remains up to date with new developments and key issues in the global EOI arena.

Absence of restrictive conditions on exchange of information (ToR C.5.3)

301. There are no laws or regulatory practices in Australia that impose restrictive conditions on exchange of information.

Determination and factors underlying recommendations

Phase 1 Determination
This element involves issues of practice that are assessed in the Phase 2 review. Accordingly no Phase 1 determination has been made.

Phase 2 Rating	
Compliant.	
Factors underlying recommendation	**Recommendation**
Australia did not always provide an update or status report to its DTA partners within ninety days in the event that it was unable to provide a substantive response within that time.	Australia should ensure that the new system put in place to provide updates to EOI partners after 90 days in those cases where it is not possible to provide a substantive response within that timeframe operates effectively.

Summary of Determinations and Factors Underlying Recommendations

Determination	Factors underlying recommendations	Recommendations
Jurisdictions should ensure that ownership and identity information for all relevant entities and arrangements is available to their competent authorities *(ToR A.1)*		
Phase 1 determination: The element is in place.	Nominees that are not financial service licensees are not required to maintain ownership and identity information in respect of all persons for whom they act as legal owners.	An obligation should be established for all nominees to maintain relevant ownership information where they act as the legal owners on behalf of any other person
Phase 2 rating: Compliant.		
Jurisdictions should ensure that reliable accounting records are kept for all relevant entities and arrangements *(ToR A.2)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: Compliant.		
Banking information should be available for all account-holders *(ToR A.3)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: Compliant.		

Determination	Factors underlying recommendations	Recommendations
Competent authorities should have the power to obtain and provide information that is the subject of a request under an exchange of information arrangement from any person within their territorial jurisdiction who is in possession or control of such information (irrespective of any legal obligation on such person to maintain the secrecy of the information) *(ToR B.1)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: Compliant.		
The rights and safeguards (e.g. notification, appeal rights) that apply to persons in the requested jurisdiction should be compatible with effective exchange of information *(ToR B.2)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: Compliant.		
Exchange of information mechanisms should allow for effective exchange of information *(ToR C.1)*		
Phase 1 determination: The element is in place.	One of Australia's DTAs does not provide for effective exchange of information.	Australia should renegotiate its agreements as necessary so that they provide for effective exchange of information.
Phase 2 rating: Compliant.		
The jurisdictions' network of information exchange mechanisms should cover all relevant partners *(ToR C.2)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: Compliant.		
The jurisdictions' mechanisms for exchange of information should have adequate provisions to ensure the confidentiality of information received*(ToR C.3)*		

Determination	Factors underlying recommendations	Recommendations
Phase 1 determination: The element is in place.		
Phase 2 rating: Compliant.		
The exchange of information mechanisms should respect the rights and safeguards of taxpayers and third parties *(ToR C.4)*		
Phase 1 determination: The element is in place.		
Phase 2 rating: Compliant.	The effect of the accountants' concession on exchange of information in practice should be monitored by the ATO on an ongoing basis.	The EOI Unit should maintain a record of all EOI cases in which the accountants concession is claimed together with an analysis of its effect in each case on the Unit's ability to provide the information requested.
The jurisdiction should provide information under its network of agreements in a timely manner *(ToR C.5)*		
Phase 1 determination: This element involves issues of practice that are assessed in the Phase 2 review. Accordingly no Phase 1 determination has been made.		

Determination	Factors underlying recommendations	Recommendations
Phase 2 rating: Compliant.	Australia did not always provide an update or status report to its DTA partners within ninety days in the event that it is unable to provide a substantive response within that time.	Australia should ensure that the new system put in place to provide updates to EOI partners after 90 days in those cases where it is not possible to provide a substantive response within that timeframe operates effectively.

Annex 1: Jurisdiction's Response to the Review Report*

Australia has had a long history in developing our capacity and commitment towards effective exchange of information for tax purpose. We are fully supportive and reaffirm our commitments to the Global Forum's international standards for transparency and exchange of information recognising the significance of working cooperatively with our international tax jurisdictions to combat tax avoidance and evasion. In demonstrating our commitment, Australia has recently indicated its commitment in joining the pilot scheme for multilateral automatic exchange of information as initiated by Britain along with France, Germany, Italy and Spain in April 2013.

We have also continued to extend our list of treaty partners since the time of the Peer Review assessment. In addition to 44 Double Tax Agreements/ Conventions, Australia has extended its Tax Information Exchange Agreement partners to 34 and has also become a signatory to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (as amended by the 2010 Protocol) which was ratified on 1 December 2012.

Australia commends the Peer Review Assessment team for their professionalism and the work done in what we consider to be a fair, balanced and accurate report.

* This Annex presents the Jurisdiction's response to the review report and shall not be deemed to represent the Global Forum's views.

Annex 2: List of Exchange-of-Information Mechanisms in Force

Jurisdiction	Type of EoI arrangement	Date signed	Date in force
Argentina	DTA	29.08.1999	30.12.1999
Austria	DTA	08.07.1986	01.09.1988
Belgium	DTA	20.03.1984	20.09.1986
Second Protocol with Belgium[27]		24.06.2009	Not yet in force
Chile	DTA	10.03.2010	Not yet in force
China (1)	DTA	17.11.1988	28.12.1990
Czech Republic	DTA	28.03.1995	27.11.1995
Denmark	DTA	01.04.1981	27.10.1981
East Timor (Timor Sea Treaty)[28]	DTA	20.05.2002	20.05.2002
Fiji	DTA	15.10.1990	28.12.1990
Germany (10)	DTA	24.11.1972	15.02.1975
Hungary	DTA	29.11.1990	10.04.1992
India (7)	DTA	25.07.1991	30.12.1991
Indonesia	DTA	22.04.1992	14.12.1992
Ireland	DTA	31.05.1983	21.12.1983
Kiribati	DTA	23.03.1991	28.06.1991
Malaysia	DTA	20.08.1980	26.06.1981
Third Protocol with Malaysia[29]		24.02.2010	Not yet in force

27. Protocol signed but which is not yet in force.
28. The Timor Sea Treaty is more than a DTA in that it provides for the sharing of petroleum revenue in an area of the seabed between Australia and East Timor. It also provides a Taxation Code for the Avoidance of Double Taxation.
29. Protocol signed but which is not yet in force.

Jurisdiction	Type of EoI arrangement	Date signed	Date in force
Malta	DTA	09.05.1984	20.05.1985
Mexico	DTA	09.09.2002	31.12.2003
New Zealand (9)	DTA	26.06.2009	19.03.2010
Papua New Guinea	DTA	24.05.1989	29.12.1989
Philippines	DTA	11.05.1979	17.06.1980
Poland	DTA	07.05.1991	04.03.1992
Romania	DTA	02.02.2000	11.04.2001
Russia	DTA	07.09.2000	17.12.2003
Singapore (6)	DTA	11.02.1969	04.06.1969
Second Protocol with Singapore[30]		08.09.2009	Not yet in force
Slovakia	DTA	24.08.1999	22.06.1999
Spain	DTA	24.03.1992	10.12.1992
Sri Lanka	DTA	18.12.1989	21.10.1991
Sweden	DTA	14.01.1981	04.09.1981
Switzerland	DTA	28.02.1980	13.02.1981
Taiwan	DTA	29.05.1996	21.10.1996
Turkey	DTA	29.04.2010	Not yet in force
Canada	DTA	21.05.1980	29.04.1981
Finland	DTA	20.11.2006	10.11.2007
France	DTA	20.06.2006	01.07.2009
Italy	DTA	14.12.1982	05.11.1985
Japan (2)	DTA	31.01.2008	03.12.2008
Netherlands	DTA	17.03.1976	27.09.1976
Norway	DTA	08.08.2006	12.09.2007
South Africa (4)	DTA	01.07.1999	21.12.1999
South Korea	DTA	12.07.1982	01.01.1984
Thailand (8)	DTA	31.08.1989	27.12.1989
United Kingdom (5)	DTA	21.08.2003	17.12.2003

30. On 9 November 2010, legislation enabling the Second Protocol with Singapore received Royal Assent. Following the exchange of diplomatic notes, the revised EOI provisions will commence from 22 December 2010.

Jurisdiction	Type of EoI arrangement	Date signed	Date in force
USA (3)	DTA	06.08.1982	31.10.1983
Vietnam	DTA	13.04.1992	10.12.1992
Anguilla	TIEA	20.03.2010	Not yet in force
Antigua and Barbuda	TIEA	30.01.2007	14.12.2009
Aruba	TIEA	16.12.2009	Not yet in force
Bahamas	TIEA	30.03.2010	Not yet in force
Belize	TIEA	31.03.2010	Not yet in force
Bermuda	TIEA	10.11.2005	20.09.2007
British Virgin Islands	TIEA	27.10.2008	12.04.2010
Cayman Islands	TIEA	30.03.2010	Not yet in force
Cook Islands	TIEA	28.10.2009	Not yet in force
Dominica	TIEA	31.03.2010	Not yet in force
Gibraltar	TIEA	25.08.2009	Not yet in force
Grenada	TIEA	30.03.2010	Not yet in force
Guernsey	TIEA	09.10.2009	Not yet in force
Isle of Man	TIEA	29.01.2009	05.01.2010
Jersey	TIEA	10.06.2009	05.01.2010
Marshall Islands	TIEA	12.05.2010	Not yet in force
Monaco	TIEA	01.04.2010	Not yet in force
Netherlands Antilles	TIEA	01.03.2007	04.04.2008
Samoa	TIEA	20.03.2010	Not yet in force
San Marino	TIEA	16.12.2009	Not yet in force
Saint Vincent and the Grenadines	TIEA	05.03.2010	Not yet in force
St. Kitts and Nevis	TIEA	05.03.2010	Not yet in force
St. Lucia	TIEA	30.03.2010	Not yet in force
Turks and Caicos Islands	TIEA	30.03.2010	Not yet in force
Vanuatu	TIEA	21.04.2010	Not yet in force

Annex 3: List of Laws, Regulations and Other Material Received

Tax Law, Regulations and other Material

Income Tax Assessment Act 1936

Tax Administration Act 1953

Income Tax Assessment Act 1997

Practice Statement PS LA 2007/13 (Exchange of Information with foreign revenue authorities in relation to goods and services tax, under international tax agreements)

Practice Statement PS LA 2006/9 (Referral of work to International Strategy and Operations)

Practice Statement PS LA 2006/3(The types of information that can be exchanged under Article 19 of the Australia-Singapore tax treaty)

Practice Statement PS LA 2005/2 (Penalty for failure to keep or retain records)

Taxation Ruling 96/7 (Income tax: record keeping – section 262A – general principles)

Taxation Ruling TR 2005/9 (Income tax: record keeping – electronic records)

Taxation Determination TD 2002/16 (obligations under the Income Tax Assessment Act 1936 where a business chooses to keep some of its records as encrypted information)

ATO Guidelines to Accessing Professional Accounting advisor's Papers

ANAO Audit Report (The Management and Use of Double Taxation Agreement Information Collected through Automatic Exchange)

Specification for Annual Investment Income Reports

ATO Guide to Information Security

Company Tax Return

Anti-Money Laundering Law

The Anti-Money Laundering and Counter-Terrorism Financing Act 2006

The Financial Transactions Reporting Act 1998

Commercial law, regulations and other material

Banking Act 1959

Corporations Act 2001

Australian Capital Territory – Partnership Act 1963

New South Wales – Commons Management Act 1989

New South Wales – Partnership Act 1892

New South Wales – Trustee Act 1925

Northern Territory – Partnership Act 1997

Queensland – Partnership Act 1891

Queensland – Partnership (Limited Liability) Act 1988

Queensland – Trust Accounts Act 1973

South Australia – Partnership Act 1891

South Australia – Trustee Regulations 1996

Tasmania – Partnership Act 1891

Tasmania – Trustee Companies Act 1953

Victoria – Partnership Act 1958

Victoria – Unclaimed Money Act 2008

Victoria – Trustee Act 1958

Western Australia – Limited Partnership Act 1905

Western Australia – Partnership Act 1895

Western Australia – Trustee Act 1962

Western Australia – Trustee Companies Act 1987

Other Legislation and Regulations

International Tax Agreements Act 1953

Annex 4: List of Authorities Interviewed

Australian Tax Office

Acting Deputy Commissioner, Large Business and International

Deputy Commissioner, Case Leadership, Small and Medium Enterprises

Assistant Commissioner – International Relations

Manager, EOI Unit

Senior Technical Specialist, EOI Unit

Members – EOI Unit

Auditors Responsible for executing EOI requests

Audit Manager

Australian Securities and Investment Commission

Counsel, Registry Services & Licensing

Senior Manager, Major Fraud and International

Senior Manager, International Cooperation Requests

Annex 5: Cover Sheet for Information Communicated to Other ATO Officers

Australian Government
Australian Taxation Office

You are viewing a document received by the ATO under one of Australia's tax treaties. Special handling procedures apply to such documents.

You must not pass or copy any material exchanged via Australia's tax treaties to external parties without the prior consent of the Exchange of Information (EOI) Unit.

There are also limitations on the use of this material, especially in regard to many of Australia's older tax treaties (for example, use by GST staff of information exchanged for income tax purposes only). Consult PSLA 2007/13.

You must also immediately notify the EOI Unit in National Office if you are asked to provide any of this material as part of any FOI request. Consult PSLA 2006/09.

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Global Forum on Transparency and Exchange of Information for Tax Purposes

PEER REVIEWS, COMBINED: PHASE 1 + PHASE 2, incorporating Phase 2 ratings – AUSTRALIA

The Global Forum on Transparency and Exchange of Information for Tax Purposes is the multilateral framework within which work in the area of tax transparency and exchange of information is carried out by 120 jurisdictions, which participate in the Global Forum on an equal footing.

The Global Forum is charged with in-depth monitoring and peer review of the implementation of the international standards of transparency and exchange of information for tax purposes. These standards are primarily reflected in the 2002 *OECD Model Agreement on Exchange of Information on Tax Matters* and its commentary, and in Article 26 of the *OECD Model Tax Convention on Income and on Capital* and its commentary as updated in 2004. The standards have also been incorporated into the UN *Model Tax Convention*.

The standards provide for international exchange on request of foreseeably relevant information for the administration or enforcement of the domestic tax laws of a requesting party. Fishing expeditions are not authorised but all foreseeably relevant information must be provided, including bank information and information held by fiduciaries, regardless of the existence of a domestic tax interest or the application of a dual criminality standard.

All members of the Global Forum, as well as jurisdictions identified by the Global Forum as relevant to its work, are being reviewed. This process is undertaken in two phases. Phase 1 reviews assess the quality of a jurisdiction's legal and regulatory framework for the exchange of information, while Phase 2 reviews look at the practical implementation of that framework. Some Global Forum members are undergoing combined – Phase 1 and Phase 2 – reviews. The Global Forum has also put in place a process for supplementary reports to follow-up on recommendations, as well as for the ongoing monitoring of jurisdictions following the conclusion of a review. The ultimate goal is to help jurisdictions to effectively implement the international standards of transparency and exchange of information for tax purposes.

All review reports are published once approved by the Global Forum and they thus represent agreed Global Forum reports.

For more information on the work of the Global Forum on Transparency and Exchange of Information for Tax Purposes, and for copies of the published review reports, please refer to ***www.oecd.org/tax/transparency*** and ***www.eoi-tax.org***.

Consult this publication on line at ***http://dx.doi.org/10.1787/9789264205529-en.***

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