

TACKLING BASE EROSION AND PROFIT SHIFTING THROUGH ENHANCED INFORMATION EXCHANGE

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his article analyses the problem of base erosion and profit shifting (BEPS) and establishes how it can be targeted through information exchange systems. Particularly this article looks at the operation of information exchange provisions in existing bilateral Double Taxation Agreements (DTAs) and Tax Information Exchange Agreements (TIEAs) and examines their deficiencies. The last part of the article looks at tackling BEPS through the establishment of a new multilateral treaty focused on automatic information exchange and discusses what such an instrument would require.

1. INTRODUCTION

Following his appointment as the Commissioner of Taxation (the Commissioner), Chris Jordan gave a speech outlining the current concerns and the intended direction for the Australian tax system. In that speech Mr Jordan addressed certain issues concerning corporate taxation noting:

A current example of an area where the ATO could take on a more active role is in the community debate around profit shifting and the threat to the tax base. For Australian taxpayers,

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especially business, this is a significant issue. People are asking whether less tax paid by multinationals means a greater burden on Australian businesses. Their expectation, rightly, is that our laws should be sophisticated enough to handle such challenges posed by the increasingly global and digitised world.¹

Activities that are associated with base erosion and profit shifting (BEPS), such as aggressive tax planning, are by no means a new practice. President John F. Kennedy raised concerns about corporate tax avoidance using complicated international structures in a speech made to the United States Congress in 1961.² What has changed in the last five decades is the complexity of financial arrangements that work to serve this purpose. This article begins by outlining what BEPS is and some of the features of BEPS arrangements. As cross-border tax avoidance is the chief characteristic of BEPS activity, this article examines how such activity might be addressed by enhancing the effectiveness of international co-operation. In particular, it examines how co-operation between Australia and other countries in the area of information exchange can be improved to increase detection of BEPS activity and thereby reverse its effect on Australia's tax base.

2. BEPS A CORPORATE PROBLEM

2.1 Background

BEPS is an issue concerning the taxation of multi-national entities (MNEs), specifically, the cross-border tax avoidance schemes orchestrated or facilitated by MNEs. Base erosion refers to the reduction over time of a state's tax base. That is, the total potential corporate taxation revenue that the state is able to

¹ Chris Jordan, 'Tax, the Way Ahead', (Speech Delivered at the Tax Institute 28th Annual Convention, Perth, 14 March 2013).

² John F Kennedy 'Special Message to the Congress on Taxation' April 20 1961.

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collect.³ Profit shifting is a significant cause of base erosion, though it is not the only cause. In many cases, the schemes that the BEPS issue highlights are not ‘shifting’ profits at all. They may instead be shifting losses, reducing profits through interest deductions from artificial debt arrangements, or by taking advantage of the mismatches in legislation between two states and consequently avoiding tax liability in both places.⁴

Despite the stigmatisation of the tax minimisation activities of large corporations in recent times, it is important to emphasise that most BEPS arrangements are not illegal. The BEPS issue addressed by this article is concerned with aggressive tax planning schemes and the concept of tax avoidance.⁵ If avoidance is established the Commissioner has the power to reverse the ‘tax benefit’ obtained by the scheme.⁶ The issue of tax evasion, that is, the elimination of tax liability by explicitly illegal means,⁷ is not addressed in this article.

³ Patrick Love ‘BEPS: Why You’re Taxed More than a Multinational’ *OECD Insights* (online) 13 February 2013 < <http://oecdinsights.org/2013/02/13/beps-why-youre-taxed-more-than-a-multinational/> > .

⁴ Ibid.

⁵ General tax avoidance occurs where there has been compliance with all the specific provisions of the Income Tax Assessment Acts, but the dominant purpose of the scheme or schemes viewed objectively is to avoid tax liability, *Income Tax Assessment Act 1936* (Cth) s 177D (1). See also Kerrie Sadiq et al 2012 *Principles of Taxation Law* (Thomson Reuters Lawbook Co, 2012) 628, 629.

⁶ *Income Tax Assessment Act 1936* (Cth) s 177F. Part IVA is intended to act as an “effective general measure against those tax avoidance arrangements that ... are blatant, artificial or contrived ... where, on an objective view of the particular arrangement and its surrounding circumstances, it would be concluded that the arrangement was entered into for the sole or dominant purpose” of obtaining the tax benefit: A H Slater, ‘Part IVA, An International Perspective’ (2013) 42 *Australian Tax Review* 149, 149.

⁷ Sadiq, above n 5, 629.

Due to the operation of Part IVA of the *Income Tax Assessment Act 1936* (Cth) (ITAA 1936), a key weapon for reversing the effects of these schemes is the knowledge of their occurrence. Australia requires companies to engage in mandatory disclosures of much of their international dealings. All information concerning related foreign entities is intended to be captured through the International Dealings Schedule as part of their income tax return.⁸ However, existing evidence of BEPS activity highlights that this Schedule is not sufficient to detect and prevent such activity.

Evidence pointing towards the prevalence of BEPS activity has been discussed in multiple reports by governmental and other organisations. The Organisation for Economic Development and Cooperation (OECD) has considered both the falling rate of corporate taxation to gross domestic product (GDP), as well as current incidents of aggressive avoidance arrangements, as indicators of a global BEPS problem.⁹

⁸ Australian Taxation Office ‘International Dealings Schedule Instructions 2013’ (6 September 2013) <http://ato.gov.au/Forms/International-dealings-schedule-instructions-2013/?default=&page=2#Introduction> ; The International Dealings Schedule can be accessed at: <http://ato.gov.au/uploadedFiles/Content/TPALS/downloads/TP00350240NAT733452013.pdf>.

⁹ There are a number of economic indicators the OECD refer to, such as the falling rate of corporate income tax to GDP, as proof of the current problem; OECD ‘Addressing Base Erosion and Profit Shifting’ (Report, OECD Publishing, February 2013) 15-19 http://www.keeper.com/Digital-Asset-Management/oecd/taxation/addressing-base-erosion-and-profit-shifting_9789264192744-en#page1

In 2009 there were a number of separate cases in New Zealand, Italy and the US where upwards of NZD 2 billion was recovered from corporations who were involved in hybrid mismatch schemes; Patrick Love, ‘How to Pay Less Tax’, *OECD Insights*, (online) 11 May 2012 < <http://oecdinsights.org/2012/05/11/how-to-pay-less-tax/>>. There has

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Separate reports produced by both the French and Australian governments have identified the existence of a BEPS issue by (among other indicators) comparing corporate revenues to the effective tax paid.¹⁰ Both reports considered that the declining effective tax rate was indicative of an increasing BEPS issue.¹¹ The Australian report also referred to statistics showing falling corporate tax revenue despite a growing economy as well as increased activity in areas where the risk of BEPS activity is high.¹² Large and unusual flows of foreign direct investment into and out of small economies (that may be identified as tax

also been considerable publicity surrounding of the amount of tax paid by well-known companies such as Amazon, whose UK company in 2012 had an effective tax rate of less than 1 percent, see, United Kingdom House of Commons, 'Tax Avoidance by Multinational Companies' (HM Revenue and Customs Nineteenth Report, London, 3 December 2012)

<<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/716/71605.htm>>.

¹⁰ The French report was commissioned by the government and carried out by Pierre Colin and Nicolas Collin and released on January 18, 2013, as sourced from: Dateline France 'France Moves Closer to Taxing the Digital Economy' (2013) 24 *Journal of International Taxation* 61, 61; See also, The Australian Government the Treasury, 'Implications of the Modern Global Economy for the Taxation of Multinational Enterprises' (Issues Paper May 2013) 13.

¹¹ The French Report was carried out by Pierre Colin and Nicolas Collin and released on January 18, 2013, as sourced from: Dateline France 'France Moves Closer to Taxing the Digital Economy' (2013) 24 *Journal of International Taxation* 61, 61; See also, The Australian Government the Treasury, 'Implications of the Modern Global Economy for the Taxation of Multinational Enterprises' (Issues Paper May 2013) 13.

¹² Australian Government Treasury, above n 10, 14.

havens) also suggest the prevalence of international avoidance activity by corporations.¹³

BEPS arrangements clearly undermine the principles of (horizontal and vertical) equity that underpin Australia's tax system.¹⁴ Their occurrence could also frustrate governmental functions such as the re-distribution of income and the ability to fund infrastructure, health and education. More importantly, though, the occurrence of BEPS activity erodes the integrity of the tax system as it generates a lack of faith by the community in the ability of the government to raise revenue as intended.¹⁵

¹³ Ibid 24; OECD 'Addressing Base Erosion and Profit Shifting' (Report, OECD Publishing, February 2013) 15-19 <http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/addressing-base-erosion-and-profit-shifting_9789264192744-en#page1> , 17. The jurisdictions with unusual FDI flows also have what the OECD describes as 'harmful preferential tax regimes' by having no or low effective tax rates, a lack of transparency, and a lack of exchange of information: see OECD, *Harmful Tax Competition: An Emerging Global Issue* (OECD Publishing, 1998). This is considered more alarming where the outward investments figures are similar to the foreign direct investment, or where the majority of outward investment is made through special purpose or shell companies, see OECD, above n 9, 17, 18.

¹⁴ The Commonwealth of Australia 'Architecture of Australia's Tax and Transfer System' in *Australia's Future Tax System* (Report, 2 May 2010) [3.2] <http://www.taxreview.treasury.gov.au/content/Paper.aspx?doc=html/publications/papers/report/section_3-02.htm>.

¹⁵ Commonwealth of Australia 'Tax Reform Road Map: A Stronger Smarter and Fairer Tax System' (Report, May 2013) 7; The Commonwealth of Australia 'Architecture of Australia's Tax and Transfer System' in *Australia's Future Tax System* (Report, 2 May 2010) [3.2] <http://www.taxreview.treasury.gov.au/content/Paper.aspx?doc=html/publications/papers/report/section_3-02.htm>.

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This article advocates the adoption of specific information exchange measures in order to address the BEPS issue. In order to understand why these measures are necessary and their likely effect on BEPS activity, it is helpful to cover briefly the key characteristics of the arrangements on which this activity is based. This exercise also serves to illustrate the gaps in the current measures being used to address the problem.

Schemes such as contrived debt arrangements and corporate loss-utilisation often involve the use of several entities across a number of jurisdictions.¹⁶ Both types of scheme are composed of legitimate and common commercial transactions that are not of themselves suspicious. What is often found is that deductions, loans, or losses involved in the scheme are in essence artificial due to the circular transfer of funds across multiple jurisdictions, usually back to the original supplier of those funds.¹⁷ As both schemes also commonly operate across more than two jurisdictions, it is not possible for tax authorities to see the overall picture of the scheme when information exchange systems fail to provide multijurisdictional data to those authorities.

Hybrid mismatch arrangements are schemes that take advantage of the difference in the tax treatment of instruments,

¹⁶ For a detailed analysis on how each scheme operates respectively see, Australian Taxation Office, 'Contrived cross-border arrangements that seek to generate debt deductions for non-assessable non-exempt income' (Taxpayer Alert, TA 2009/9, 23 April 2009) Example 1 <<http://law.at0.gov.au/atolaw/view.htm?DocID=TPA/TA20099/NAT/ATO/00001>> ; OECD, 'Corporate Loss Utilisation through Aggressive Tax Planning' (Report, OECD Publishing, 2011) 51.

¹⁷ Australian Taxation Office 'Contrived Cross-border Arrangements that Seek to Generate Debt Deductions for Non-assessable Non-exempt Income' (Taxpayer Alert, TA 2009/9, 23 April 2009) Example 1 <<http://law.at0.gov.au/atolaw/view.htm?DocID=TPA/TA20099/NAT/ATO/00001>>.

entities or transfers between two or more jurisdictions.¹⁸ Hybrid arrangements are dynamic in nature and either adapt to, or are redeveloped in response to, changing domestic laws.¹⁹ Where hybrid arrangements straddle more than two jurisdictions, it is difficult for any one jurisdiction to have sufficient information to be alerted to the bigger picture.

Finally, many schemes involve elements of questionable transfer pricing, particularly pricing reflected in royalties and interest rates charged between entities in the same corporate group, which are not fully recognised by the affected tax authorities for years into their operation.²⁰

The nature of the BEPS problem is a global one. Governments can therefore employ strategies centred on domestic reform and strategies centred on global co-operation and international law reform. Governments have hitherto tended to focus on domestic and therefore unilateral measures in tackling the problem.²¹ Australia has implemented a number of

¹⁸ OECD, 'Hybrid Mismatch Arrangements: Tax Policy and Compliance Issues' (OECD Publishing, March 2012) 7; Steven Bank, 'The Globalization of Corporate Tax Reform' (2013) 40 *Pepperdine Law Review* 1307, 1311.

¹⁹ OECD, above n 18, 6.

²⁰ For example Starbucks UK was investigated after reporting losses for 14 of the 15 years of its operation in the UK despite having a 31% market share in terms of turnover. Investigations found the company was charging excessive mark-ups on royalties between its Netherlands and Swiss based companies, as well as higher than normal interest rates on inter-company loans, see, United Kingdom House of Commons, 'Tax avoidance by multinational companies' (HM Revenue and Customs Nineteenth Report, London, 3 December 2012) <<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/716/71605.htm>>.

²¹ Bruce Zagaris 'Ethical Issues in Offshore Planning' (5th STEP Pacific Rim Conference, Santa Monica, 3 May 2012) American Law Institute, 22.

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important reforms in recent years which are aimed at closing some of the loopholes that have facilitated particular schemes. These include reforms to limit the availability of interest deductions on debt,²² strengthening transfer pricing provisions,²³ and changes to thin capitalisation rules.²⁴

These reforms have been discussed comprehensively by other commentators.²⁵ The focus of this article, however, is on international strategies to address the BEPS issue, specifically on methodology to improve the effectiveness of information exchange between tax authorities.

²² Newnham et al, '2013-2014 Australian Federal Budget: The Tax Implications' *Mondaq* (online) 20 May 2013 <<http://www.mondaq.com/australia/x/239866/Fiscal+Monetary+Policy/20132014+Australian+Federal+Budget+The+Tax+Implications>>.

²³ Jock McCormack, 'Australia Intensifies Attack on Global Transfer Pricing' *Mondaq* (online) 21 February 2013 <<http://www.mondaq.com/australia/x/222638/Transfer+Pricing/Australia+intensifies+attack+on+global+transfer+pricing>> ; Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit Shifting) Bill 2013 pt 7 which amends ss 284-250, 284-255 of the *Tax Administration Act 1953* (Cth). Part 2 introduces to the *Income Tax Assessment Act 1997* (Cth): Subdivision 815-B — Arm's length principle for cross-border conditions between entities; Subdivision 815-C — Arm's length principle for permanent establishments; Subdivision 815-D — Special rules for trusts and partnerships.

²⁴ Newnham above n 22; CCH 'Budget Night Report' 14 May 2013 <<http://www.cch.com.au/AttachmentLibrary/MarketingPromo/budget2013.pdf>>.

²⁵ See, for example, a detailed analysis of the transfer pricing reforms in the BEPS context; Michael Dirkis, 'On the Eve of the Global Response to BEPS: Australia's New Transfer Pricing Rules' (2013) 23 *Revenue Law Journal* 46.

3. CROSS BORDER INSTRUMENTS FOR CROSS BORDER PROBLEMS

3.1 Why International Co-Operation Is The Key

While the value of targeted domestic reforms should not be discredited, the OECD and the Australian government acknowledge that unilateral measures alone are insufficient to address BEPS.²⁶ Revenue authorities abroad, such as New Zealand's Minister of Revenue, continue to insist that the answer to the difficult problem of taxing MNEs lies in international projects and agreements.²⁷

The reason for the need for continued global co-operation to tackle the BEPS issue is evident in the problem itself. Pinto argues that the nature of cross-border transactions establishes the need for cross-border management of their taxation.²⁸ This is particularly so in recent years as the wave of electronic commerce has meant exponential growth in the number and methodology of international transactions.²⁹ Unilateral measures may be effective in eliminating, for a particular country, the operation of one or several different types of arrangements. For instance, reforms targeted at removing the ability for entities to claim an interest deduction on borrowings used to generate non-assessable, non-exempt income.³⁰

However, unilateral measures alone may leave room for more schemes to evolve. With hybrid-mismatch arrangements,

²⁶ Australian Government the Treasury, above n 12, 20; OECD, above n 9, 7, 8; The Australian Government the Treasury, 'Risk's to the Sustainability of Australia's Corporate Tax Base' (Scoping Paper, July 2013) 41.

²⁷ Adrian Sawyer and Lin Mei Tan, 'Editorial' (2013) 19 *New Zealand Journal of Taxation Law and Policy* 2, 3.

²⁸ Dale Pinto, 'Taxation Issues in a World of Electronic Commerce' (1999) 2 *Journal of Australian Taxation* 227, 244.

²⁹ *Ibid.*

³⁰ Newman et al, above n 22.

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the success of the schemes comes from the interplay of different domestic tax systems.³¹ Although legislative amendment may be able to stop one or several schemes operating in a particular jurisdiction, the schemes will evolve to find a new way to take advantage of the new rules and without co-operation between revenue authorities such activities may remain undetected for many years. There are also other unwanted consequences from unilateral stances such as rivalry for tax revenue and double taxation, creating inefficiencies and inequities between companies, or pushing corporations out of some jurisdictions almost entirely.³²

A number of bodies and commentators in the field of international taxation have also recognised that BEPS cannot be solved by unilateral measures alone.³³ The issue itself is inherently multi-jurisdictional and therefore needs extensive negotiations between states as to how the problem should be addressed. Arrangements arising from those negotiations also need to be implemented co-operatively. As a nation codifies its international agreements by way of convention or treaty it is these instruments that are the next focus of the article.³⁴

³¹ OECD, above n 18, 8.

³² Australian Government the Treasury, above n 21, 23; OECD ‘Action Plan on Base Erosion and Profit Shifting’ (Report, OECD Publishing July 2013) 9.

³³ The Australian Government the Treasury, above n 12, 20; OECD, above n 9, 7, 8; The Australian Government the Treasury, above n 26, 41; Michael Dirkis and Brett Bondfield, ‘The Developing International Framework and Practice for the Exchange of Tax Related Information: Evolution or Change?’ (2013) 11 *eJournal of Tax Research* 115, 115.

³⁴ *Vienna Convention on the Law of Treaties*, open for signature Vienna, 23 May 1969, ATS [1974] 2, entry into force 27 January 1980, Article (2) (a); Ademola Abass *International Law: Text, Cases and Materials* (Oxford University Press 2012) 68.

3.2 Existing Tax Treaties & Conventions

International co-operation through tax treaties has long been seen as a necessary incident of effective cross-border trade and taxation. States have been negotiating the application of income tax rules between domestic and foreign residents from as early as the 1920s.³⁵

As Australia has an existing framework of tax treaties, it makes sense to try and use these existing inter-governmental relationships as a means to promote international co-operation aimed at tackling the BEPS problem.³⁶ This article will therefore consider how the information exchange provisions in these treaties could be used as the basis of furthering such co-operation in order to curb the problem effectively. Before doing so, some recent treaty developments will be reviewed briefly.

Double taxation agreements (DTAs) are bilateral treaties entered into between two states for the purpose of allocating taxing rights between these two states, preventing double taxation, and combating evasion and avoidance.³⁷ DTAs have

³⁵ Dianne Ring, 'International Tax Relations: Theory and Implications' (2007) 60 *Tax Law Review* 1, 1.

³⁶ Australian Government the Treasury, Australian Tax Treaties, <<http://www.treasury.gov.au/Policy-Topics/Taxation/Tax-Treaties/HTML/Income-Tax-Treaties>>.

³⁷ Catherine Brown 'Strangers in a Strange Land: The Taxation of Services in a Global Economy' (2010) 39 *Australian Tax Review* 82, 85. For example see *Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* Australia – United States of America, signed Sydney 6 August 1982, [1983] ATS 16, entry into force 31 October 1983;

Protocol amending the Agreement between the Government of Australia and the Government of the Republic of India for the avoidance of double taxation and the prevention of fiscal evasion with

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been progressively shifting to try and encompass changes in the way businesses operate globally. For example, DTAs that entered into force in the last five years provide greater clarity for the meaning of terms such as ‘permanent establishment’.³⁸

Australia has also recently updated its DTA with India to allow for exchanged information to be shared with other government authorities under certain conditions and to require both states to assist where possible in the collection of their respective taxes.

³⁹

Tax information exchange agreements (TIEAs) are intended for use with countries for which a DTA is not considered appropriate, mainly because they have no, or low, taxes on income or profits.⁴⁰ TIEAs are, unlike DTAs, a fairly young concept, with Australia entering into its first TIEA with

respect to taxes on income, Australia – India, signed New Delhi 16 December 2011, [2013] ATS 22, entry into force 02/04/2013.

³⁸ Jock McCormack and Anshu Maharaj, ‘Is There a Permanent Establishment?’ (International Fiscal Association Vancouver Congress, 30 August 2009 - 4 September 2009)

<http://www.law.unimelb.edu.au/files/dmfile/McCormack_IFA_Paper1.pdf>.

³⁹ See Article 26, which allows information received by a contracting state to be used for other purposes, if it does not contravene the domestic laws of either state, and permission is granted from the sending state. The amendment also inserted Article 26A, which requires each state to do what it can to assist in the collection of taxes owed to it by residents of the other state. *Protocol amending the Agreement between the Government of Australia and the Government of the Republic of India for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, Australia – India, signed New Delhi 16 December 2011, [2013] ATS 22, entry into force 02/04/2013.*

⁴⁰ LAC Lawyers, ‘Taxation Law – Tax Information Exchange Agreements Part 2’ (Article, 8 February 2011)

<http://www.laclawyers.com.au/document/Taxation-Law-__-Tax-Information-Exchange-Agreements-__-Part-2.aspx>.

Bermuda in 2005.⁴¹ While TIEAs are much narrower in scope than DTAs, they are more detailed than DTAs on the subject of information exchange.⁴² Although the progression to TIEAs was a significant step internationally in being able to reach agreements with these seemingly incompatible jurisdictions, it is arguable that in practical effect they have limited benefit. This is because of the stringent requirements contained in TIEAs for information exchange to take place and the lack of incentive for tax haven jurisdictions to co-operate.⁴³

The Convention on Mutual Administrative Assistance in Tax Matters (the Convention) is a freestanding multilateral agreement to promote international co-operation to foster the more effective operation of national tax laws. The Convention was open to all countries for signature in 2011 and Australia signed the Convention in that year.⁴⁴ Aside from allowing

⁴¹ Australian Government, The Treasury, Tax Information Exchange Agreements, <http://www.treasury.gov.au/Policy-Topics/Taxation/Tax-Treaties/HTML/TIEA> ; Tony Anamourlis and Les Nethercott, 'The TIEA Coming to a Tax Haven Near You' (2010) 86 *Law Institute Journal* 44, 46.

⁴² LAC Lawyers, above n 40.

⁴³ Itai Grinberg, *Beyond FACTA: An Evolutionary Moment for the International Tax System* (January 27 2012) Social Science Research Network, 8 <<http://dx.doi.org/10.2139/ssrn.1996752>>

⁴⁴ OECD *The Multilateral Convention on Mutual Administrative Assistance for Tax Matters* (14 December 2012) <http://www.oecd.org/ctp/exchange-of-tax-information/ENG_Convention_Flyer.pdf>; OECD *Jurisdictions Participating In The Convention On Mutual Administrative Assistance In Tax Matters Status* (24 February 2015) <http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf>; see also Itai Grinberg *Beyond FACTA: An Evolutionary Moment for the International Tax System* (January 27 2012) Social Science Research Network, 54 <<http://dx.doi.org/10.2139/ssrn.1996752>>.

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parties to the treaty to make their own arrangements with regard to automatic exchange of information (AIE), there is nothing in the Convention that diverts significantly from information exchange provisions in Australia's bilateral DTAs.⁴⁵ The limitations of the Convention in the context of the BEPS problem are discussed in more detail in Section 4.1 below.

3.3 Interpretation of Treaties and Their Overlap with Part IVA

Before proceeding to examine information exchange under Australia's existing treaty framework and the improvements which might be made in order to deal with BEPS, it is important to give a brief overview of how tax treaties are interpreted by Australian courts. Furthermore, it is crucial to clarify how treaties interact with Australia's key armoury against tax avoidance, the general anti-avoidance rule contained in Part IVA of the ITAA 1936.

*Thiel v FCT*⁴⁶ is authority for the proposition that Art 32 of the Vienna Convention authorises the use of Model Conventions (such as the OECD Model Convention) and their commentary as aids in the interpretation of treaties. This is particularly helpful in the circumstances where corporations might try and take advantage of a treaty itself to facilitate a scheme. In such a case, the OECD Commentary to the Model Convention provides that provisions of a treaty cannot be relied upon in circumstances that would be contrary to the purpose of the treaty.⁴⁷

⁴⁵ *Convention on Mutual Administrative Assistance in Tax Matters*, signed by Australia 3 November 2011, entry into force 01/12/2012, Art 6 Automatic exchange of information (1 June 2011) <<http://www.oecd.org/ctp/exchange-of-tax-information/ENG-Amended-Convention.pdf>> .

⁴⁶ (1990) 171 CLR 338, 349 [10] (Dawson J).

⁴⁷ OECD *Model Tax Convention on Income and Capital* Commentary to Article 1 para 9.5 (Added 28 January 2003).

A different approach was taken in *FCT v SNF*,⁴⁸ where the Full Federal Court stated that the OECD Transfer Pricing Guidelines are not a legitimate aid to the construction of DTAs and neither are they permissible materials for interpreting DTAs or domestic legislation. However, the government was quick to correct this perceived threat by introducing reforms that ensure Australia's transfer pricing rules are on par with the OECD Transfer Pricing Guidelines.⁴⁹

The interplay between Australia's tax treaties and Part IVA is crucial in understanding the fundamental role that information plays in being able to reverse the effects of BEPS. Part IVA is a 'catch all' anti-avoidance provision and ensures that the Commissioner can cancel the tax benefit attained by corporations engaged in a scheme where an Australian tax benefit was the scheme's dominant purpose.⁵⁰ The wide operation of these provisions means that where taxpayers are engaged in cross-border avoidance schemes, if the Australian Taxation Office (ATO) has knowledge of the scheme, they have the ability to reverse it. Of course, all of this would be redundant if some treaties were able to oust the operation of Part IVA.

If treaties could be used in this way, it would completely undermine the effectiveness of information exchange as an anti-BEPS tool because the relevant information could not be used to reverse the tax benefit to the corporation. One analysis is that treaties will not be able to override the domestic anti-avoidance laws because if the transaction as classified is to be dealt with under the treaty in such a way that results in avoidance of tax, a contracting state can simply recharacterise the transaction under

⁴⁸ (2011) 193 FCR 149, 185 [118].

⁴⁹ *Tax Laws Amendment (Cross-Border Transfer Pricing) Act (No 1) 2012*. For further discussion on the impact of *FCT v SNF*, see Dirkis, above n 25, 51.

⁵⁰ *Income Tax Assessment Act 1936* (Cth) s 177F.

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domestic law, so that the way it is dealt with does not infringe the treaty.⁵¹

Furthermore, the OECD Commentary to the Model Tax Convention, which has been held to be a valid aid in treaty interpretation in *Theil* also supports the view that a treaty must be interpreted in a way that does not frustrate its purpose.⁵² This supports the idea that avoidance cannot be protected by any treaty provision particularly when a large majority of Australia's DTAs have a clear and primary objective of being 'for the prevention of fiscal evasion and avoidance'.⁵³

More importantly however, Australia specifically provides that its anti-avoidance laws override the provisions of any treaty. According to s 4(2) *International Tax Agreements Act 1953* (Cth):

The provisions of this Act have effect notwithstanding anything inconsistent with those provisions contained in the Assessment Act (other than Part IVA of the Income Tax Assessment Act 1936) or in an Act imposing Australian tax.

Australia's declaration of supremacy of Part IVA in relation to treaties, along with the Commentary indicating that treaties cannot be used in a way that frustrates their purpose, supports a

⁵¹ Craig Elliffe and John Prebble 'Anti-avoidance Rules and Double Tax Agreements' (2009) 19 *Revenue Law Journal* 48, 59.

⁵² OECD, above n 47.

⁵³ See, eg, *Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* Australia – United States of America, signed Sydney 6 August 1982, [1983] ATS 16, entry into force 31 October 1983; *Protocol amending the Agreement between the Government of Australia and the Government of the Republic of India for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income*, Australia – India, signed New Delhi 16 December 2011, [2013] ATS 22, entry into force 02/04/2013.

conclusion that Part IVA constitutes a sufficient power for the Commissioner to rectify any improper tax benefit obtained under a cross-border scheme, despite any DTA or TIEA provision, if the information was available to establish that the scheme existed.

4. SYSTEMS OF INFORMATION EXCHANGE

Facilitating information exchange between the revenue authorities of different states, in order to combat tax evasion and avoidance, has been a focus of tax treaties for some time. A key recommendation for combating evasion and avoidance in a 1998 OECD report was the facilitation of the exchange of information multilaterally.⁵⁴ Information exchange has also consistently been acknowledged as an area that needs to be improved in combating international tax evasion and avoidance. Pinto describes how the new world of electronic commerce requires revenue bodies to review and update their information exchange systems, but also provides an opportunity to use newer and more efficient platforms to facilitate information exchange.⁵⁵

Hybrid mismatch arrangements show how MNEs can manipulate differences in domestic taxation systems. Unilateral approaches to rule out hybrids can easily have a distortive effect. Consider the example of a double deduction arrangement.⁵⁶ While one country may enact laws to deny deductions of payments that are not included in the taxable income of the recipient, the second country may enact laws that deny the exemption of income if it is deductible in the first country.⁵⁷ Although the intention of both states is merely to try and avoid double deductions, the outcome is likely to result in

⁵⁴ OECD, 'Harmful Tax Competition: An Emerging Global Issue' (OECD Publishing, 1998) 52.

⁵⁵ Pinto, above n 28, 241

⁵⁶ For a detailed explanation on the operation of a 'double deduction arrangement' see, OECD, above n 18, 7.

⁵⁷ OECD, above n 18, 13-14.

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double taxation. The focus of solving the BEPS issue should not be on international co-operation through tax treaties, but more specifically information exchange through these treaties. The primacy of Part IVA discussed in Part Three establishes that, for Australia, the key ingredient to countering the tax benefits obtained by MNEs engaged in international tax avoidance schemes is the knowledge of their existence.

In February 2013, the OECD produced a scoping paper entitled ‘Addressing Base Erosion and Profit Shifting’.⁵⁸ This was followed by their ‘Action Plan on Base Erosion and Profit Shifting’ (Action Plan) released in July 2013.⁵⁹ The plan contains a number of actions the OECD believes can effectively address the BEPS issue, if pursued by states collectively. Surprisingly, improved information exchange is not one of the sixteen actions listed in the Action Plan. However, a few of the recommended actions contain an element of improved information exchange.⁶⁰ The OECD does not suggest that the categories of data being obtained by jurisdictions are inadequate according to OECD standards.⁶¹ However, there is not a strong

⁵⁸ OECD, above n 9.

⁵⁹ OECD ‘Action Plan on Base Erosion and Profit Shifting’ (Report, OECD Publishing July 2013).

⁶⁰ Action 12 focuses on schemes and recommends the implementation of models of information sharing between tax authorities specifically targeted at international schemes. Action 13 recommends requiring MNEs to regularly supply governments with information regarding the global allocation of income. This may be relevant in some jurisdictions but Australia already obtains comprehensive data about a corporation’s related party international dealings through the International Dealings Schedule, see above n 8.

⁶¹ OECD, above n 59, 23. The Action revolves around transfer pricing documentation, but would require ‘MNEs to supply all governments with needed information on their global allocation of income, economic activity, and taxes paid among countries according to a common template’.

emphasis on facilitating better exchange of the data already collected.

It should also be noted, though, that due to the bank secrecy laws operating in some jurisdictions such as Austria, Switzerland and the Cayman Islands, it may still remain impossible to obtain all information about corporate assets.⁶² There are also quasi-trust structures such as the ‘Hidden Treuhand’, which operate in parts of Europe that prevent information about the identities of beneficial owners of assets and income derived from those assets, from being released.⁶³ Nevertheless, maximising the efficiency and effectiveness of information exchange in jurisdictions and circumstances where it is possible, is still an important tool in detecting BEPS activities.

4.1 Existing Information Exchange Provisions

There are several different types of information exchange that can be provided for in bilateral or multilateral tax treaties. According to the Australian National Audit Office (ANAO), the types of information exchange provided for in DTAs are specific (upon request), spontaneous, industry wide, simultaneous, and AIE.⁶⁴ The most common form of exchange between states in recent decades is information exchange upon request, with a growing trend towards AIE.⁶⁵

⁶² For example, those that apply in Switzerland, Luxembourg, Austria and Belgium; Grinberg, above n 43, 7, 27.

⁶³ Shelley Stark *Hidden Treuhand, How Corporations and Individuals Hide Assets and Money* (Universal Publishers Florida 2009).

⁶⁴ Australian National Audit Office ‘The Management and Use of Double Taxation Agreement Information Collected through Automatic Exchange’ (Audit Report No 34 2009–10 18 May 2012) 31.

⁶⁵ Markus Meinzer ‘Towards Multilateral Automatic Information Exchange: Current Practice of AIE in Selected Countries’ (Report, Tax Justice Network, 29 January 2013) 9, 55.

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The ‘Exchange of Information’ Article in most of Australia’s DTAs does not require a particular type of information exchange be entered into, only that the parties shall exchange information ‘as is necessary’. For example in the US–Australia DTA, the exchange of information provision Article 25(1) provides:

The competent authorities shall exchange such information as is necessary for carrying out the provisions of this Convention or for the prevention of fraud or for the administration of statutory provisions concerning taxes to which this Convention applies provided the information is of a class that can be obtained under the laws and administrative practices of each Contracting state with respect to its own taxes.

Similar exchange of information provisions appear in most of the DTAs between Australia and other states.⁶⁶ However, information exchange provisions in TIEAs are much more cumbersome, allowing only for information exchange on request, and only when the requests meet specific criteria.⁶⁷ The TIEA between Australia and Bermuda, for example, requires that requests for information contain the name and address of persons believed to have such information, the tax purposes for which the information is being sought, and reasonable grounds

⁶⁶ See, for example, Article 26 of the *Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*, ATS 1991 No.49, Signed 25 July 1991, entered into force 30 December 1991; Article 28 of *Convention between Australia and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* [2008] ATS 21, signed 31 January 2008, entered into force 3 December 2008. Both articles are virtually identical to Article 26 of the OECD Model Tax Convention as examined in: OECD ‘Update to Article 26 of the OECD Model Tax Convention and Its Commentary’ (OECD Publishing, 17 July 2012).

⁶⁷ Australian National Audit Office, above n 64, 33.

for suspecting that such information is present in the jurisdiction of the requested party.⁶⁸

Information exchange upon request is the most commonly accepted global standard of information exchange within DTAs. Under this system, Australia sends a request for information to its DTA (or TIEA) partner seeking specific data about a specific taxpayer. The request must normally be backed up by the reasons why that data is needed, what investigation it relates to, and what the taxpayer is under suspicion for.⁶⁹

Grinberg points out that one of the reasons exchange of information upon request is inadequate (particularly in tackling BEPS) is that it requires a contracting state to be suspicious already. For that particular state to become suspicious, the taxpayer will have already left an obvious trail, and the state would at the very least have had access to enough information to know specifically what further information it needs to build its case about a particular taxpayer. The provisions in bilateral treaties Australia has entered do not allow for ‘fishing expeditions’. This alone means information exchange upon request cannot be used to detect much BEPS activity.⁷⁰

As opposed to requesting information an alternative is AIE. AIE is fairly self-explanatory in nature; it involves the periodic and automatic collection and exchange of specified income and tax data between states. The types or categories of data exchanged are entirely dependent on the particular agreement between the two states.⁷¹ As well as being of great potential in being able to alert tax authorities more readily to the possible

⁶⁸ *Australia – Bermuda Tax Information Exchange Agreement* signed Washington, 10 December 2005, entry into force 10 December 2007 – Article 5 (5).

⁶⁹ Grinberg, above n 43, 7.

⁷⁰ *Ibid.*

⁷¹ As there is no legal instrument enforcing the type or categories of data under AIE.

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existence of a cross-border scheme, AIE has other benefits such as deterrent effects and increasing voluntary compliance from taxpayers who are less confident about arrangements going undetected.⁷²

Australia has been engaging in AIE with DTA partners since the early 1980s and since 2000 Australia has engaged in AIE using electronic means.⁷³ Research by the Tax Justice Network shows that AIE is now common practice amongst many nations, both OECD and non-OECD states.⁷⁴ However, there are still states that do not support progressive change or expansion of an AIE system. Luxemburg, Austria, and Switzerland are the main opponents of AIE in Europe.⁷⁵

In order for tax information to be exchanged between states, there must be a legal foundation for the exchange. Globally, the most commonly used legal platform for AIE is through the exchange of information articles within the network of bilateral DTAs.⁷⁶ Despite not expressly providing for AIE, Australia undertakes all of its AIE arrangements under the power to do so contained in DTAs.⁷⁷ The exchange of information article in most of Australia's DTAs is modelled on Article 26 of the

⁷² Secretary General Gurría of the OECD, 'Tackling Offshore Tax Evasion The G20/OECD Continues To Make Progress' (Report, OECD Publishing June 2012) 2; Australian National Audit Office, above n 63, 11.

⁷³ Meinzer, above n 65, 20; Australian National Audit Office, above n 64, 14.

⁷⁴ Salman Shaheen 'ITR: TJN Study Unveils Progress On Automatic Information Exchange' (14 August 2012) <<http://taxjustice.blogspot.de/2012/08/itr-tjn-study-unveils-progress-on.html>>.

⁷⁵ Ibid.

⁷⁶ Meinzer, above n 65, 14.

⁷⁷ Australian National Audit Office, above n 64, 12.

OECD Model Tax Convention.⁷⁸ Despite many countries having signed the Convention, including Australia, there is little evidence that states engage in AIE under its express AIE article.⁷⁹ This is likely because the Convention does not require participation in AIE but merely condones it if arranged between states.⁸⁰ Such a provision does not endeavour to make remarkable difference to the status quo of AIE and there would be no need for states to revoke AIEs arranged under the DTA provisions and create identical ones under the provision of the Convention.⁸¹

4.2 A Need To Improve AIE

There are some clear deficiencies in the current system of AIE in the BEPS context in that it has historically focused more on individual taxpayers as opposed to the transactions and

⁷⁸ See, eg, Article 26 of the *Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*, ATS 1991 No.49, Signed 25 July 1991, entered into force 30 December 1991; Article 28 of *Convention between Australia and Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* [2008] ATS 21, Signed 31 January 2008, entered into force 3 December 2008. Both articles are virtually identical to Article 26 of the OECD Model Tax Convention as examined in: OECD ‘Update to Article 26 of the OECD Model Tax Convention and Its Commentary’ (OECD Publishing, 17 July 2012).

⁷⁹ Meinzer, above n 65, 14.

⁸⁰ *Convention on Mutual Administrative Assistance in Tax Matters*, signed by Australia 3 November 2011, entry into force 01/12/2012, Art 6 Automatic exchange of information.

⁸¹ Pinto, above n 28, 257; The Australian National Audit Office, (ANAO) reviewed Australia’s use of AIE, and stated in the summary that Australia engages in AIE through DTAs. This also supports the conclusion that there is no use, domestically at least, in creating AIE agreements through ‘the Convention’, see Australia National Audit Office, above n 63, 12.

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avoidance activities of corporations.⁸² However, AIE has great potential to be able to be moulded through new international agreements, into a legal framework for capturing the data necessary to flag and investigate the BEPS activities of corporations.

Australia already engages in AIE with a majority of its DTA partners.⁸³ The volume and financial value of incoming AIE has been increasing over time.⁸⁴ This corresponds with an improvement in the matching ratios of incoming data, that is, the ability to match a data record to the actual taxpayer to which it relates.⁸⁵ However, the current system of obtaining and sending out AIE data is still not structured effectively to enable it be used as a tool against BEPS.

The audit report by the ANAO, in summarising what AIE is used for by the ATO, explicitly states that it allows the ATO to gather data on the money *individuals* earn overseas. This reflects an implicit understanding that the major risk to Australia's tax base is a number of wealthy individuals engaging in tax evasion by not declaring foreign income.⁸⁶ In an opening summary the report states that AIE data is received where 'DTA partners send AEOI data to Australia where an Australian resident has earned income overseas and Australia may have a right to collect tax from that individual'.⁸⁷

Moreover, the report found that 97.5 percent of outgoing AIE data related to individuals, which again indicates that Australia's focus for AIE is on individuals, as opposed to

⁸² OECD, 'Automatic Exchange of Information' (OECD Publishing, Report, 2012) 7-9.

⁸³ Australian National Audit Office, above n 64, 40.

⁸⁴ Ibid 15.

⁸⁵ Ibid.

⁸⁶ Ibid 11.

⁸⁷ Ibid.

corporations.⁸⁸ Further, no acknowledgement was made to explain the lack of corporate records in outgoing AIE data, which could imply that there is no current view that this figure is deficient.

The ANAO also oversees the type of data collected through AIE. They distinguish between identifying fields and quantitative data. The former contains data necessary to match the record to the correct taxpayer while the latter relates to the transaction or financial data in question. Of the quantitative data, the ANAO reports that it can pertain to events including: change in taxable place of residence; ownership of and income from immovable property; dividends; interest; royalties; capital gains; salaries, wages and other similar remuneration in respect of employment; directors' fees; income derived by artists and sportspersons, pensions, salaries, wages including commissions and proceeds from gambling; remuneration for government services; and indirect taxes such as VAT/sales tax and excise duties.⁸⁹ Other than dividends, interest, royalties and, to a lesser extent, capital gains, there is not a significant focus on corporate transactional data or data that would aid in targeting BEPS.

Other sections of the report showed similar results. One section, which reviewed adjustments made to income tax returns as a result of information obtained through AIE data, showed that the average adjustment in tax payable following AIE was AUD 2,591.⁹⁰ This alone indicates that Australia's use of AIE is not having success in unravelling billion dollar multinational avoidance schemes. Confirming this line of thought are the results from the enquiry about AIE data use in compliance activities undertaken by the ATO. One of the compliance units of the ATO is the Large Business and International Division. In 2007 this division had not to that date utilised any AIE data in

⁸⁸ Ibid 55.

⁸⁹ Ibid 43.

⁹⁰ Ibid 87.

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compliance-based activities. The division was more likely to use JITSIC (Joint International Tax Shelter Information Centre)⁹¹ and also noted that cash flows between MNEs could be monitored through AUSTRAC.⁹² AUSTRAC as a complementary means of monitoring international transactions may be able to see cash flows, but this again aids only in detecting evasion, as most avoidance schemes appear on the surface as valid transactions. A broader and standardised system of AIE could enhance the effectiveness of investigative collaborations such as JITSIC by increasing the number of cases to investigate, and decreasing the timeframes needed to complete investigations by supplying much of the necessary information to JITSIC before an investigation even commences.⁹³

5. RECOMMENDATIONS –TOWARDS MULTILATERAL AIE

⁹¹ JITSIC is a collaborative investigative unit consisting of the tax administrations of nine States, being Australia, United Kingdom, United States, Japan, Canada, South Korea, China, France and Germany. The unit comes together at either of the two international offices; Washington or London. Goals of the unit include sharing intelligence regarding schemes and investigating these particular schemes; see, Commissioner of Taxation, *It's a Small World After All – Australia's Place in a Global Environment* Australian Government Australian Taxation Office (5 July, 2012)

< <http://www.ato.gov.au/Media-centre/Speeches/Commissioner/It-s-a-small-world-after-all---Australia-s-place-in-a-Global-Environment/>>.

⁹² Australian National Audit Office, above n 64, 88.

⁹³ An example of work uncovered by JITSIC includes a collaborative investigation between the ATO and the Canadian revenue authorities to uncover AUD 23 million in omitted revenue from a superannuation compliance issue; Commissioner of Taxation, above n 91. This paper argues that a better system of information exchange might make such investigations both efficient and more frequent.

The rationale behind the argument of enhancing the flow of AIE is incredibly clear. When the illustrations of how a number of the aggressive tax planning arrangements are structured unravels, their complexity shows, at the very least, that the structures would be cumbersome for Australia to detect on the information it gathers from domestic reporting obligations alone. Not only that, the information available to the ATO from domestic reporting obligations may not even be enough to invoke suspicion, as all the transactions in isolation appear on the surface to be commercially sound and it may be only one of those transactions an Australian entity is required to declare.⁹⁴

On 19 June 2012, at a meeting in Los Cabos, the G20 made declarations about ongoing methodology needed to strengthen tax transparency and in doing so recognised a need for continued development of comprehensive information exchange, particularly AIE.⁹⁵ An international group, the Tax Justice Network, also argue that moving towards a strong system of AIE should be the goal of developed economies.⁹⁶

The ATO are conscious of the present issues with AIE and the need to improve it. They acknowledge these issues in the report by the ANAO, such as the fact that at this point Australia has no control over the amount or quality of incoming AIE data.⁹⁷ Although Australia could still not control it, there may be more consistency and certainty in incoming data if a multilateral agreement was entered into. In 2006, the Automatic Exchange of Information Steering Committee, within the ATO, spent

⁹⁴ Australian Taxation Office, above n 16.

⁹⁵ Bruce Zagaris, 'G20 Commits to Strengthening Tax Transparency and Anti-Money Laundering Enforcement' (2012) 28 *International Enforcement Law Reporter* 267, 267.

⁹⁶ Tax Justice Network *On Exchange of Information for Tax Purposes* <http://www.taxjustice.net/cms/front_content.php?idcat=140>.

⁹⁷ Australian National Audit Office, above n 64, 44.

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considerable time in bi-monthly meetings discussing the need to work towards an incremental increase in the coverage of AIE.⁹⁸

In a recent report, the OECD has called AIE the ‘smoking gun needed to trigger new investigations’.⁹⁹ According to the Tax Justice Network, this is a change in tune from the OECD about AIE. The Tax Justice Network criticise the OECD for being slow and prohibitive in promoting its use and claim that historically the OECD has preferred to promote exchange of information upon request as the agreed international standard.¹⁰⁰

Commentators accuse the OECD of being slow to come to the table with AIE. The Tax Justice Network, for instance, claims that the OECD has historically hindered progress because of member countries such as Austria and Luxembourg.¹⁰¹ This may explain why AIE, as discussed in a 2011 OECD report entitled ‘Automatic Exchange of Information’, appears to limit the exchange of information to simple data such as employee salaries and wages.¹⁰² Such information may help combat evasion by individual taxpayers but is largely irrelevant in the context of the BEPS issue. Categories of income data that are thought best to unveil corporate avoidance schemes are highly mobile income, such as dividends, royalties and interest payments.¹⁰³ That being said, the OECD now acknowledges the need to invest in improving the capabilities and potential that AIE has as a system.¹⁰⁴ In a 2012 report recognising progress made by the G20/OECD initiative against offshore tax evasion,

⁹⁸ Ibid 63.

⁹⁹ Secretary General Gurría, above n 72, 18.

¹⁰⁰ Meinzer, above n 65, 10; This is also noted in Itai Grinberg, *Beyond FACTA: An Evolutionary Moment for the International Tax System* (January 27 2012) Social Science Research Network, 53 <<http://dx.doi.org/10.2139/ssrn.1996752>>

¹⁰¹ Meinzer, above n 65, 5

¹⁰² OECD, above n 82.

¹⁰³ Meinzer, above n 65, 5.

¹⁰⁴ Gurría, above n 72, 2

the OECD claimed they stood ready to develop a multilateral platform for AIE for those countries interested in signing the Convention.¹⁰⁵ Following on from this promise, the OECD released a further report in 2013, which strongly advocates for a singular multilateral system of AIE.¹⁰⁶ However, the report still contains the same restricted attitude towards AIE with the focus solely on accountholder interest and capital reporting by financial institutions. This was followed in February 2014 by the *Standard for Automatic Exchange of Financial Account Information*. Although this initiative is a step forward in AIE, it is still limited to the problem of evasion as opposed to avoidance based BEPS activities.¹⁰⁷

The US has introduced the Foreign Account Tax Compliance Act (FATCA) in a bid to protect the integrity of its tax base and limit the powers of foreign tax havens.¹⁰⁸ The system focuses on the reporting of financial institutions with US accounts directly to the US government. Under FATCA, foreign financial institutions will be required to provide financial information about accounts held by particular US residents or be subject to a punitive withholding tax of 30 percent.¹⁰⁹ This is

¹⁰⁵ Ibid.

¹⁰⁶ OECD 'A Step Change in Tax Transparency' (OECD Report for the G8 Summit Lough Erne, Enniskillen, June 2013) 6.

¹⁰⁷ This is evident from the document itself, which largely discusses the applicability of the new Standard to the issue of evasion, OECD 'Standard for Automatic Exchange of Financial Account Information' (OECD Publishing, February 2014) 5 <<http://www.oecd.org/ctp/exchange-of-tax-information/automatic-exchange-financial-account-information-common-reporting-standard.pdf>>. For a discussion on improvements to AIE in the evasion context see, Tom Lickess, 'A New World Order: Global Information Exchange and the Offshore Disclosure Initiative' (2014) 48 *Taxation in Australia* 638.

¹⁰⁸ Allison Christians, 'Putting the Reign Back in Sovereign' (2013) 40 *Pepperdine Law Review* 1373, 1373-1374.

¹⁰⁹ Grinberg, above n 43, 3.

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something that may target evasion more effectively than avoidance.¹¹⁰ However, it demonstrates the growing anxiety that foreign governments have about the information they are receiving about their tax residents and a perceived inadequacy of the AIE data coming from the arrangements under bilateral tax treaties.

5.1 Moving Towards a Multilateral Convention On AIE

Globally, experts in the area are pushing for an enhanced system of AIE.¹¹¹ However the idea that a multilateral convention regarding information exchange be introduced is not a new one. Pinto argues that a multilateral system makes sense.¹¹² This is because of deficiencies in bilateral treaties and the fact so many corporate transactions occur throughout several jurisdictions, not just two. A multilateral system of information sharing would also allow for the information to give a complete picture of corporate activities. Moreover, as the OECD has stated recently, a proliferation of different and inconsistent models would lead to excessive compliance costs and benefit no one.¹¹³

As mentioned, AIE is already carried out under Australia's existing network of bilateral DTAs. This raises the option of amending the information exchange provisions of these existing

¹¹⁰ Ibid 57.

¹¹¹ See generally, Markus Menzier 'Towards Multilateral Automatic Information Exchange' (Tax Justice Network 29 January 2013); Itai Grinberg, *Beyond FACTA: An Evolutionary Moment for the International Tax System* (January 27 2012) Social Science Research Network <<http://dx.doi.org/10.2139/ssrn.1996752>> ; see also comments made by New Zealand's Commissioner for Inland Revenue, Peter Dunne, 'Dunne Explains NZ's Approach to Taxing Multinationals' (Media Statement, 4 December 2012) <<http://taxpolicy.ird.govt.nz/news/2012-12-04-taxing-multinational-companies>>.

¹¹² Pinto, above n 28, 252.

¹¹³ OECD, above n 106, 1, 7.

DTAs and, to the extent it is diplomatically feasible, the TIEAs, to mandate AIE and the way it is carried out in a bid to capture more relevant BEPS data on a more regular basis. However, given this system is bilateral, it has some obvious deficiencies.

One clear deficiency of bilateral arrangements is that they are ineffective in dealing with avoidance strategies undertaken across borders by MNEs.¹¹⁴ Stemming from this is the inability for bilateral treaties to provide a complete global picture of the structure and transactions of MNEs if those structures or transactions extend to more than one other country.¹¹⁵ It would also seem illogical that a network of more than 1,400 bilateral tax treaties is necessary to govern international taxation, when many other areas of trade operate on a much more simplified basis.¹¹⁶ It is also obviously more difficult to amend the information exchange provisions within this enormous network of DTAs one by one, than to change a multilateral agreement.¹¹⁷

Multilateral systems of AIE are also starting to emerge in the global sphere. In 2005, Europe introduced the EU-Savings Tax Directive (EUSTD), which is targeted at capturing information about interest income, with a particular emphasis at identifying the beneficial owners of interest payments.¹¹⁸ This agreement operates through all member states whereby information about income payments to non-residents is automatically reported and transferred to the resident state of the

¹¹⁴ Pinto, above n 28, 252.

¹¹⁵ Ibid 253.

¹¹⁶ John Jones, 'Do We Really Need Tax Treaties?' (1999) 53 *Tax Law Review* 1, 1.

¹¹⁷ Pinto, above n 28, 254.

¹¹⁸ Marcus Meinzer, 'EU-Savings Tax Directive and Automatic Tax Information Exchange' (Tax Justice Network, Briefing, January 2011) 1 http://www.taxjustice.net/cms/upload/pdf/EUSTD-TJN-Briefing_-_JAN-2011.pdf.

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taxpayer.¹¹⁹ However the limitations of the system in the BEPS context are that it covers only interest payments, it is concerned only with payments to natural persons and that it is limited at present to EU member countries.¹²⁰ Meanwhile, the US has recently entered into agreements with France, Germany, United Kingdom, Italy and Spain, and have to date developed the Model 1 Intergovernmental Agreement to Improve International Tax Compliance and to Implement FATCA ‘Model 1 IGA’, which is an agreement to extend FATCA beyond the US into some parts of Europe.¹²¹

As discussed previously, despite being heralded as a ground breaking development in tax information exchange,¹²² the provisions of the Convention do not differ widely from existing information exchange Article 26.¹²³ In regards to AIE, the

¹¹⁹ European Commission ‘Presenting an Evaluation For The Second Review of The Effects of The Council Directive 2003/48/EC’ (European Commission, Commission Staff Working Document SWD (2012) 16, 2 March 2012).

¹²⁰ Meinzer, above n 118, 2.

¹²¹ The joint statement issued on behalf of the named states also notes that they see the initiative as supporting a move toward a more global system to effectively combat tax evasion: Joint Communique By France, Germany, Italy, Spain, The United Kingdom And The United States On The Occasion Of The Publication Of The “Model Intergovernmental Agreements To Improve Tax Compliance And Implement FATCA”. 25 July 2012
<<http://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Joint-Communique-Model-Agreement-to-Implement-FATCA-7-25-2012.pdf>>.

¹²² Deputy Prime Minister and Treasurer and Assistant Treasurer, *The Gillard Government welcomes automatic tax information sharing by G8 tax authorities*, (Joint Media Release No 111, 19 June 2013)
<<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2013/111.htm&pageID=003&min=djba&Year=&DocType=0>>.

¹²³ Compare information exchange Articles 4 & 5 in *Convention on Mutual Administrative Assistance in Tax Matters*, signed by Australia

Convention requires states to engage in only AIE, when and as they see fit. As mentioned above, this does nothing to change the status quo as many states including Australia already engage in AIE using the legal platforms of DTAs. Its other deficiencies in regards to being a multilateral platform for AIE is that it was not created with a view to developing a revolutionary system of AIE and therefore lacks the requisite design and detail to carry out that task. AIE could be used most effectively to combat BEPS, if a new multilateral treaty, specifically designed around AIE was implemented. This is something that has been suggested by various commentators in the field, with varying degrees of how the treaty should be characterised.¹²⁴

5.2 What Would a Multilateral Treaty Need?

The argument for the need to develop a multilateral treaty being made, the next question is what should such an instrument contain if it is to be an effective tool against the BEPS problem? It is beyond the scope of this article to outline exactly what provisions such a treaty should have and the methodology behind implementing those provisions. However, it is possible to recommend certain key features that such a treaty should contain in order to improve the current system in a way that helps to curb cross-border corporate tax avoidance. These features are the standardisation of AIE data exchange, reciprocity to facilitate as many signatories as possible, and coverage to allow for the right kind of AIE data to be exchanged.

Two important measures that a multilateral system of AIE should provide for are effective information exchange between financial institutions and governments and effective exchange of

3 November 2011, entry into force 01/12/2012, with Article 26 in the OECD Model Tax Convention; OECD, 'Update to Article 26 of the OECD Model Tax Convention and Its Commentary' (OECD Publishing, 17 July 2012).

¹²⁴ Grinberg, above n 43, 52-61; Pinto, above n 28, 252.

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that information between governments. Although it is merely a foundational step to ensure that governments receive effective and timely information from financial institutions,¹²⁵ the scope of this article is primarily concerned with the mechanisms of international law as a way of facilitating more effective systems of AIE between governments, as opposed to soliciting co-operation from financial institutions domestically.

5.2.1 *Standardisation*

Given the many issues surrounding the matching of AIE records with particular taxpayers or entities and the obvious importance of being able to apply AIE data as efficiently and effectively as possible, some effort must be made to standardise the format of data. The OECD recognises as much by placing considerable emphasis on multiple elements of standardisation in recent proposals promoting the expansion of AIE.¹²⁶ Already in existence is the standardisation by the OECD of the electronic format of data exchange. Originally ‘Standard Magnetic Format’, this has progressed over time to ‘Standard Transmission Format’ (STF). This standard of electronic exchange is based on extensible mark-up language (XML), which is preferred for its ability to separate the content of the message from the display structure and the readability for machines and humans.¹²⁷ Standardisation of electronic format is vital for the ability of all states to access the content of AIE data efficiently without having to first convert it to be readable by the relevant software. Research by the Tax Justice Network about the global use of AIE also shows that automatic matching ratios were higher in jurisdictions that used a strict common protocol

¹²⁵ Meinzer, above n 65, 56.

¹²⁶ OECD, above n 106, 8-9.

¹²⁷ OECD *OECD Standardised Format For Automatic Exchange Of Information For Tax Purposes* <http://www.oecd.org/tax/exchange-of-tax-information/40501987.pdf> ; Australian National Audit Office, above n 64, 33.

for the data format.¹²⁸ However, with the constant evolution of information technology and data formats it would be impractical to mandate the format within the treaty, as this would impede the ability to benefit from continual advances in data exchange. It would instead be better instead to mandate that states should use the one format, which can be subject to regular review.¹²⁹

However, standardisation of data in a new multilateral treaty must go beyond this. In the ANAO's report on the use of AIE, it is acknowledged that there are impediments to the use of AIE because of issues with quality and variations in the data received.¹³⁰ Specifically, the ANAO identified issues with different standards in the language of data received, the different financial year ends in different jurisdictions, and currency exchange rate variations over time.¹³¹ In AIE within the EUSTD, Spain and Portugal both reported that a lack of standardisation was an impediment to the effective utilisation of AIE data.¹³² Detailed standardisation of how this data should be formatted for the purposes of information exchange, right down to whether to use American date formats of MDY, or European and Australasian date formats of DMY, should be worked out in order to maximise the ability of all states to use incoming AIE data readily.¹³³

Another reason for the increase in automatic matching ratios globally, is the transmission of data such as date of birth.¹³⁴ Date of birth is not ideal in matching data against corporations, but some agreement should be made as to what characteristic is

¹²⁸ Meinzer, above n 65, 2.

¹²⁹ This is on par with the standard of electronic data formats currently. OECD standards are not in the treaties.

¹³⁰ Australian National Audit Office, above n 64, 44.

¹³¹ *Ibid* 39-40.

¹³² Meinzer, above n 65, 52.

¹³³ English Club, *Writing the Date* (2013) The English Club <<http://www.englishclub.com/vocabulary/time-date.htm>>.

¹³⁴ Meinzer, above n 65, 2.

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most effective in being able to match AIE data against a corporation, and then as mentioned above, the standardisation of the format of this data should also be agreed upon.

Idealistically what would benefit all states participating in multilateral AIE is a single electronic platform, such as a knowledge portal, from which authorised representatives of the revenue departments of the states could upload data onto, and download data from. Knowledge portals are linked with the ability to generate information intelligence by facilitating holistic organisation and thus analysis of data and have been used by private corporations such as IBM and government departments like the US intelligence agencies.¹³⁵ In reality, however, this kind of international agreement, particularly because of data security concerns that it would likely raise,¹³⁶ is a long way off being feasible and the details of how this technology could be implemented to better improve the standardisation of data exchange is beyond the scope of this article.

5.2.2 Reciprocity/ Incentive to Join

The success of such a multilateral proposal is dependent on the number of participating states. There is a need to consider in the design process of a multilateral treaty on AIE, the concerns and motivations of different sovereign states in a bid to create strong incentives to join the treaty.¹³⁷

Different international relations theories about how states come to agreement internationally can be useful in looking at how a multilateral treaty can be developed in a way that maximises co-operation but also still achieves its purpose. The Convention, for example, has gained international acceptance

¹³⁵ David King, Efraim Turban, and Judy Lang, *Introduction to Electronic Commerce* (2009 Pearson Education,) 315, 339.

¹³⁶ Australian National Audit Office, above n 64, 64.

¹³⁷ Michael Dirkis and Brett Bondfield, above n 33, 121.

with 58 signatories,¹³⁸ however it arguably does so because the Articles are vague enough not to require much action on behalf of the states. The neoliberal international relations theory maintains that states are ‘instrumentally rational actors’ pursuing mutual reciprocal benefits.¹³⁹ Neoliberal theory also suggests that states come to agreement in circumstances where there has been market failure. The development of DTAs is arguably an example of this, as incidents of double taxation could represent market failure.¹⁴⁰ BEPS could be another example of market failure that would drive this pursuit of mutually reciprocal benefits and create agreement. However, this does not solve the issue of how to encourage the co-operation of states that have been labelled as tax havens who are undoubtedly receiving enough benefit from the MNEs’ presence within their jurisdictions to outweigh the cost of the tax incentives offered to the MNEs.¹⁴¹

One argument is that a multilateral system should require all participating jurisdictions to impose some disincentives or coercive measures to ensure global compliance.¹⁴² The FATCA system introduced by the US is one that focuses primarily on the reporting of financial institutions as a key indicator. In his critique of FATCA, which imposes large withholding tax rates for institutions who are non-compliant with the initiative, Grinberg argues that although this specific method may be

¹³⁸ As at 15 October 2013; OECD ‘Exchange of Information - Convention on Mutual Administrative Assistance in Tax Matters’ 15 October 2013 <<http://www.oecd.org/tax/exchange-of-tax-information/conventiononmutualadministrativeassistanceintaxmatters.htm>>.

¹³⁹ Ring, above n 35, 10.

¹⁴⁰ Ibid 17.

¹⁴¹ Michiel van Dijk, Francis Weyzig, Richard Murphy, ‘What’s in it for the Netherlands’ in ‘The Netherlands: A Tax Haven?’ (Report, Somo, November 2006) 30.

¹⁴² Grinberg, above n 43, 60.

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inappropriate between co-operating jurisdictions, some form of coercive disincentive is essential to ensure compliance from all states in a multilateral system of AIE.¹⁴³ These methods may be the only avenue for encouraging compliance from tax haven jurisdictions.

Incentive to co-operate needs to extend beyond the mere signing of a multilateral treaty, as the states' full and active participation will be necessary to give effect to the intended outcomes of AIE. The design of incentives or coercive measures needs to account for the danger that states may 'agree in form and defect in practice' for their own advantage.¹⁴⁴ Consequences of non-conformity to treaty provisions may be written into the treaty or be external to it, but nevertheless should be debated and agreed upon.

Another train of thought is that as the multilateral treaty being suggested would be focused not on allocating taxing rights or changing the revenue entitlements of participating states, but purely facilitating administrative measures, there may be much less resistance than with other multilateral agreements.¹⁴⁵ Grinberg also suggests that, as regards some countries' resistance to a multilateral system, this will fall away over time as a new international system develops around these countries with the resulting pressure eventually making non-compliance unsustainable.¹⁴⁶

5.2.3 Coverage and Scope

Probably the most important feature that a new multilateral convention on AIE needs to address is the categories of data covered. Existing categories of AIE data have been too limited to be capable of aiding the detection of cleverly orchestrated

¹⁴³ Grinberg, above n 43, 58.

¹⁴⁴ Christians, above n 108, 1373.

¹⁴⁵ Pinto, above n 28, 257.

¹⁴⁶ Grinberg, above n 43, 62.

schemes and there is no current push to change this. As mentioned one of the main limitations of the EUSTD is that it covers only interest payments and payments to only natural persons. The recent OECD report, which encourages the increase of AIE through FATCA's expansion, still focuses on reporting by financial institutions of interest payments and capital, which restricts the ability to detect corporate avoidance schemes.¹⁴⁷ Data reported by financial institutions cannot assist if the nature of those transactions is unknown. A multilateral AIE treaty would need to extend the categories of data already exchanged, with a particular focus on providing for circumstances where corporate transactions between two states can be exchanged with a third state.¹⁴⁸ In line with the nature of the BEPS problem, the coverage should include data about individuals, corporations, and trusts, but with a greater focus on corporate data.

The purpose of having a multilateral treaty should be that there is a substantial improvement of AIE as compared to its operation under bilateral treaties. One of the main issues with AIE in bilateral treaties in trying to identify schemes is that the treaties operate between only two countries, and can in this way fail to reveal the true nature of transactions operating through multiple jurisdictions.

Australia needs to be able to capture data about a transaction occurring between two foreign entities in separate states if that transaction is in fact connected to an apparently separate transaction between an Australian resident taxpayer and one of those other jurisdictions. Identifying when transactions between foreign states might be connected to a third state and therefore

¹⁴⁷ OECD, above n 106.

¹⁴⁸ Categories of data already exchanged are, dividends, royalties, interest, income, salaries, pensions. Director's fees, income from immovable property, capital gains, income from government services and indirect taxes. Australian National Audit Office, above n 64, 43.

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warrant access to this third party data requires a relevance test to be developed to satisfy privacy and political concerns that might accompany these kinds of releases. When developing the convention recourse should be had to all of the research conducted by the OECD into the operation of various schemes in order to determine the types of data needed. Although it is beyond the scope of this article to formulate any of the articles of the proposed convention, it is worth discussing how some types of transactional information could be particularly useful in tackling the BEPS problem.

For example, loan and equity flows between corporations could be used to highlight many circulatory arrangements, although, certain specifications would need to be established to filter through the mass of information. Firstly, if such information were captured, the data would only be required if the corporation had engaged in a transaction with an Australian entity over a threshold amount (for example, AUD 10 million).¹⁴⁹ The data that would then be sent to Australia about those foreign companies would be all the loan and equity flows the foreign entities had engaged in over the set threshold amount. This would inevitably be an extremely high volume of data, however, appropriate data matching software could be able to run queries through the data and raise red flags in certain

¹⁴⁹ Such a threshold would need to be determined in an agreed upon currency in a schedule to the agreement, and subject to periodic increases and review. Note that the OECD advocates against the notion of a threshold for AIE for reasons that they add too much complexity in a multilateral convention. However that opposition was made under the premise that a system of AIE would be based on financial institutions reporting on interest and capital, see, OECD above n 106, 12. In the example given above, it is argued that the absence of a threshold would create burdensome compliance costs and reporting requirements.

scenarios, such as where a company a foreign entity has transacted with is appearing in multiple lists.¹⁵⁰

To demonstrate how this might occur, consider the Contrived Debt Deduction Arrangement given by the ATO.¹⁵¹ A capable system could firstly generate a list of international loans and investments that the Australian entity had entered into over the threshold amount. This information would be supplied by the Australian entity under domestic reporting requirements. This would reveal the loan the Australian entity had obtained from the lender and the investment of the same value in the non-resident company, as well as all other transactions over the threshold. Under the convention, Australia would have automatically been supplied loan and equity flows about the lender and the non-resident company as they had both engaged with the Australian entity over the threshold amount. To filter such a high load of data the system would scan through all loan and equity transactions made by the lender, over the threshold amount. This would detect that the lender had obtained the funds lent from the marketer. The system would then eventually scan through all loan and equity transactions made by the non-resident company and raise flags when the query shows they had also made an investment of the same value in the marketer. Ideally the system would flag this kind of event, where an entity (in this case the marketer) has come up in a second query, and only then would it require manual examination from ATO staff

¹⁵⁰ Data matching software and systems are widely acknowledged to be a necessary component of an effective system of AIE; OECD above n 106, 9.

¹⁵¹ See Australian Taxation Office ‘Contrived cross-border arrangements that seek to generate debt deductions for non-assessable non-exempt income’ (Taxpayer Alert, TA 2009/9, 23 April 2009) Example 1
<<http://law.ato.gov.au/atolaw/view.htm?DocID=TPA/TA20099/NAT/ATO/00001>>.

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who could go over the findings and discover a commonality in the transactions. Note that the commonality of transactions between four entities would not be conclusive, but simply raise enough suspicion to initiate a request for further information, (information exchange upon request) and the details of that information would likely be enough to trigger an audit.

Other information that should be included should extend to the effective tax rate paid by corporations in the various states, including deductions claimed, offsets granted, or losses claimed. The effective tax rate in particular may be able to instantly highlight some of the more extreme cases of BEPS activity. An aggregate of this kind of data, if put into the right system, should be able to highlight when double deductions have occurred, losses have been used in more than one jurisdiction, or if the ratio of global tax to global revenue paid by a corporation is such as to warrant investigation. Although some of this data can be obtained through other sources including it in the AIE process aids in verification.¹⁵²

Although there may be other elements needed for a multilateral system of AIE, these will arguably be the most effective for countering the BEPS issue. Australia's membership and periodic roles in international groups such as the G20 provide platforms for driving the movement toward this kind of multilateral information exchange.¹⁵³

5.3 Issues with Automatic Information Exchange

Whilst the BEPS problem highlights the need for tax authorities to have better access to information that could identify schemes, there are certain other concerns, such as those

¹⁵² International Dealings Schedule, above n 8. Verification is a necessary part of AIE; Australian National Audit Office, above n 64, 44.

¹⁵³ Australian Government the Treasury, 'Risk's to the Sustainability of Australia's Corporate Tax Base' (Scoping Paper, July 2013) 43.

relating to taxpayers' rights and privacy, as well as data security concerns, that also need to be taken into account.

Data security is an important issue for the integrity of an AIE system. There have been reported incidents where foreign governments have lost public records, and this could lead to a lack of faith from the community and reduced motivation for compliance.¹⁵⁴

A report commissioned by the ATO in 2008 noted some significant deficiencies in data security.¹⁵⁵ The report found that in terms of international exchange, there was no consistent application of a security mechanism to prevent unauthorised access or loss. In particular, international transfer of classified information did not always use appropriate encryption methods. Sometimes, information was simply attached in an email. The report further found that there were often cases of taxpayer information being reported to third parties with no or limited assurance that the third party will adequately protect the security of that data.¹⁵⁶ For a multilateral convention on AIE to be trusted it would need to be established that all foreign jurisdictions signing up to the convention are also applying appropriate data security measures. This would include both the transfer and storage of data. In terms of transferring information, the OECD have alluded to the use of new methods for secure data

¹⁵⁴ Note these instances did not involve taxpayer information.

Australian National Audit Office, above n 64, 64.

¹⁵⁵ Australian Tax Office 'Information Security Practices Review' (ATO, IT Security Review, April 2008) <<http://www.ato.gov.au/About-ATO/Access,-accountability-and-reporting/In-detail/Conformance-reports/Review-of-ATO-information-security/>>.

¹⁵⁶ Australian National Audit Office, above n 64, 65.

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exchange developed by the US in preparation for FATCA as a favourable new standard.¹⁵⁷

Certain basic safeguards would need to be put into place even to ensure a large enough number of signatories. There would be a need to ensure that all parties to the convention have in place laws to prevent the wrongful release or misuse of information. Failing to mandate this would discourage a large number of developed states from signing and ratifying such a convention and would leave the instrument with no integrity. There would also be a need to monitor adherence to these regulations.¹⁵⁸

The second issue that AIE brings up is the privacy rights of taxpayers.¹⁵⁹ There have already been concerns that current information exchange arrangements violate certain taxpayer rights, particularly when information about them is being sought from third parties without their knowledge.¹⁶⁰ Among other points, commentators supporting the protection of taxpayer rights argue that exchange of information provisions should at the very least ensure that requests from a contracting state are not a fishing expedition and that taxpayers are involved in the

¹⁵⁷ OECD, above n 106, 13. The OECD has also released a guide on the safeguarding of tax information, OECD *Keeping It Safe. Joint OECD/Global Forum Guide on the Protection of Confidentiality of the Information Exchanged for Tax Purposes* (2012)

<<http://www.oecd.org/tax/transparency/finalpercent20Keepingpercent20itpercent20Safepercent20withpercent20cover.pdf>>.

¹⁵⁸ Grinberg, above n 43, 55.

¹⁵⁹ See generally, Tony Schenk-Geers *International Exchange of Information and the Rights of Taxpayers* (Kluwer Law International 2009).

¹⁶⁰ John McLaren, 'Exchange of Information Agreements with Tax Havens: How Will this Affect the Rights of Non-Resident Taxpayers and Investors?' (2010) 5 *Journal of The Australasian Tax Teachers Association* 117, 132.

process.¹⁶¹ This article has argued, however, that given the challenge posed by BEPS, information exchange should be the catalyst for identifying schemes, not a confirmation of them.

In opposition to arguments put forward by this article, pro-rights authors assert that the current information exchange provisions are already positioned in a way that ignores the rights of taxpayers to privacy and procedural fairness, and that more needs to be done in the reverse direction; that is in re-instating these rights within tax treaties where information about taxpayers is being put in the hands of foreign governments and their agents.¹⁶² However even those arguing for increased protection of taxpayer rights acknowledge that some rights, such as a right to be notified of the of an information request being made, raise a significant risk of the investigation being sabotaged.¹⁶³

What distinguishes some of these concerns in a BEPS context is that the concerns are generally based on the private rights of individuals, with even some reference to human rights. BEPS, however, is primarily concerned with corporations.¹⁶⁴ It is questionable whether corporations have the same rights to privacy as individuals. Most jurisdictions would consider that a corporation's right to privacy is not the same as that of a natural person.¹⁶⁵ What measures of protection, then, are appropriate to

¹⁶¹ Ibid 136; CC Branson QC, 'The International Exchange of Information on Tax Matters and The Rights of Taxpayers' (2004) 33 *Australian Tax Review* 71, 82.

¹⁶² Branson QC, above n 161, 87.

¹⁶³ Ibid 82.

¹⁶⁴ Ibid 87; Phillip Barker, 'Should Article 6 ECHR (Civil) Apply to Tax Proceedings?' (2001) 29 *Intertax* 205, 205.

¹⁶⁵ For example the *Freedom Of Information Act* in the US has only limited protections for corporations in its application; see, for example, Nicole Washington, 'Transparency v Intelligence: Corporate Information Privacy Rights Under the Freedom of Information Act and

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apply to the financial records of corporations? The importance of ensuring that corporate information, particularly information that might reveal trade or business secrets, is not leaked into the public sphere should not be disregarded. However, this protection is already in place in Australia's domestic legislation.¹⁶⁶ It does not seem necessary to put further rights and restrictions on access to foreign corporate data than those existing for domestic corporate data. It may be necessary though that if the data exchanged is wider in scope than ever before and on a more regular basis, to limit access to only certain competent authorities within the revenue department of each state. This would mean disregarding the latest changes that the OECD has made to Article 26 of the Model Convention (as adopted in the Australia-India DTA), which allows information exchanged between revenue authorities, to be released to other government departments of the recipient state in certain circumstances.¹⁶⁷ Whilst this provision could still operate in instances of information exchange occurring in the network of bilateral DTAs, it might be too risky to apply in a wide reaching system of AIE.

If data security risks and issues can be overcome, it is likely that most jurisdictions will see that the benefits of improved AIE far outweigh the need to protect the privacy of taxable corporate transactions.

Whether Inquiring Minds Still Have a Right to Know' (2012) 12 *Houston Business and Tax Law Journal* 194, 196.

¹⁶⁶ *Taxation Administration Act 1953* (Cth) sch 1, s 355-25.

¹⁶⁷ OECD, 'Update to Article 26 of the Model Convention and It's Commentary' (OECD Council 17 July 2012); this update has been implemented in the Australia – India DTA, *Protocol amending the Agreement between the Government of Australia and the Government of the Republic of India for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income*, Australia – India, signed New Delhi 16 December 2011, [2013] ATS 22, entry into force 02/04/2013.

6. CONCLUSION

Data from various sources indicates that BEPS is a problem, not just domestically but globally. A new system on information exchange is a vital step in addressing this problem. The existence of the BEPS issue indicates that current measures to address cross-border avoidance schemes are not working effectively. The operation of Part IVA of the ITAA 1936 means that Australia has the opportunity to reverse some of the effects of BEPS by cancelling the tax benefit attained in avoidance schemes if the ATO has the information available to confirm their existence.

The use of AIE could be greatly improved upon to address BEPS if a multilateral convention on AIE was entered into which sought to address issues of information access and flow. In the current network of AIE arrangements operating under DTAs, there has been limited use of AIE data in compliance activities. A multilateral treaty on AIE, if developed correctly, could standardise the type and format of data exchange and thereby increase matching ratios and expand the coverage of data to allow states to detect BEPS activities more readily.

It is apparent that many jurisdictions are eager to move towards better systems of AIE. Australia should capitalise on this interest by using the opportunities it has through the G20, OECD and APEC forums to introduce the concept of a multilateral convention on AIE that focuses on standardisation, wider coverage and global acceptance and to encourage discussion on the topic.