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PETROLEUM (AUSTRALIA-INDONESIA ZONE OF COOPERATION) BILL 1990

PETROLEUM (AUSTRALIA-INDONESIA ZONE OF COOPERATION) (CONSEQUENTIAL PROVISIONS) BILL 1990

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Primary Industries and Energy, the Hon. John Kerin, MP)

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OUTLINE

PETROLEUM (AUSTRALIA-INDONESIA ZONE OF COOPERATION) BILL 1990

PETROLEUM (AUSTRALIA-INDONESIA ZONE OF COOPERATION) (CONSEQUENTIAL PROVISIONS) BILL 1990

The Petroleum (Australia-Indonesia Zone of Cooperation) Bill 1990 (the Treaty Bill) gives effect to the Treaty Between Australia and the Republic of Indonesia on the a Zone of Cooperation between the Indonesian Province of East Timor and Northern Australia, which was signed by the Minister for Foreign Affairs and Trade Senator the Honourable Gareth Evans QC on behalf of Australia on 11 December 1989. The Treaty provides a framework for the exploration for and exploitation of petroleum resources in the Zone of Cooperation by Australia and the Republic of Indonesia.

2. Article 3 of the Treaty provides that control of the joint Australian/Indonesian development of Area A will be exercised by a Ministerial Council and a Joint Authority. The Ministerial Council will normally consist of those Ministers who are responsible for administering the laws of their respective Contracting States relating to petroleum exploration and exploitation. The Ministerial Council will have overall responsibility for petroleum operations in Area A. It will take all the major decisions, such as approving production sharing contracts, and will control the activities of the Joint Authority.

3. The Joint Authority will be responsible for the day-to-day management of petroleum operations in Area A including the releas of exploration acreage, entering into production sharing contracts, approving seismic surveys and the drilling of wells, agreeing project developments, exercising control over the safety and environmental aspects of petroleum operations and distributing to each country their 50 per cent share of the proceeds of the Authority's share of petroleum production from production sharing contracts.

4. The Treaty Bill enables Australia to fulfil its obligation under the Treaty and in particular, gives effect to Article 3 of the Treaty by enabling the Ministerial Council and the Joint Authority to exercise certain rights and responsibilities of Australia in relation to the exploration for and exploitation of petroleum resources in Area A of the Zone of Cooperation. The Bill also clarifies the status of the Joint Authority.

5. The Bill gives effect to Articles 32 and 33 of the Petroleum Mining Code (Annex B) by making it an offence for persons not to obtain approval from the Joint Authority before engaging in prospecting for petroleum in Area A, and before engaging in petroleum operations including prospecting. Powers are given to inspectors appointed by the Joint Authority to ensure that contractors conduct petroleum operations in a manner consistent

with the Petroleum Mining Code and production sharing contract conditions.

6. In relation to civil claims, the Bill gives effect to Article 28 by providing for Northern Territory law to be applied to claims dealt with in that Article. In relation to matters not dealt with in Article 28, courts will continue to exercise jurisdiction and apply relevant law in accordance with the normal private international law rules.

Taxation Code

7. The Taxation Code for the Avoidance of Double Taxation in Respect of Activities Connected with Area A of the Zone of Cooperation (Taxation Code) which forms part of the principal Zone of Cooperation Treaty (Annex D) is designed to avoid double taxation of income arising out of exploration for and exploitation of petroleum in Area A and to prevent fiscal evasion of taxes covered by the Taxation Code. Double taxation is avoided in this Treaty by allocating taxing rights between the contracting countries in relation to certain categories of income and by setting out how relief from double taxation is to be provided where other income may be taxed by both countries. The associated procedural and definitional provisions have generally been modelled on equivalent provisions common to both Contracting States' comprehensive double taxation agreements.

8. Article 29 of the Treaty and the Taxation Code (Annex D) provides the underlying framework for the imposition of taxes in Area A. In essence, Area A is to be treated as part of both Contracting States and double taxation is to be avoided in accordance with the provisions of the Taxation Code. Further, paragraph (3) of Article 29 is intended, inter alia, to prevent the application of Australia's petroleum resource rent tax in respect of projects in Area A.

9. In addition, Article 10 of the Treaty provides for exemption from income tax in both Australia and Indonesia of the Joint Authority. The official remuneration of its officers is exempt from tax other than in their state of residence.

10. The principal features of the Taxation Code are as follows:

- Companies are to be taxed in each Contracting State on 50% of their Area A profits and correspondingly, only 50% of their Area A losses are to be allowed for the purposes of the loss carry forward/transfer provisions of the income tax law of each Contracting State (Article 4(1));

- Capital gains/losses that accrue to companies in respect of property situated in Area A are to be reduced by 50% (Article 8(2));

- Individuals resident in either Contracting State are to be taxed on Area A source income and capital gains generally only in the Contracting State of residence (Articles 4(2), 8(1), 9(1), 10(1) and 11(1));

- Individuals resident in third countries are to be taxed on Area A source income (and interest and royalties to which Articles 6 and 7 apply respectively) in both Contracting States but subject to a 50% rebate of the tax payable on such income and, in the case of capital gains/losses, such gains/losses are to be reduced by 50% (Articles 4(3), 6(4), 7(4), 8(2), 9(2), 10(2) and 11(2));

- Dividends paid wholly or partly out of profits derived from sources in Area A, flowing from a company resident in one Contracting State to a person resident in the other Contracting State are to be taxed only in that other Contracting State (Article 5);

- Interest flowing from an Area A Contractor to a resident of a Contracting State may be taxed in the other Contracting State but only up to 10% of the gross amount of the interest and such interest shall be deemed to have its source in that second mentioned Contracting State for foreign tax credit purposes in the first mentioned Contracting State (Article 6);

- Royalties flowing from an Area A Contractor to a resident of a Contracting State may be taxed in the other Contracting State but only up to 10% of the gross amount of the royalties and such royalties shall be deemed to have their source in that second mentioned Contracting State for foreign tax credit purposes in the first mentioned Contracting State (Article 7);

- The taxable value of fringe benefits paid to individuals resident in third countries in respect of Area A employment is to be reduced by 50% (Article 12); and

- Goods entering Area A from places outside of either Contracting state are to be taxable, in the case of Australia, only if and when such goods are permanently transferred to another part of Australia (Article 13).'

11. The Taxation Code also provides for the exchange of information and for consultation between the taxation authorities of the Contracting States.

12. It is intended that Part 3 of the Petroleum (Australia-Indonesia Zone of Cooperation) Bill 1990, Taxation Provisions, will, under the Administrative Arrangements Orders, be administered by the Treasurer.

13. The Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Bill 1990 (the Consequential Provisions Bill) gives effect to provisions contained in certain Articles of the Treaty relating to criminal jurisdiction, customs, employment regulation, migration, quarantine, Income Tax and Fringe Benefits Tax.

14. The Consequential Provisions Bill amends the:

- Crimes at Sea Act 1979;
- Customs Act 1901;
- Fringe Benefits Tax Assessment Act 1986;
- Income Tax Assessment Act 1936;
- Industrial Relations Act 1988;
- Migration Act 1958;
- Petroleum (Submerged Lands) Act 1967; and
- Quarantine Act 1908.

Amendments of the Crimes at Sea Act

15. The Crimes at Sea Act provides a regime for ascertaining the criminal law which is to be applied to an offence at sea committed in various circumstances. The amendments to the Crimes at Sea Act create a specific regime for the application of criminal law in Area A. This gives effect to Article 27 of the Treaty.

16. Subject to the continued application of the law of the "flag state" where relevant, in relation to acts or omissions connected with petroleum exploration and exploitation in Area A, citizens and permanent residents of Australia and Indonesia are subject respectively, to the criminal law of Australia and Indonesia. Nationals of a third state are subject to the criminal law of both Australia and Indonesia, with provision for consultation to determine which law is to be applied in any particular case.

Amendments of the Customs Act

17. Part 3 of this Bill effects three substantive amendments to the Customs Act 1901 as follows:

(i) a definitional amendment to provide that resources installations attached to the seabed in Area A of the Zone of Cooperation are, after the commencement of this Bill, to be regarded as not attached to the Australian seabed (clause 8)

(ii) a control over the direct movement of persons and or goods between resources installations in Area A of the Zone of Cooperation and external places other than Indonesia (clause 9); and

(iii) an exemption from customs import or export duty for goods taken out of or brought into Australia, for the purpose of being taken to Area A, and used for a purpose related to petroleum operations; goods brought into Australia from Area A, however, for the purpose of being entered for home consumption are to be subject to customs import duty in the normal way (clause 10).

Amendment of the Fringe Benefits Tax Assessment Act

18. This Bill amends the Fringe Benefits Tax Assessment Act 1986 to ensure that the general anti-avoidance provisions of the fringe benefits tax legislation are not diminished in any way by anything contained in the Treaty including the Taxation Code (Annex D of the Treaty).

Amendment of the Income Tax Assessment Act

19. This Bill amends the Income Tax Assessment Act 1936 to ensure that the general anti-avoidance provisions of the income tax legislation are not diminished in any way by anything contained in the Treaty including the Taxation Code (Annex D of the Treaty).

Amendment of the Industrial Relations Act

20. The amendment of the Industrial Relations Act enables employment contracts and collective agreements entered into by employers and employees in Area A of the Zone of Cooperation under Article 24(2) of the Treaty, to specify the Australian Industrial Relations Commission as the applicable mechanism for settlement of disputes which cannot be settled by negotiation.

Amendments of the Migration Act

21. The amendments of the Migration Act give effect to Article 23(1) of the Treaty which permits Australia to apply its migration laws to persons travelling to and from Area A. The Bill amends the Migration Act 1958 to provide that entry to Australia from a resources installation will be subject to the Migration Act. The Bill further amends the Migration Act to provide for regulations which may prescribe which persons arriving at or departing from a resources installation in Area A shall be taken to be leaving or entering Australia for the purposes of the Migration Act. Under the Migration Act as amended, the foregoing regulations may be expressed to apply to all or some of the resources installations in Area A. Otherwise, Area A shall be outside Australia for the purposes of the Migration Act.

Amendments of the Petroleum (Submerged Lands) Act

22. Article 2 of the Treaty provides the basis on which exploration for and exploitation of petroleum resources are to be conducted. Area A is the area of joint development where the control of petroleum operations will be exercised by a Ministerial Council and a Joint Authority on behalf of Australia and the Republic of Indonesia. Area B is the area of sole Australian jurisdiction, and Area C is the area of sole Indonesian jurisdiction.

23. Accordingly, consistent with Article 2, the amendments of the Petroleum (Submerged Lands) Act alter the definition of "adjacent area" in which the Act applies. Redefinition and renewal provisions are provided for those parts of permits extending outside Area A.

Amendments of the Quarantine Act

24. The amendments of the Quarantine Act 1908 give effect to the Quarantine provisions of Article 23 of the Treaty. The Quarantine Act is amended to exclude Area A of the Zone of Cooperation from the operation of the Act. Regulations may be made under the Act, however, to apply the Act, parts of the Act, either subject to

modifications or not, to or in relation to, all or specified resource installations attached to the seabed in Area A.

Financial Impact Statement

25. The principal financial impact resulting from the commencement of these two Acts will be the prospective revenues from Areas A, B and C of the Zone of Cooperation. These revenues cannot be estimated at this time because there is little detailed knowledge about the geology of Area A, and hence its economic potential. The Zone of Cooperation is, however, within the Timor Sea region which is a proven oil producing region. Prospective revenues include:

. Australia's share of revenue derived from production sharing contracts;

. taxation by Australia of 50% of business profits earned by companies from petroleum operations in Area A; and

. taxation by Australia of individuals income in accordance with the Taxation Code.

26. Article 11 of the Treaty provides that the Joint Authority will be self funding from contract fees collected under Part VI of the Petroleum Mining Code. Such fees however, will not be receivable until contract bids are received and contracts are subsequently awarded. The initial working capital requirement of the Joint Authority over its initial year is provisionally estimated at $US 2 million, of which Australia's contribution is $US 1 million. It is anticipated that this amount will be repaid within five years. This advance will be sought in the normal appropriation legislation.

27. Obligations under Article 4 of the Treaty provide that:

- 10% of contractor's Income Tax collected by the Republic of Indonesia from corporations producing petroleum from Area C of the Zone of Cooperation will be paid to Australia; and

- prospectively, Australia will pay to the Republic of Indonesia 10% of gross Resource Rent Tax revenues collected by Australia from corporations producing petroleum from Area B of the Zone of Cooperation.

28. Articles 23.5 (a) and (b) of the Treaty provide for remission of customs duty for goods used in petroleum operations in Area A. Until the petroleum potential of Area A is better understood and hence development plans are prepared, there is no basis on which to estimate the impact of this provision.

PETROLEUM (AUSTRALIA-INDONESIA ZONE OF COOPERATION) BILL 1990

PART 1 - PRELIMINARY

NOTES ON CLAUSES

Clause 1 - Short title

29. This clause provides for the Act to be cited as the Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990.

Clause 2 - Commencement

30. Commencement of the Act coincidental with entry into force of the Treaty is required because of the interdependent nature of the provisions of both the Petroleum (Australia-Indonesia Zone of Cooperation) Bill 1990, Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Bill 1990 and the Treaty. Commencement by proclamation is consistent with the provisions of Article 32 of the Treaty, whereby the Treaty will enter into force thirty days after the date on which the Contracting States have notified each other in writing that their respective requirements for entry into force have been complied with.

Clause 3 - Object of the Act

31. This clause recites the purpose of the Act.

Clause 4 - Ministerial Council and Joint Authority authorised to exercise rights of Australia

32. This clause confers on Ministerial Council and Joint Authority the rights and responsibilities of the contracting States in relation to the exploration for and exploitation of petroleum resources in Area A of the Zone of Cooperation in accordance with the Treaty.

Clause 5 - Interpretation

33. This clause defines "Area A of the Zone of Cooperation"
"Joint Authority"
"Ministerial Council"
"Treaty".

34. To avoid misinterpretation of terms, sub-clause 5(2) specifies that a word or an expression defined in the Treaty has, in this Act, the same meaning as it has in the Treaty unless stated otherwise in the Act.

PART 2 - GENERAL PROVISIONS

Clause 6 - International Organisations (Privileges and Immunities) Act to apply to Joint Authority

35. This clause clarifies the status of the Joint Authority as an international organisation, not a body created by Australian law.

Clause 7 - Prospecting for petroleum

36. This clause makes it an offence to prospect for petroleum without the approval of the Joint Authority.

Clause 8 - Petroleum Operations

37. This clause makes it an offence to undertake petroleum operations other than under a production sharing contract or with the approval of the Joint Authority.

Clause 9 - Powers of Inspectors

38. This clause provides the powers for inspectors appointed by the Joint Authority to take necessary actions through inspection, testing, and inspection and examination of documentation, to ensure that appropriate standards relating to petroleum operations are being maintained under production sharing contracts in Area A.

Clause 10 - Jurisdiction of State and Territory Courts

39. This clause is designed to give effect to Article 28 of the Treaty. It confers jurisdiction on appropriate State and Territory courts to hear civil claims brought by a national or permanent resident of Australia for damages or expenses arising out of an act or omission as a result of activities in Area A. The clause does not preclude courts exercising jurisdiction in relation to other claims arising from activities in Area A where such jurisdiction would otherwise exist.

Clause 11 - Northern Territory laws to be applied

40. This clause deals with the law to be applied by a court exercising jurisdiction pursuant to Clause 10. The provision is designed to give effect to the last sentence of Article 28 of the Treaty. It does not prescribe the law that a court might apply when it exercises jurisdiction over matters relating to activities in Area A other than those dealt with by Clause 10. In those situations the ordinary choice of law rules will apply.

PART 3 - TAX PROVISIONS

Clause 12 - Interpretation

41. This clause will facilitate the reference to "Australian tax" contained in clause 13 to mean only those taxes imposed by Australia under the respective legislation dealing with fringe benefits tax, income tax or sales tax.

Clause 13 - Australian tax - treaty including taxation code have the force of law

42. This clause will give the force of law in Australia to the Treaty including the Taxation Code, so far as those provisions affect Australian tax.

Clause 14 - Medicare levy to be treated as income tax

43. Clause 14 deems the Medicare levy to be income tax for the purposes of the Taxation Code. Under the income tax law, Australians who receive income from overseas that is included in their taxable income are entitled to a credit for the foreign tax paid on that income. This clause will ensure that these arrangements for relief of double taxation apply to both income tax and Medicare levy consistent with the practice accorded under subsection 3(10) of the Income Tax (International Agreements) Act in relation to Australia's comprehensive double taxation agreements.

Clause 15 - Incorporation of Australian tax laws

44. A number of the provisions of the Treaty including the Taxation Code will require to be interpreted having regard to provisions of the Income Tax Assessment Act, the Fringe Benefits Tax Assessment Act, and the Sales Tax Assessment Acts (Nos. 5, 6, 7, and 8).

45. Subclause 15(1) accordingly incorporates these Acts with Part 3 of the Bill and the various measures will be read as a single enactment.

46. Subclause 15(2) will apply where provisions of the Bill are inconsistent with the Fringe Benefits Tax Assessment Act, the Income Tax Assessment Act, the Sales Tax Assessment Acts (Nos. 5, 6, 7, and 8) or with an Act imposing "Australian tax" (see notes on clause 12).

47. The Taxation Code as well as Articles 10 and 29 of the Treaty contain provisions designed to vary the effect of the Acts mentioned in clause 13 and the rates of tax which would otherwise be imposed by the Acts mentioned in clause 12. It is accordingly necessary to ensure that the terms of the Treaty and machinery provisions for the practical application of the Taxation Code prevail over conflicting provisions of the various Assessment Acts and the various laws imposing rates of tax. The sub-clause will result in those statutes being applied subject to the provisions of the Bill.

Clause 16 - Calculation of rebates under taxation code.

48. Clause 16 is an interpretative provision which, for the purposes of Articles 4, 9, 10, and 11 of the Taxation Code, provides a formula for calculating the dollar amount of income tax upon which an individual who is not a resident of either Contracting State will be entitled to the 50% rebate for the purposes of Australian income tax.

49. Subclause 16(1) limits the application of the clause to those Articles of the Taxation Code that provide for a rebate against income tax of 50% of the gross tax payable.

50. Subclause 16(2) gives practical effect to this measure by specifying how the gross tax payable is to be calculated and accordingly determines the dollar amount to which the 50% rebate is to apply. The need for such a formula is due to the fact that a non-resident individual taxpayer may have other Australian source income to which a comprehensive double taxation agreement limits the amount of income tax payable (e.g. royalty income not effectively connected with a permanent establishment or fixed base of the beneficial owner resident in that other country), or other income such as rental income that are taxed at ordinary rates of tax, which in the case of an individual, contain various marginal rates.

PART 4 - REGULATIONS

Clause 17 - Regulations

51. This clause will grant power to make regulations under Part 3. Regulations would, of course, be valid only if they are not inconsistent with the provisions of that Part.

52. The clause is inserted because regulations may be desirable in order to facilitate the practical application of the Treaty so far as it relates to taxation matters.

THE SCHEDULE

53. This schedule sets out the Treaty Between Australia and the Republic of Indonesia on the Zone of Cooperation in an area between the Indonesian Province of East Timor and Northern Australia including its Annexes.

TREATY - TAXATION ARTICLE COMMENTARY

Article 1 of the Treaty - Resident

54. This article inter alia, sets out the basis on which the residential status of a person is to be determined for the purposes of Article 10 of the Treaty and the Taxation Code. Residential status is one of the criteria for determining each country's taxing rights over particular classes of income. Residence according to each country's taxation law provides the basic test. The article also includes rules for determining how residency is to be allocated to one or other of the countries for the purposes of Treaty where a person - whether an individual, a company or other entity - is regarded as a resident under the domestic laws of both countries.

Article 10 of the Treaty - Taxation of the Joint Authority and its Officers

55. This article will provide for exemption of the funds of th Joint Authority (created by Article 7 of the Treaty to administer activities relating to the exploration for and exploitation of petroleum resources in Area A) from income tax in both Australia and Indonesia, including any identical or substantially similar taxes imposed after the date of signature of the Treaty which ar in addition to, or in place of, the existing taxes.

56. In addition, the article provides for exemption from incom tax of the executive directors and other officers of the Joint Authority, other than in their state of residence, in relation to their official remuneration received from such employment, as well as entitling the employees to various exemptions in certain circumstances from customs duties and other such charges in respect of imports of furniture and other household effects into the Contracting State of which they are not resident.

Article 29 of the Treaty - Application of the Taxation Law

57. Article 29 specifies that the source of Area A income for the purposes of each Contracting State's taxation law is to be deemed to be that Contracting State. It is also designed to ensure that where either interest or royalties are taxable also by the country of residence of the recipient, double taxation relief will be given by that country in respect of tax levied by the other Contracting State in accordance with the taxing rights allocated to it under the Treaty. The provision resolves any conflict in domestic law source rules and obviates any question of income not having, by domestic law rules, a source in the country that is by the Treaty, entitled to tax that income in the hands of a resid nt of the other country.

58. The article also permits only those taxes covered by the provisions of the Taxation Code to apply to Area A income unless the other Contracting State consents to the imposition of additional taxes. Accordingly, Australia's petroleum resource rent tax imposed by the Petroleum Resource Rent Tax Act 1987 will hav no application to income derived from sources within Area A.

TREATY TAXATION CODE (ANNEX D) - ARTICLE COMMENTARY

Article 1 - General Definitions

59. This article provides definitions for a number of the terms used in the Taxation Code. Some other terms are defined in Article 1 of the Treaty or in the particular articles to which they relate. Terms referred to in the Taxation Code that are not defined in the Treaty are to have the meaning which they have under the taxation law from time to time in force of the country applying the Taxation Code.

Article 2 - Personal Scope

60. This article establishes the general scope of the Taxation Code and provides for it to apply to persons (which term includes companies) who are residents of either Australia or Indonesia as well as persons who are not resident of either country, but only for taxation purposes related directly or indirectly to the exploration for or the exploitation of petroleum in Area A or acts, matters, circumstances, and things touching, concerning, arising, out of or connected with any such exploration or exploitation.

61. The situation of persons who are dual residents (i.e., residents of both countries) is dealt with in Article 1 of the Treaty.

Article 3 - Taxes Covered

62. This article specifies the existing taxes to which the Taxation Code applies. These are, in the case of Australia, the income tax, the fringe benefits tax and the sales tax. For Indonesia, its income tax, including the tax on profits after income tax payable by a contractor and the value-added tax on goods and services and sales tax on luxury goods are specified. The article will automatically extend the application of the Taxation Code to any identical or substantially similar taxes which may subsequently be imposed by either country in addition to, or in place of, the existing taxes.

Article 4 - Business Profits

63. This article is concerned with the taxation of business profits derived by a person (individuals as well as companies and other entities) from sources in Area A.

64. In the case of business profits or business losses of a person other than an individual derived from, or incurred in, Area A in a year shall be reduced by 50%. Only those amounts of income or expense which can be directly related to the exploration for, or the exploitation of, petroleum in Area A, or so much of any other amount which can be appropriately related to such activities will qualify for the 50% reduction. For individuals who are residents of one of the Contracting States, business profits shall be taxable only in the country of residence of the recipient.

65. In the case of individuals who are not residents of either Contracting State, their business profits derived from sources within Area A may be taxable in both Contracting States, but will be eligible for a 50% rebate in each country in respect of the gross tax payable in that country on those profits.

66. Alternatively, business losses incurred by such persons will be able to be carried forward in both Australia and Indonesia concurrently, but are to be reduced by 50% in each case.

67. Article 4(4) provides a mechanism for the correct calculation of the 50% reduction to be afforded by Articles 4(1) and 4(4) in any case where carry forward of losses from prior years are

involved. The purpose of the provision is to exclude from the calculation of the amount of reduction of business profits or business losses the quantum of carry forward losses from previous years which may be allowable under the laws of each Contracting State. These losses are nevertheless taken into account when working out the person's overall tax liability.

68. Article 4(6) makes it clear that the terms "business profits" or "business losses" used in Article 4 do not include gains or losses of a capital nature which fall for consideration under Article 8.

Article 5 - Dividends

69. This article prevents a Contracting State from taxing dividends paid out of Area A profits by a company resident in that Contracting State and which are beneficially owned by a resident of the other Contracting State. The purpose of the article from an Australian perspective obviates problems that could otherwise arise out of the fact that the source of such dividends is Area A (which is deemed to be a part of each Contracting State for taxation purposes), and hence, a beneficial owner who is a resident of Australia would not be entitled to a foreign tax credit in respect of any foreign taxes paid in respect of those dividends. (Under Australian tax law, a foreign tax credit is available only for foreign taxes paid on foreign source income derived by a resident.)

70. For reasons of convenience, rather than attempting to distinguish between corporate and individual recipients as is appropriate elsewhere in the Taxation Code the article provides for all dividends paid to residents of a Contracting State by a company resident in the other Contracting State be exempted from tax in the last mentioned Contracting State.

71. Article 11 will cover, amongst other things, the taxation treatment of dividends paid in all other circumstances.

Article 6 - Interest

72. This article requires the country of source to limit its tax on interest income to which a resident of the other country is beneficially entitled to 10 percent of the gross amount of the interest. This limitation will not affect the rate of Australian withholding tax on interest derived by residents of Indonesia which will continue to be imposed at the general rate of 10 percent applicable under Australia's domestic law.

73. In order to facilitate the allowance of a foreign tax credit, Article 6(3) deems such interest to be foreign source income for the purposes of the tax laws of the country of residence. Without such a provision, the problem outlined above in the case of dividends would occur. Any interest paid to a person resident in a third country is to have the taxable amount of such interest reduced by 50%.

Article 7 - Royalties

74. This article limits to 10 percent of the gross amount of the royalties the tax that the country of source may impose on royalties paid to beneficial owners resident in the other country. The term "royalties" is not defined in the Taxation Code and therefore it will have the meaning ascribed to it under Australia's domestic income tax law which is consistent with the comparable definition in Australia's modern comprehensive tax treaties.

75. In order to facilitate the allowance of a foreign tax credit, Article 7(3) deems the royalties to be foreign source income for the purposes of the tax laws of the country of residence. Without such a provision, the problem outlined above in the case of dividends would occur. Any royalties paid to a person resident in a third country is to have the taxable amount of such income reduced by 50%.

Article 8 - Alienation of Property

76. This article deals with the taxation treatment of capital gains and losses from the alienation of property situated in Area A. It is necessary from an Australian perspective because, under Australian tax law, capital is distinguished from income and as such capital gains and losses might not be appropriately covered, if at all, by any other provision of the Taxation Code.

77. Capital gains attributable to Area A, that are derived by an individual who is a resident of a Contracting State are taxable only in that Contracting State. In all other circumstances capital gains and losses attributable to Area A are, for the purposes of Australian tax law, reduced by 50%.

Article 9 - Independent Personal Services

78. Under this article remuneration received from the performance of professional services or other independent activities of a similar character within Area A by a resident of either Contracting State is to be taxed only in that country.

79. In the case of individuals who are not residents of either Contracting State, the article provides for taxation of such remuneration in both Australia and Indonesia simultaneously. To eliminate the double taxation that would otherwise occur, the article allows for a rebate entitlement of 50% of the gross tax payable in each Contracting State, effectively halving the liability to income tax in each country. By this mechanism both Australia and Indonesia are ensured an equitable share of the tax revenues generated by residents of third countries in such circumstances.

Article 10 - Dependent Personal Services

80. Under this article salary, wages and other similar remuneration paid to employees working in Area A are to be taxed only by that country.

81. In the case of employees who are not residents of either Contracting State, the article provides for taxation of such remuneration in both Australia and Indonesia simultaneously. To eliminate the double taxation that would otherwise occur, the article allows for a rebate entitlement of 50% of the gross tax payable in each Contracting State, effectively halving the liability to income tax in each country. By this mechanism both Australia and Indonesia are ensured an equitable share of the tax revenues generated by residents of third countries in such circumstances.

Article 11 - Other Income

82. This article provides rules for the allocation between the two countries of taxing rights in relation to items of income not expressly mentioned in the preceding articles of the Taxation Code.

83. Broadly, such income derived by a resident of either Australia or Indonesia is to be taxed only in the person's country of residence. However, in the case of a person who is not a resident of either country such income may be taxed in both countries simultaneously, but subject to each giving the person a 50% rebate against the tax otherwise payable.

Article 12 - Fringe Benefits

84. In accordance with the other provisions of the Taxation Code concerning the liability of third country residents to income tax, the taxable value of fringe benefits provided by an Australian employer to those employees is to be reduced by 50%. Consequently, the employer's obligation to fringe benefits tax in respect of benefits provided to those employees will be reduced by 50%.

Article 13 - Goods Imported into Area A

85. The effect of this article in the case of Australia is to delay the liability for sales tax to a point in time when the goods that have been imported into Area A from a place other than either Contracting State are permanently transferred to Australia. No liability will arise if such goods are never to enter Australia from Area A.

Article 14 - Mutual Agreement Procedure

86. One of the purposes of this article is to provide for consultation between the taxation authorities of the two countries with a view to reaching a satisfactory solution where a taxpayer is able to demonstrate actual or potential subjection to taxation contrary to the provisions of the Taxation Code. A taxpayer wishing to use this procedure must present a case within three years of the first notification of the action giving rise to the taxation not in accordance with the Taxation Code and if, on consideration, a solution is reached, it may be implemented irrespective of any time limits imposed by domestic tax laws of the relevant country.

87. The article also authorises consultation between the taxation authorities of the two countries for the purpose of resolving any difficulties regarding the interpretation or application of the Taxation Code and to give effect to it.

88. The provisions of the article are, in essence, common to the comprehensive double taxation agreements of both countries and provide an important additional remedy for persons who may be subject to tax on income and other things in two or more countries. A remedy of this kind is particularly appropriate in circumstances, such as in this case, where an area is treated for tax purposes as being part of two countries.

Article 15 - Exchange of Information

89. This article authorises the two taxation authorities to exchange information necessary for the carrying out of the Treaty or for the administration of domestic laws concerning the taxes to which the Treaty applies. The purposes for which this information may be used and the persons to whom it may be disclosed are restricted along the lines of Australia's other comprehensive double taxation agreements.

90. The exchange of information that would disclose any trade, business, industrial, commercial or professional secret or trade process or which would be contrary to public policy is not permitted by the article.

PETROLEUM (AUSTRALIA-INDONESIA ZONE OF COOPERATION) (CONSEQUENTIAL PROVISIONS) BILL 1990

PART 1 - PRELIMINARY

NOTES ON INDIVIDUAL CLAUSES

Clause 1 - Short title

91. This clause provides for the Act to be cited as the Petroleu (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Act 1990.

Clause 2 - Commencement

92. Commencement of the Act coincidental with the commencement o the Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990 and the entry into force of the Treaty Between Australia and the Republic of Indonesia on the Zone of Cooperation in an area between the Indonesian Province of East Timor and Northern Australia is required because of the interdependent nature of the provisions of both the Petroleum (Australia-Indonesia Zone of Cooperation) Bill 1990, Petroleum (Australia-Indonesia Zone of Cooperation) (Consequential Provisions) Bill 1990 and the Treaty.

PART 2 - AMENDMENTS OF THE CRIMES AT SEA ACT 1979

Clause 3 - Principal Act

93. This clause identifies the Crimes at Sea Act 1979 as the Principal Act referred to in Part 2.

Clause 4 - Interpretation

94. This clause adds the definition of "Area A of the Zone of Cooperation" to the Principal Act to ensure identical interpretation of the term in both the Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990 and the Crimes at Sea Act 1979.

Clause 5 - Criminal laws applicable in Area A of the Australian-Indonesian Zone of Cooperation

95. This clause inserts a new section 9A after section 9 of the Principal Act. This implements Article 27(1) and (2) of the Treaty.

96. Sub-clause (1) applies the criminal laws of the Northern Territory to acts or omissions relating to exploration for and exploitation of petroleum in Area A where the alleged conduct was engaged in by a person other than a national or resident of Indonesia.

97. Sub-clause (2) excludes from the operation of the clause, acts done on or from a ship or aircraft - flag state jurisdiction will continue to apply to ships in accordance with sections 6 and 7 of the Principal Act. Jurisdiction relating to aircraft will continue to be governed by section 7 of the Crimes (Aircraft) Act 1963. Acts done by nationals and permanent residents of Indonesia are also excluded from the operation of the section. Indonesians are dealt with under Indonesian criminal law.

98. Sub-clause (3) protects persons from double jeopardy. The sub-clause provides that when a final prosecution decision is taken in relation to a person under the law of Indonesia, including acquittal, discharge, penalty or decision not to prosecute, they are protected from prosecution for the same offence under the laws of the Northern Territory.

99. Sub-clause (4) requires the consent of the Attorney-General for the continuation of proceedings against offenders after an arrest has been made, for an offence against the laws of the Northern Territory.

100. Sub-clause (5) applies the existing provisions in sub-sections 7(8), (9) and (10) of the Principal Act which provide for what may happen before the Attorney-General has given his consent, including arrest, charge and remand. Once consent has been given it applies to committal, hearing and determination.

101. Sub-clause (6) gives the same meaning to "petroleum" as in the Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990 to be enacted simultaneously with this Act.

Clause 6 - Transit of persons accused of offences against Indonesian laws

102. This clause provides a mechanism for transporting through Australia, persons who are subject to the jurisdiction of Indonesia, arrested for offences allegedly committed in Area A and in the custody of Indonesian authorities.

103. Such persons are deemed in transit to Indonesia and provision is made for their custody, transport, warrants to hold them in custody, extension of their custody and release. The total time for which this transit may continue must not exceed is 96 hours.

104. No express provision is made for persons not brought to Australia in custody and who are liable to be dealt with under Indonesian law or the law of some other country. Such persons, if found to be in Australia, are liable to deportation in accordance with the Migration Act 1958.

105. The same mechanism is applied by section 48 of the Extradition Act 1988.

106. Sub-clause (2) provides for a police officer, as defined in sub-clause (5) to arrest a person believed on reasonable grounds to have escaped from custody which is authorised by sub-clause (1), and sub-clause (3) provides for their return to that custody.

107. Sub-clause (4) applies the mechanism provisions of this clause to the whole of the journey of the aircraft or ship on which the person is being transported, including the beginning of the journey.

108. Sub-clause (5) is definitional.

Agreements relating to enforcement of criminal laws in Area A

109. This clause allows the regulations to make provisions to giv effect to arrangements or agreements between Australia and Indonesia to assist in the enforcement of criminal law in Area A.

110. The regulations will be able to provide, amongst other things, for procedural matters such as the production of documents, summoning witnesses and taking of evidence by Indonesian authorities for use in Australian criminal proceedings They will also authorise holding of persons subject to Australian criminal jurisdiction in the custody of Indonesian officials pending the handing over of a person to the relevant authorities of Australia and similarly concerning detention by Australia of persons subject to Indonesian jurisdiction. The provisions so made will operate to the exclusion of the Extradition Act 1988 in the relevant circumstances.

111. The regulations must not allow a person to be so detained longer than is required to effect a surrender of that person to the proper Australian or Indonesian authority.

PART 3 - AMENDMENTS OF THE CUSTOMS ACT 1901

Clause 7 - Principal Act

112. This clause identifies the Customs Act 1901 as the Principal Act referred to in Part 3.

Clause 8 - Interpretation

113. Clause 8 amends section 4 of the Principal Act and introduc certain transitional arrangements by:

Sub-clause (1):

- omitting the words "adjacent to Australia" for the definition of "Australian sea-bed" and substituting "adjacent to Australia (other than the sea-bed within Area A of the Zone of Cooperation)". This amendment i designed to make it clear that Area A of the Zone of Cooperation is not to be regarded as part of the Australian sea-bed for the purposes of the application

of the Principal Act, such that any resources installations attached to the sea-bed in Area A will now be regarded as attached to a place overseas (paragraph (a))

- Clause 9 (new subsection 9A) discusses what is meant by a resources installation being attached to the seabed in Area A;

. inserting a new definition for "Area A of the Zone of Cooperation", to bear the same meaning as in the Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990.

Clause 9 - Direct journeys between certain resources installations and external places prohibited

114. Clause 9 introduces a new section 58B into the Principal Act whch is modelled on the present section 58A, and expressly controls the direct movement of persons and or goods between resources installations in Area A and external places without first entering Australia or Indonesia. In particular,

. Subsection (1) qualifies the term "external place" used in the new section 58B;

- an "external place" does not include a place in Indonesia;

proposed subsection (2) imposes a control over persons travelling direct from an external place to a resources installation in Area A (whether or not in the course of a longer journey) as follows:

. the person, the owner of the installation, and the owner and person in charge of the ship or aircraft on which the person arrived at the installation, are each guilty of an offence punishable on conviction by a fine not exceeding $10,000 (proposed subsection (8)), where:

- the person has not first entered Australia or Indonesia.

. proposed subsection (3) imposes a similar control to that imposed in proposed subsection (2) for goods brought from an external place to a resources installation in Area A.

. proposed subsections (4) and (5) repeat the same controls over persons and goods in proposed subsections (2) and (3) respectively, for journeys from a resources installation in Area A to an external place (which does not include Indonesia).

- proposed subsection (6) prescribes three exceptions to the "prohibition" on direct journeys to or from resources installations in Area A as follows:

  - the direct journey to or from the resources installation was necessary to secure the safety of or avert a threat to, human life (paragraph (a));

  - the direct journey to or from the resources installation was necessary to secure the safety of or avert a threat to, a ship at sea, an aircraft i flight or a resources installation (paragraph (b)); or

  - the direct journey to or from the resources installation was authorised in writing by the Comptroller, and was carried out in accordance wit any conditions which may have been prescribed (paragraph (c)).

- proposed subsection (8) serves to qualify the application of this control by clarifying that a persor or goods are not deemed to have travelled to or from a resources installation by reason only of having been i an aircraft flying over the place or installation, or a landing strip in the place or installation. This provision is intended to exempt, amongst other things, in-transit passengers or goods from the control of the section, where such passengers or goods do not disembark, or are not unloaded, in an external place, a resources installation.

Clause 10 - Special provision for goods taken to, or brought fro Area A of the Zone of Cooperation

115. Clause 10 introduces a new section 131AA into the Principal Act to provide an exemption from duties of Customs for goods taken out of Australia (new subsection (1)), or brought into Australia (new subsection (2)), for the purpose of being taken t Area A and used for a purpose related to petroleum operations.

- "Petroleum operations" has the same meaning as in the Petroleum (Australia-Indonesia Zone of Cooperation) Ac 1990; viz, activities undertaken to produce petroleum and includes exploration, development, field processin production and pipeline operations, and marketing authorised or contemplated under a production sharing contract (new subsection (3));

- This provision effectively implements Article 23.5 (b) of the Treaty which provides that no customs duties would be collected on goods brought into or taken out Australia, for the purpose of being taken to Area A an there used for the purpose of petroleum operations. Goods brought into Australia from Area A for the purpo of being entered for home consumption, however, are subject to customs import duty in the normal way.

PART 4 - AMENDMENT OF THE FRINGE BENEFITS TAX ASSESSMENT ACT

Clause 11 - Principal Act

116. This clause identifies the Fringe Benefits Assessment Act 1986 as the Principal Act referred to in Part 4.

Clause 12 - Arrangements to avoid or reduce fringe benefits tax

117. The amendment proposed by clause 12 of this Bill to subsection 67(12) of the Fringe Benefits Tax Assessment Act preserves Australia's right to apply its general anti-avoidance measures contained in that Act by retaining their position of paramount force in the taxation law. Against this background the effect of clause 12 will be that the anti-avoidance operation of section 67 of the Fringe Benefits Tax Assessment Act is not to be diminished by anything contained in the Treaty or the Taxation Code.

PART 5 - AMENDMENT OF THE INCOME TAX ASSESSMENT ACT

Clause 13 - Principal Act

118. This clause identifies the Income Tax Assessment Act 1936 as the Principal Act referred to in Part 5.

Clause 14 - Operation of Part

119. The amendment proposed by clause 14 of this Bill to subsection 177B(1) of the Income Tax Assessment Act preserves Australia's right to apply its general anti-avoidance measures contained in that Act by retaining their position of paramount force in the income taxation law. Against this background the effect of clause 14 will be that the anti-avoidance operation of Part IVA of the Income Tax Assessment Act is not to be limited by anything contained in the Treaty including the Taxation Code.

PART 6 - AMENDMENTS OF THE INDUSTRIAL RELATIONS ACT 1988

Clause 15 - Principal Act

120. This clause identifies the Industrial Relations Act 1988 as the Principal Act referred to in Part 6.

Clause 16 - Special provision for the Australia-Indonesia Zone of Cooperation

121. Article 24 of the Treaty provides that terms and conditions of employment in Area A of the Zone of Cooperation will be governed by employment contracts or collective agreements which specify the applicable mechanism for settlement of disputes between employers and employees which cannot be settled by

negotiation. This clause extends the operation of the Industria Relations Act to such disputes, in cases where the contract specifies the Commission, so as to give the Australian Industrid Relations Commission power to deal with them as industrial disputes under that Act.

PART 7 - AMENDMENTS OF THE MIGRATION ACT 1958

Clause 17 - Principal Act

122. This clause identifies the Migration Act 1958 as the Principal Act referred to in Part 7.

Clause 18 - Interpretation

123. This clause excludes Area A of the Zone of Cooperation fror the definition of 'Australian seabed' and also inserts a definition of Area A into subsection 4(1) of the Principal Act. This amendment is made so that a resources installation will cc within the potential coverage of the Migration Act by virtue of attachment to the seabed of Area A rather than by virtue of attachment to the Australian seabed.

124. This clause also inserts new subsection 4(10A) into the Principal Act which exempts both persons who leave Australia an board a resources installation which becomes attached to the seabed of Area A and persons who leave Australia and board an installation already so attached from the coverage of the prese subsection 4(9) of the Principal Act. The latter subsection wo otherwise have the effect that such persons who returned to Australia would be deemed not to enter or re-enter Australia. immigration controls cannot be imposed upon persons deemed not enter or re-enter Australia, it is necessary that subsection 4(of the principal Act not apply with regard to persons leaving f and returning to Australia from resources installations in Area Thus, appropriate immigration controls upon the movement of the person can be put in place.

Clause 19 - Special provisions regarding resources installation in Area A of the Zone of Cooperation

125. This clause inserts into the Principal Act an additional regulation-making power, Section 7A. Regulations may provide t the Principal Act applies to categories or classes of installations or persons in Area A. Otherwise, Area A will be outside Australia for the purposes of the Principal Act.

PART 8 - AMENDMENTS OF THE PETROLEUM (SUBMERGED LANDS) ACT 1967

Clause 20 - Principal Act

126. This clause identifies the Petroleum (Submerged Lands) Act 1967 as the Principal Act referred to in Part 8.

Clause 21 - Interpretation

127. This clause defines "Area A of the Zone of Cooperation"

Clause 22 - Adjacent Areas

128. This clause amends Section 5A of the Principal Act consistent with Article 3 of the Treaty thereby excising Area A from the "adjacent area" and thus removing it from the scope of operation of the Act. The effect of the excision of Area A from the adjacent area is that exploration permits previously issued by Australia, to the extent that these permits had been situated within Area A are no longer covered by the Act.

129. Sub-clauses 22(a) to (e) redefine the adjacent areas as provided in Section 5A of the Principal Act, in respect of Western Australia, the Northern Territory and the Territory of the Ashmore and Cartier Islands to exclude Area A of the Zone of Cooperation.

130. Sub-clause 22(f) provides that the excision of Area A of the Zone of Cooperation shall not be applied in relation to other Acts whose application is determined by reference to the definition of adjacent area in the Petroleum (Submerged Lands) Act where these Acts are prescribed by regulation.

Clause 23 - Renewal of permit in respect of blocks constituted by graticular sections wholly or partly in Area A of the Zone of Cooperation

131. This clause inserts a new section 30A after section 30 of the Principal Act. This provides for the renewal of those parts of exploration permits which have been redefined as a result of the excision of Area A from the adjacent area by the amendment of section 5A of the Principal Act.

132. Sub-clause (1) applies clause 30A to any permit, all or part of which had been contained in Area A prior to the excision of Area A from the adjacent area as a result of amendments provided in clause 22.

133. Sub-clause (2) refers to the amendments of section 5A provided in clause 22 and the operation of subsection 17(2) of the Principal Act which includes the provision that 'if part of a graticular section is, or parts of a graticular section are, within an adjacent area, the area of that part , or of those parts, constitutes a block'. Accordingly, as a result of the excision of Area A from the Adjacent Area as provided in clause 22, a block may cease to exist; or the boundaries of a block may change to exclude any part of Area A from a block as redefined by the excision of Area A; or a block may remain unaffected.

134. Sub-clause (3) deems that any application made under section 30 of the Principal Act for the renewal of a permit, will be taken to apply to the redefined permit area arising out of the operation of clause 22, as described in sub-clause 30A(2).

135. Sub-clause (4) provides that where an instrument of suspension under section 103A of the Principal Act had been in operation, it is:

(a) revoked; and

(b) the permittee is deemed to have made an application fo the renewal under section 30 of the Principal Act over the permit area existing following the excision of Area A from the Adjacent Area as a result of the operation of clause 22.

136. Sub-clause (5) states that the provisions of section 31 of the Principal Act under which permit areas are renewed over a reduced area will not apply where either an application for renewal has been made as referred to in sub-clause (3), or is deemed to have been made under sub-clause (4).

Clause 24 - Compensation

137. Clause 24 contains compensation provisions in the event tha the amendments made in this Part of the Bill result in 'an acquisition of property' other than on 'an acquisition of property' other than on 'just terms' The words 'an acquisition property' and 'just terms' have the same meaning as in paragraph 51(xxxi)of the Constitution. Provision is made in sub-clause (3 for proceedings to be instituted in the Federal Court to determi compensation of a reasonable amount.

PART 9 - AMENDMENTS OF THE QUARANTINE ACT 1908

Clause 25 - Principal Act

138. This clause identifies the Quarantine Act 1908 as the Principal Act referred to in Part 9.

Clause 26 - Interpretation

139. This clause amends the definition of "Australian seabed" i section 5 of the Quarantine Act 1908 by excluding from it Area of the Zone of Cooperation within the meaning of the Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990. The effect that exclusion is that the Quarantine Act will not apply in Area A.

Clause 27 - Amendment of Principal Act

140. This clause inserts a provision into the Quarantine Act to allow the making of regulations which apply to Area A:

. specified provisions of the Act; and

. provisions of the Act to the extent or subject to suc modifications as are specified.

141. The application may be in relation to all resource installations in Area A or to a specified resource installation in Area A.

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