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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

INTERNATIONAL TAX AGREEMENTS AMENDMENT BILL (NO. 1) 2014

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Treasurer, Hon J. B. Hockey MP)

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Glossary

The following abbreviations and acronyms are used throughout this explanatory memorandum.

Abbreviation	***Definition***
Agreements Act 1953	*International Tax Agreements Act 1953*
CGT	*capital gains tax*
ITAA 1936	*Income Tax Assessment Act 1936*
ITAA 1997	*Income Tax Assessment Act 1997*
OECD	*Organisation for Economic Cooperation and Development*
OECD Model	*OECD Model Tax Convention on Income and on Capital*
SISA 1993	*Superannuation Industry (Supervision) Act 1993*
Swiss Convention	*Convention between Australia and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, with Protocol*
FBTAA 1986	*Fringe Benefits Tax Assessment Act 1986*

General outline and financial impact

Swiss Confederation convention

Schedule 1 of this Bill amends the *International Tax Agreements Act 1953* (Agreements Act 1953) to give the force of law in Australia to the *Convention between Australia and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, with Protocol* (the Swiss Convention), which was signed in Sydney on 30 July 2013.

Date of effect: the Swiss Convention must first enter into force. For entry into force, Australia and Switzerland are required to provide notification to each other on the completion of the necessary domestic procedures. Once the Convention enters into force, it will take effect in Australia in four stages, namely:

- in respect of fringe benefits tax, on fringe benefits provided on or after 1 April next following entry into force;
- in respect of withholding tax on income derived by a resident of Switzerland, on income derived on or after 1 January next following entry into force;
- in respect of other Australian tax, on income, profits or gains of any income derived in the income year beginning 1 July next following entry into force; and
- in respect of exchange of information, to information that relates to taxation or business years in course on, or beginning on or after, 1 January next following entry into force.

Proposal announced: Negotiations to update the existing tax treaty between Australia and Switzerland were announced by the former Government, in the then Assistant Treasurer's Media Release No. 026 of 9 February 2011. Signature of the Swiss Convention was announced in the then Assistant Treasurer's Media Release No. 144 of 30 July 2013.

Financial impact: Minimal.

Human rights implications: This Bill does not raise any human rights issues.

Compliance cost impact: The text of the Swiss Convention is broadly consistent with international norms and no significant additional compliance costs are expected to result from its entry into force. For taxpayers with cross-border dealings between Australia and Switzerland, a reduction in compliance costs is expected.

Chapter 1
The Australia-Switzerland Convention

Outline of chapter

1.1 Schedule 1 of this Bill amends the *International Tax Agreements Act 1953* to define and give the force of law to the *Convention between Australia and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, with Protocol* (the Swiss Convention). This chapter explains the rules that apply under the Swiss Convention.

Context of amendments

1.2 The Swiss Convention was signed in Sydney on 30 July 2013 and once in force, will replace the *Agreement between Australia and Switzerland for the Avoidance of Double Taxation with respect to Taxes on Income* and its *Protocol*, which entered into force on 13 February 1981.

1.3 The Swiss Convention modernises the tax treaty arrangements between Australia and Switzerland. It broadly follows the *Organisation for Economic Cooperation and Development Model Tax Convention on Income and on Capital* (OECD Model) and, in doing so, broadly reflects current Australian and international tax policy settings.

Summary of new law

1.4 The main features of the Swiss Convention are as follows:

- Certain taxes imposed by each country are explicitly covered. Australian taxes covered are income tax, fringe benefits tax and resource rent taxes (for example, petroleum resource rent tax). Swiss taxes covered are federal, cantonal and communal taxes on income. ***[Article 2]***

- Dual resident individuals (for example, individuals who are residents of both Australia and Switzerland according to the domestic taxation laws of each country) are, in accordance with the specified criteria, to be treated for the purposes of the Swiss Convention as being resident of only one country. Where a non-individual such as a company is a resident of both countries for their domestic law purposes, then the Convention deems the entity to be a resident of the country in which its place of effective management is situated. ***[Article 4]***

- Revised time periods will apply for the purpose of deeming certain business activities to constitute a 'permanent establishment'. The rules will also broaden the range of circumstances in which Australia can tax business profits derived by Swiss residents from construction and mining activities, and the operation of substantial equipment in Australia. ***[Article 5]***

- Income from immovable property (including income from agriculture or forestry) may be taxed by the country in which the property is situated. Income from immovable property includes leases or other interests in land, property accessory to immovable property and rights to explore for mineral, oil or gas deposits or other natural resources, and to mine those deposits or resources. ***[Article 6]***

- Business profits are generally taxed only in the country of residence of the recipient unless they are derived by a resident of one country through a permanent establishment located in the other country, in which case the other country may also tax the profits. These rules will also apply to business profits derived through a trust. ***[Article 7]***

- Profits derived by an enterprise of one country from the operation of ships and aircraft in international traffic are only taxable in that country. This does not include profits derived from shipping and air transport activities undertaken between two ports within the other country. ***[Article 8]***

- Profits of associated enterprises are to be adjusted by the Australian and Swiss revenue authorities for tax purposes, where transactions have been entered into on terms other than at arm's length. ***[Article 9]***

- Dividends, interest and royalties may generally be taxed in both countries, but there are limits on the tax that the country in which they are sourced may charge on such income

flowing to residents of the other country who are the beneficial owners of the income. ***[Articles 10 to 12]***

- With respect to dividends:

  – no source country tax is payable on inter-corporate dividends where the beneficial owner of those dividends is a company that holds, directly or indirectly, at least 80 per cent of the voting power (in the case of Australia) or the capital of the company (in the case of Switzerland), subject to certain conditions. ***[Article 10, paragraph 3]***

  – no source country tax is payable on dividends where the beneficial owner of those dividends holds directly no more than 10 per cent of the voting power in the company paying the dividend (in the case of Australia) or the capital of the company (in the case of Switzerland), and the beneficial owner is a Contracting State, a political subdivision or a local authority thereof. This would also apply where a beneficial owner is a central bank, a complying Australian superannuation fund or a tax exempt Swiss pension scheme. ***[Article 10, paragraph 4]***

  – a 5 per cent limitation applies to inter-corporate dividends where the beneficial owner of those dividends is a company that holds directly at least 10 per cent of the voting power of the company paying the dividends (in the case of Australia) or the capital of the company (in the case of Switzerland). ***[Article 10, subparagraph 2a)]***

  – a 15 per cent limitation applies to all other dividends. ***[Article 10, subparagraph 2b)]***

- With respect to interest, source country taxation on interest is limited to 10 per cent ***[Article 11, paragraph 2]***. However, exemptions from source country taxation have been provided for interest paid to:

  – certain government bodies and banks performing central banking functions; ***[Article 11, subparagraph 3a)]***

  – financial institutions that are unrelated to and dealing wholly independently with the payer, subject to certain conditions. ***[Article 11, subparagraph 3b)]***

  – complying Australian superannuation funds or tax exempt Swiss pension schemes. ***[Article 11, subparagraph 3c) and 3d)]***

- With respect to royalties, the definition of 'royalties' excludes payments or credits in respect of the use of, or the right to use industrial, commercial or scientific equipment ***[Article 12]***. The rate limit on source country taxation of royalties is 5 per cent. ***[Article 12, paragraph 2]***

- Income, profits or gains from the alienation of real property may be taxed by the country in which the property is situated. Subject to that rule and other specific rules in relation to business assets and shares or other interests in land-rich entities (the alienation of which may be taxed by the country in which the underlying property is situated), all other capital gains will be taxable only in the country of residence. ***[Article 13]***

- Profits derived from professional services or other activities of an independent nature are generally to be taxed only in the country of residence of the recipient unless they are derived by a resident of one country through a fixed base located in the other country. In such cases, the other country may also tax the income. ***[Article 14]***

- Income from dependent personal services (that is, salaries, wages and other similar remuneration) will generally be taxable in the country where the services are performed. However, where the services are performed during certain short visits to one country by a resident of the other country, the income will be exempt in the country visited. ***[Article 15]***

- Fringe benefits provided to employees that would otherwise be subject to tax in both countries will be taxable only in the country that has the primary taxing right in respect of salary or wages to which the benefit relates. ***[Article 15]***

- Directors' remuneration may be taxed in the country in which the company of which the person is a director is a resident for tax purposes. ***[Article 16]***

- Income derived by entertainers and sportspersons may generally be taxed by the country in which the activities are performed. However, where the income is derived from government funds, the income will be taxable only in the country in which the entertainer or sportsperson is a resident. ***[Article 17]***

- Pensions, social security payments and annuities will be taxable only in the country of residence of the recipient, unless the recipient is not liable to tax in that country in respect of that income. In such cases, the income may be taxed in the other country. Subject to certain conditions, pensions paid from government funds in respect of services rendered to that government will be taxable only in that country. ***[Articles 18 and 19]***

- Income from government service will generally be taxed only in the country that pays the remuneration. However, the remuneration will be taxed only in the other country where the services are rendered in that other country by a resident of that other country who is a national of that other country, or did not become a resident of that other country solely for the purpose of rendering the services. ***[Article 19]***

- Payments made from abroad to visiting students or business apprentices for the purposes of their maintenance, education or training, will be exempt from tax in the country visited. ***[Article 20]***

- Income, profits or gains derived by a resident of a country which may be taxed in the other country are deemed to have a source in that other country. ***[Article 21]***

- Relief from double taxation will be provided for income which, under the Convention, may be taxed in both countries. Such relief is required to be provided by the country of which the taxpayer is a resident as follows:

  – In Australia by allowing a credit for Swiss tax paid, against Australian tax payable, on income derived by an Australian resident from sources in Switzerland ***[Article 22, paragraph 1]***; and

  – In Switzerland by exempting income derived by a Swiss resident from sources in Australia, on which Australian tax is payable, from Swiss tax, subject to certain conditions. ***[Article 22, paragraph 2]***]

- The Swiss Convention will protect nationals and businesses from one country from tax discrimination in the other country whilst ensuring that laws intended to maintain tax system integrity continue to apply. ***[Article 23]***

- The Swiss Convention will provide an administrative process to assist in the resolution of taxpayer disputes arising from the application of the Convention. This includes the possibility of referring disputes that remain unresolved after two years to independent arbitration. ***[Article 24]***

- The Swiss Convention will authorise the exchange of information between the competent authorities of Australia and Switzerland, by obliging each country to provide information to the other country on request ***[Article 25]***. It will authorise the competent authorities to exchange information as is foreseeably relevant for carrying out the provisions of the Convention or for administering the laws of each country. This provision does not oblige either country to exchange information on an automatic or spontaneous basis. ***[Protocol subparagraph 14c)]***

- The Swiss Convention will enter into force on the date of receipt of the later diplomatic notification that the domestic processes to approve the Convention in the respective countries have been completed. ***[Article 27]***

  - For Australian fringe benefits tax purposes it will apply to benefits provided on or after 1 April next following the date of entry into force. ***[Article 27, subparagraph 2a)(i)]***

  - For Australian withholding tax, it will apply to income derived by residents of Switzerland on or after 1 January following the date on which the Convention enters into force. ***[Article 27, subparagraph 2a)(ii)]***

  - For other Australian taxes, it will apply in relation to any year of income beginning on or after 1 July next following the date on which the Convention enters into force. ***[Article 27, subparagraph 2a)(iii)]***

  - In respect of 'exchange of information' the Convention will apply to taxation years in course, or beginning after, 1 January of the year following entry into force. ***[Article 27, paragraph 2c)]***

- The Swiss Convention will continue in effect until terminated. Either country may terminate the agreement by giving notice of termination at least six months before the end of the calendar year. Termination is by notice through the diplomatic channel. ***[Article 28]***

- Treaty benefits under the Swiss Convention will not apply if one of the principal purposes of a person in creating or assigning property rights in respect of which income was paid, or in becoming a resident of Australia or Switzerland, was to take advantage of the Convention in order to obtain such benefits. ***[Protocol, paragraph 1]***

Comparison of key features of new law and current law

New law	***Current law***
This Schedule implements a revised treaty: the *Convention between Australia and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, with Protocol* (the Swiss Convention); which will replace the existing Australia-Switzerland tax treaty.	The existing treaty between Australia and Switzerland: the *Agreement between Australia and Switzerland for the Avoidance of Double Taxation with Respect to taxes on Income, and Protocol;* will terminate upon the entry into force of the Swiss Convention.
The Swiss Convention will cover the Australian income tax, fringe benefits tax and petroleum resource rent tax (and any other resource rent taxes imposed under the federal law of Australia).	The existing treaty only covers Australian income tax.
The definition of 'person' in Article 3 of the Swiss Convention will include a trust.	The definition of 'person' in Article 3 of the existing treaty does not include a trust.
Article 3 contains a definition of the term 'pension scheme'.	No equivalent.
The Article 3 contains a definition of the term 'recognised stock exchange' in Article 3.	No equivalent.
Article 4 sets out rules to help determine the residency status of dual resident individuals. These rules give consideration to an individual's nationality if the individual's residence cannot be determined from the location of their permanent home, their centre of vital interests or their place of habitual abode. If the individual is a dual national, the competent authorities shall attempt to determine the individual's residence by mutual agreement.	Article 4 of the existing treaty seeks to resolve cases of dual residence by giving consideration only to the location of the individual's permanent home or their centre of vital interests.
The Swiss Convention will not require Switzerland to provide treaty benefits in relation to Swiss-source income derived by Australian temporary residents if that income is exempt from tax in Australia.	No equivalent.

Article 5 defines the term 'permanent establishment' (PE) to no longer include assembly projects. The article also deems a PE to exist in relation to the following activities undertaken in a country by an enterprise that is a resident of the other country: • Supervisory or consultancy activities (carried on in connection with a building, site or construction or installation project) carried on for more than 12 months; • Activities (including the operation of substantial equipment) in the exploration or exploitation of natural resources for an aggregate period of at least 6 months in any 24 month period; or • The operation of substantial equipment for more than 12 months.	The definition of 'permanent establishment' in Article 5 of the existing treaty includes, among other things, an assembly project that lasts for more than 12 months. Article 5 of the existing treaty also deems a PE to exist in relation to the following activities: • Supervisory activities carried on for more than 12 months in connection with a building site or a construction, installation or assembly project. • The use of substantial equipment by for or under contract with the enterprise in relation to natural resource activities.
Article 6 applies to the taxation of income from immovable property (including income from agriculture or forestry activities). The definition of immovable property includes: a lease or other interest in or over land; property accessory to immovable property; livestock and equipment used in agriculture or forestry; certain rights in connection with natural resource activities; and rights to receive variable or fixed payments in respect of certain natural resource activities.	Article 6 of the existing treaty defines real property to include: rights to royalties and other payments in respect of the operation of mines or quarries or the exploitation of any natural resource.
Article 7 applies to the taxation of business profits and provides that such profits are taxable only in the country of residence of the enterprise that derives the profits unless that enterprise carries on business in the other country through a PE situated therein. Any profits attributable to that PE may also be taxed by the other country.	No change.

Article 7 will apply to business profits of an enterprise carried on by a trust.	No equivalent.
Article 8 applies to the taxation of profits from shipping and air transport activities. Profits derived from the operation of ships or aircraft in international traffic are taxable only in the country of residence of the shipping or airline operator. However, profits derived from shipping or airline operations conducted solely between two places in one country may also be taxed in that country. Profits derived from operations conducted solely between two places in one country include profits from the leasing of ships or aircraft for such purposes.	No change. No change. No equivalent.
Article 9 applies to profits derived from the transfer of goods or services between associated entities and authorises the revenue authorities of the two countries to adjust such profits to reflect the arm's-length price of those goods or services. Where such an adjustment is made to increase the profits of an enterprise of one country, and those profits have also been taxed in the hands of an associated enterprise that is a resident of the other country, the revenue authorities of the other country are required to make a correlative adjustment to the income of the associated enterprise.	No change. No equivalent.
Article 10 will limit source country taxation of cross-border dividends as follows: • Zero – for certain inter-corporate dividends; • Zero for complying Australian superannuation funds and tax exempt Swiss pension schemes; • 5 per cent – for certain inter-corporate dividends; and	The existing treaty prescribes a single source country tax rate limit of 15 per cent on outbound dividends.

• 15 per cent in all other cases.	
Article 11 will limit source country taxation of cross-border interest as follows: • Zero – for interest paid to government bodies and central banks; • Zero – for interest paid to unrelated financial institutions; • Zero – for interest paid to complying Australian superannuation funds and tax exempt Swiss pension schemes.	The existing treaty prescribes a single source country tax rate limit of 10 per cent on outbound interest.
Article 12 will limit source country taxation of cross-border royalties to 5 per cent. The definition of 'royalties' excludes payments for the right to use industrial, commercial or scientific equipment.	The existing treaty prescribes a source country tax rate limit on outbound royalties of 10 per cent. The definition of 'royalties' includes such payments.
Income, profits or gains from the alienation of immovable property may be taxed in the country where the property is situated. Income profits or gains from the alienation of interests in land-rich entities will be taxable in the country where the underlying land is situated. Residual capital gains will be taxable only in the country of residence of the alienator. Australia may continue to tax its former resident individuals on the capital gains if they alienate property within four years of ceasing to be a resident.	No substantive change (the existing treaty applies to income or gains made from the alienation of real property). No substantive change. No equivalent. No equivalent.
Taxing rights over fringe benefits provided to employees will be allocated exclusively to the country that has the sole or primary taxing right over the underlying employment income to which the benefit relates.	No equivalent.
Pensions and similar payments will be taxable only in the recipient's country of residence, provided the recipient is taxable on those payments in that country. If not, the other	The existing treaty allocates exclusive taxing rights over pensions to the country of residence of the recipient, without regard to whether such income is taxable in that country.

country may also tax the income. Lump sum payments in respect of retirement, invalidity, disability, death or injury may also be taxed in the source (paying) country.	No equivalent.
Government pensions paid in respect of past government service will be taxable only in the source country, subject to certain conditions.	Government pensions paid in respect of past government service are taxable in the country of residence of the recipient.
Income which may be taxed in the source country will be deemed to arise in that country.	No equivalent.
The Swiss Convention will include a comprehensive article to prevent tax discrimination under each country's tax laws.	No equivalent.
The mutual agreement procedure in the Swiss Convention will provide taxpayers with the option of referring unresolved tax disputes to independent arbitration.	No equivalent.
The Swiss Convention will provide a legal basis for the exchange of taxpayer information, including for the purpose of detecting and preventing tax evasion.	The existing treaty does not provide for taxpayer information exchange for tax compliance purposes.
The Swiss Convention will enable the revenue authorities of Australia and Switzerland to deny treaty benefits if a person's principal purpose is to take advantage of the treaty.	No equivalent.

Detailed explanation of new law

CHAPTER 1 – SCOPE OF THE CONVENTION

Article 1 – Persons covered

1.6 This Article establishes the scope of the application of the Swiss Convention by providing for it to apply to 'persons' (defined to include individuals, companies, trusts and any other body of persons) who are residents of one or both of the countries. It generally precludes extra-territorial application of the Swiss Convention. ***[Article 1]***

1.7 The Swiss Convention also applies to third country residents in relation to Article 23 (*Non-Discrimination*) in its application to nationals of one of the treaty countries, Article 24 (*Mutual Agreement Procedure*) so far as the person is a national of one of the treaty countries, and in relation to the exchange of information under Article 25 (*Exchange of Information*).

1.8 The application of the Swiss Convention to persons who are dual residents (that is, residents of both countries) is dealt with in Article 4 (*Resident*).

Article 2 – Taxes covered

1.9 This Article specifies the existing taxes of each country to which the Convention applies. These are, in the case of Australia, the Australian income tax, the fringe benefits tax and resource rent taxes imposed under Australian federal law.

1.10 The term 'income tax' includes Australian income tax imposed on capital gains. The term 'resource rent taxes' includes the petroleum resource rent tax. Although Australia considers the petroleum resource rent tax to be encompassed by the term 'income tax', a specific category has been included in the Swiss Convention to put beyond doubt that taxes of this sort are covered. ***[Article 2, subparagraph 3a)]***

1.11 As with the existing Switzerland Agreement, the Swiss Convention generally does not cover Australia's goods and services tax (GST), customs duties, state taxes and duties and estate tax and duties.

1.12 For Switzerland, the Swiss Convention applies to federal, cantonal and communal taxes on income, encompassing total income, earned income, income from capital, industrial and commercial profits, capital gains, and other items of income. ***[Article 2, subparagraph 3b)]***

Extended scope for non-discrimination and exchange of information

1.13 While the taxes specified in Article 2 are covered for all purposes of the Swiss Convention, a wider range of taxes is covered for the purposes of Article 23 (*Non-discrimination*) and Article 25 (*Exchange of Information*). Paragraph 5 of Article 23 provides that the article applies to taxes of every kind and description. Article 25 applies, for Australia, to all federal taxes administered by the Commissioner of Taxation. ***[Article 23, paragraph 5 and Article 25, paragraph 1]***

Identical or substantially similar taxes

1.14 The application of the Convention is also extended to any identical or substantially similar taxes which are subsequently imposed by either country in addition to, or in place of, the existing taxes. ***[Article 2, paragraph 4]***

1.15 The competent authorities (that is, the Commissioner of Taxation in the case of Australia and the Head of the Federal Department of Finance in the case of Switzerland, or their authorised representatives) are required to notify each other in the event of a significant change in the taxation law of the respective countries, within a reasonable period of time after those changes. ***[Article 2, paragraph 4]***

1.16 The Swiss Convention does not apply to taxes withheld at source from lottery prizes. ***[Article 2, paragraph 5]***

CHAPTER 2 – DEFINITIONS

Article 3 – General definitions

1.17 This Article provides general definitions and rules of interpretation applicable throughout the Swiss Convention. In particular, paragraph 1 defines a number of basic terms used in the Convention. These definitions apply for all purposes of the Convention unless the context requires otherwise.

1.18 Certain other terms are defined in other articles of the Swiss Convention. For example, the terms ‘resident of a Contracting State’, ‘permanent establishment’, and ‘immovable property’ are defined in Articles 4 (*Resident*), 5 (*Permanent Establishment*) and 6 (*Income from Immovable Property*) respectively. In contrast, a number of terms, such as ‘dividends’, interest’ and ‘royalties’ are defined in specific articles for use only in those articles.

Definition of Australia

1.19 As in Australia's other modern tax treaties, ***Australia*** is defined to include certain external territories and the continental shelf. The Swiss Convention also refers specifically to the 'exclusive economic zone'. Although the exclusive economic zone is considered to be covered by the definition used in Australia's other modern tax treaties, it is specifically included in the Swiss Convention for additional clarity. By reason of this definition, Australia preserves its taxing rights, for example, over mineral exploration and mining activities carried on by non-residents on the seabed and subsoil of the relevant continental shelf areas under section 6AA of the *Income Tax Assessment Act 1936* (ITAA 1936), certain sea installations and offshore areas are to be treated as part of Australia. ***[Article 3, subparagraph 1a)]***

Definition of Switzerland

1.20 The definition of ***Switzerland*** means the Swiss Confederation. ***[Article 3, subparagraph 1b)]***

Definition of person

1.21 The definition of ***person*** in the Swiss Convention includes an individual, a company, a trust and any other body of persons. This includes a partnership (as a body of persons). ***[Article 3, subparagraph 1c)]***

Definition of company

1.22 The definition of company in the Swiss Convention accords with the OECD Model, and means any body corporate or any entity which is treated as a body corporate for tax purposes.

1.23 The Australian tax law treats certain trusts (public unit trusts and public trading trusts) and corporate limited partnerships (limited liability partnerships) in the same way as companies for income tax purposes. These trusts and partnerships are included as companies for the purposes of the Convention. ***[Article 3, subparagraph 1d)]***

Definition of enterprise of a Contracting State and enterprise of the other Contracting State

1.24 The terms ***enterprise of a Contracting State*** and ***enterprise of the other Contracting State*** are defined as an enterprise carried on by residents of the respective countries. An enterprise of a Contracting State need not be carried on in that State. It may be carried on in the other Contracting State or a third state (that is, an Australian company doing all its business in Switzerland would still be an Australian enterprise). ***[Article 3, subparagraph 1e)]***

Definition of international traffic

1.25 In the Swiss Convention, this term is relevant to the taxation of profits from shipping and air transport operations (Article 8 (*Shipping and Air Transport*)), the taxation of income, profits or gains from the alienation of ships and aircraft (paragraph 3 of Article 13 (*Alienation of Property*)) and the taxation of employment income derived by the crew of a ship or aircraft (paragraph 3 of Article 15 (*Dependent personal services*)).

1.26 The definition of ***international traffic*** covers international transport by a ship or aircraft operated by an enterprise of one country, as well as domestic transport within that country; that is, where the journey of a ship or aircraft within that country forms part of a longer voyage of that ship or aircraft involving a place of arrival or departure outside that country. However, it does not include transport where the ship or aircraft is operated solely between places in the other country; that is, where the place of departure and the place of arrival of the ship or aircraft are both in that other country, irrespective of whether any part of the transport occurs in international waters or airspace. For example, a 'voyage to nowhere' which begins and ends in Sydney on a ship operated by a Swiss enterprise would not come within the definition of 'international traffic', even if the ship travels through international waters in the course of the cruise. ***[Article 3, subparagraph 1f)]***

Definition of competent authority

1.27 The ***competent authority*** is the person specifically authorised to perform certain actions under the Swiss Convention. For instance, they are required to notify each other of any significant changes to the relevant tax laws of their respective countries (paragraph 4 of Article 2 (*Taxes Covered*)), and to gather and exchange certain tax information (Article 25 (*Exchange of Information*)).

1.28 In the case of Australia, the competent authority is the Commissioner of Taxation or an authorised representative. In the case of Switzerland, the competent authority is the Head of the Federal Department of Finance or his or her authorised representative. ***[Article 3, subparagraph 1g)]***

Definition of national

1.29 The Swiss Convention defines ***national*** by reference to an individual's nationality or citizenship. A company, partnership, association or any other legal person will be a national if it is created or organised under the laws of Australia or Switzerland. For example, a

company's nationality is determined by where it is incorporated. ***[Article 3, subparagraph 1h)]***

1.30 The concept of nationality is used in paragraph 2 of Article 4 (*Resident*), paragraphs 1 and 2 of Article 19 (*Government service*), paragraph 1 of Article 23 (*Non-discrimination*) and paragraph 1 of Article 24 (*Mutual agreement procedure*).

Definition of pension scheme

1.31 The term ***pension scheme*** means, for Australia, an 'Australian superannuation fund'. ***[Article 3, subparagraph 1i)]***

1.32 To satisfy this definition, an Australian superannuation fund must meet the conditions set out in section 295-95(2) of the *Income Tax Assessment Act 1997* (ITAA 1997). Broadly speaking, an Australian superannuation fund is a complying superannuation fund for the purposes of the *Superannuation Industry (Supervision) Act 1993* (SISA 1993) and therefore eligible for concessional tax treatment under Australian tax law. The definition of superannuation fund has the meaning given by the SISA 1993, which is either an indefinitely continuing provident, benefit, superannuation or retirement fund, or a public sector superannuation scheme.

1.33 In addition, approved deposit funds and pooled superannuation trusts which are also defined in the SISA 1993, fall within the scope of a pension scheme because they are also superannuation entities and are subject to specific taxation provisions in the ITAA 1997 and ITAA 1936. ***[Protocol, subparagraph 2a)]***

1.34 In Switzerland, a pension scheme includes any plan, scheme, fund, foundation or trust that is established and regulated in Switzerland and is operated principally to administer or provide pension or retirement benefits or to earn income for the benefit of one or more such schemes. ***[Article 3, subparagraph 1i)(i) and 1i)(ii)]***

1.35 More specifically, the Swiss Convention is also intended to cover any Swiss pension scheme established by legislation after its signature and covered by:

- the Federal Act on old age and survivors' insurance, of 20 December 1946;
- the Federal Act on disabled persons' insurance of 19 June 1959;

- the Federal Act on supplementary pensions in respect of old age, survivors' and disabled persons' insurance of 6 October 2006; or

- the Federal Act on old age, survivors' and disabled persons' insurance payable in respect of employment or self-employment of 25 June 1982, including the non-registered pension schemes which offer occupational pension plans and the forms of individual recognised pension schemes comparable with the occupational pension plans. ***[Protocol, subparagraph 2b)]***

Definition of tax

1.36 For the purposes of the Swiss Convention, the term ***tax*** does not include any amount of penalty or interest imposed under the respective domestic tax law of the two countries. ***[Article 3, subparagraph 1j)]***

1.37 In the case of a resident of Australia, any penalty or interest component of a liability determined under the domestic taxation law of Switzerland with respect to income that Switzerland is entitled to tax under the Convention would not be a creditable Swiss tax for the purposes of paragraph 1 of Article 22 (*Elimination of Double Taxation*). This is in keeping with the meaning of 'foreign income tax' in subsection 770-15(1) of the ITAA 1997. Accordingly, such a penalty or interest liability would be excluded from calculations when determining the Australian resident taxpayer's foreign income tax offset entitlement under paragraph 1 of Article 22 (pursuant to Division 770 of the ITAA 1997 – Foreign Income Tax Offsets).

Definition of recognised stock exchange

1.38 The term is used in relation to the limits on source country taxation contained in Article 10 (*Dividends*). For example, Australia will not impose dividend withholding tax on a dividend paid by an Australian resident company to a Swiss resident company which holds 80 per cent or more of the voting power of the Australian company where the principal class of shares of the Swiss company is listed and regularly traded on a recognised stock exchange.

1.39 The term ***recognised stock exchange*** is defined as:

- the Australian Securities Exchange and any other Australian stock exchange recognised as such under Australian law;

- the SIX Swiss Exchange and any other Swiss stock exchange recognised as such under Swiss law;

- the London Stock Exchange, the Irish Stock Exchange and the stock exchanges of Amsterdam, Brussels, Dusseldorf, Frankfurt, Hamburg, Hong Kong, Johannesburg, Lisbon, Luxembourg, Madrid, Mexico, Milan, New York, Paris, Sao Paulo, Seoul, Singapore, Stockholm, Toronto and Vienna, and the NASDAQ System; and

- any other stock exchange agreed upon by the competent authorities. ***[Article 3, subparagraph 1k)]***

Terms not specifically defined

1.40 A term is not specifically defined in the Swiss Convention (unless used in a context that requires otherwise) will have the meaning as it has under the domestic taxation law of the country applying the Convention at the time of its application. In that case, the meaning of the term under the taxation law of that country will have precedence over the meaning it may have under other domestic laws.

1.41 The same term may have a differing meaning and a varied scope within different Acts relating to specific taxation measures. For example, GST definitions are sometimes broader than income tax definitions. The definition more specific to the type of tax should be applied in such cases. For example, where the matter subject to interpretation is an income tax matter, but definitions exist in either the ITAA 1936 or the ITAA 1997 and the *A New Tax System (Goods and Services Tax) Act 1999*, the income tax definition would be the relevant definition to be applied.

1.42 If a term is not defined in the Convention, but has an internationally understood meaning in tax treaties and a meaning under the domestic law, the context would normally require that the international meaning be applied. ***[Article 3, paragraph 2]***

Article 4 – Resident

Residential status

1.43 This Article sets out the basis upon which the residence of a person is to be determined for the purposes of the Swiss Convention. Residence in one or the other country is a necessary condition for the provision of relief under the Convention. For both Australia and Switzerland, 'resident' status is determined by reference to the person's liability to tax as a resident under the laws of the respective country. ***[Article 4, paragraph 1]***

1.44 The term 'liable to tax as a resident' is intended to capture those persons who are subject to comprehensive taxation under a country's

domestic taxation laws. A person may be regarded as liable to tax as a resident even where the country does not in fact impose tax on the income of that person.

1.45 For example, under Australian law charitable institutions are exempt from income tax if they meet certain requirements. Such institutions are liable to tax for the purposes of the Article, however, and are therefore 'residents' under the Convention. ***[Protocol, subparagraph 3a)(ii)].***

1.46 In addition, the term 'resident of a Contracting State' includes a pension scheme established in that State. ***[Protocol, subparagraph 3a)i)]***

1.47 The second sentence of paragraph 1 of the Article deals with a person who may be considered a resident of a country according to its domestic laws but is only liable to taxation on income from sources in that country, such as foreign diplomatic and consular staff. In the Australian context, this also means, for example, that Norfolk Island residents, who are generally subject to Australian tax on Australian source income only, are not residents of Australia for the purposes of the Swiss Convention. Accordingly, Switzerland will not have to forgo tax in accordance with the Convention on income derived by residents of Norfolk Island from sources in Switzerland (which will not be subject to Australian tax). ***[Article 4, paragraph 1]***

Temporary residents

1.48 The Protocol to the Swiss Convention clarifies the application of the Convention to a person who is a temporary resident of Australia (as defined in section 995-1 of the ITAA 1997). Switzerland is not obliged to provide any relief from Swiss tax under the Convention in respect of income that is not taxed in Australia because the person is a temporary resident. ***[Protocol, subparagraph 3b)]***

1.49 In the absence of the above provision, the interaction of the usual treaty rules and Australia's domestic law rules for temporary residents could result in the relevant income, profits or gains escaping taxation in both countries. During the course of negotiations, the two delegations noted that:

> '…For instance, without this provision, the treaty would provide that a Swiss-sourced pension paid in respect of past employment would be taxable only in Australia but Australia would exempt this income if it is derived by a temporary resident. In this example, the provision ensures that Switzerland can tax that pension at source if it so wishes.'

Residency of governments

1.50 Article 4 follows the OECD Model in specifically providing that the Government of that State, or a political subdivision, or local authority thereof, is a resident for the purposes of the Swiss Convention. This means that the Australian Government, the state governments and local councils of Australia will be residents for the purpose of the Convention. This does not necessarily mean that income, profits or gains derived by these bodies from sources in Switzerland will be subject to tax in Switzerland as sovereign immunity principles may apply. ***[Article 4, paragraph 1]***

Dual residents

1.51 A set of tie-breaker rules is included for determining how residence is to be allocated to one or other of the countries for the purposes of the Swiss Convention if an individual taxpayer qualifies as a dual resident; that is, as a resident of both countries in accordance with paragraph 1 of the Article.

1.52 The tie-breaker rules for individuals apply certain tests, in a descending hierarchy. These rules, in order of application, are:

- if the individual has a permanent home available to them in only one of the countries, the person will be deemed to be a resident solely of that country;
- if the individual has a permanent home available to them in both countries, then the person's residence status takes into account their personal or economic relations with Australia and Switzerland; and the person is deemed to be a resident only of the country with which the person has the closer personal and economic relations (centre of vital interests);
- if the individual does not have a permanent home in either country or their centre of vital interests cannot be determined, the individual shall be deemed to be a resident of the country in which they have an habitual abode;
- if the individual has an habitual abode in both countries or in neither of them, they shall be deemed to be a resident only of the country of which they are a national;
- if the individual is a national of both countries or is not a national of either of them, the competent authorities of Australia and Switzerland will endeavour to resolve the question by mutual agreement.

[Article 4, paragraph 2]

1.53 Notwithstanding that the Swiss Convention deems certain dual residents to be a resident only of one country for treaty purposes, that person remains a resident for the purposes of Australian domestic tax law. Accordingly, that person remains liable to tax in Australia as a resident, insofar as the Swiss Convention allows.

Other persons

1.54 Where a person who is not an individual (for example, a company) is a resident of both countries in accordance with paragraph 1, the person will be deemed to be a resident of the country in which its place of effective management is situated. ***[Article 4, paragraph 3]***

1.55 Consistent with paragraph 24 in the commentary on Article 4 of the OECD Model, the place of effective management is generally regarded as the place where key management and commercial decisions that are necessary for the conduct of the entity's business as a whole are in substance made.

Article 5 – Permanent establishment

1.56 The application of the various provisions of the Convention (Articles 7 *(Business Profits)*, 10 (*Dividends)*, 11 (*Interest)*, 12 (*Royalties)*, 13 *(Alienation of Property)*, 15 *(Dependent Personal Services)* and 23 (*Non-discrimination)*) is dependent upon whether a person who is a resident of one country carries on business through a permanent establishment in the other country, and if so, whether income derived by that person is attributable to, or assets of that person are effectively connected with, that permanent establishment.

Meaning of permanent establishment

1.57 A 'permanent establishment' is a fixed place of business through which the business of an enterprise is wholly or partly carried out in. The critical elements of this term are:

- There must be a place of business;
- The place of business must be fixed (both in physical location and in time); and
- The business or enterprise must be carried on through this fixed place

[Article 5, paragraph 1]

1.58 The article provides a non-exhaustive list of examples of permanent establishments:

- a place of management;
- a branch;
- an office;
- a factory;
- a workshop;
- a mine, an oil or gas well, a quarry or any other place of extraction of natural resources; and
- an agricultural, pastoral or forestry property.

[Article 5, paragraph 2]

1.59 As paragraph 2 of this article is subordinate to paragraph 1, the examples listed in paragraph 2 will only constitute a permanent establishment if the primary definition in paragraph 1 is satisfied.

1.60 The principles contained in paragraphs 1 through 8 of Article 5 will be applied in determining whether an enterprise can be regarded as a permanent establishment in one of the contracting states. ***[Article 5, paragraph 9]***

Building site or installation

1.61 A building site, construction or installation project will constitute a permanent establishment if it lasts for longer than 12 months. ***[Article 5, paragraph 3]***

1.62 The phrase 'building site or construction or installation project' includes not only places used for the construction of buildings but also for the construction of roads, bridges or canals, the renovation (involving more than mere maintenance or redecoration) of buildings, roads, bridges or canals, the laying of pipelines and excavating and dredging.

1.63 Planning and supervision are considered part of the building site if carried out by the construction contractor. However, planning and supervision carried out by an un-associated enterprise will not be considered in determining whether the construction contractor has a permanent establishment in Australia.

Agricultural, pastoral or forestry property

1.64 Most of Australia's tax treaties include as a permanent establishment an agricultural, pastoral or forestry property. This reflects Australia's usual practice of providing for taxation of profits from the exploitation of Australian land for the purposes of primary production under Article 7 (*Business Profits*).

1.65 Under the Swiss Convention, profits from agriculture or forestry property are dealt with under Article 6 (*Income from Immovable Property*). This is reflected in the phrase 'including income from agriculture or forestry' in paragraph 1 of that article.

1.66 A fixed place of business used for primary production purposes, such as a farm or forestry property, will constitute a permanent establishment. This has significance for the application of articles where the concept of permanent establishment is relevant, for example in determining the right of a country to tax income (Article 15 (*Dependent personal services*) or determining the country in which the income arises (for example, Article 10 (*Interest*)).

Deemed permanent establishment

Performance of services

1.67 Where an enterprise of one country performs supervisory or consultancy activities in the other country in connection with a building site or construction or installation project in the other country for more than 12 months, such activities will be deemed to be carried on through a permanent establishment of the enterprise located in that other country. ***[Article 5, paragraph 4a)]***

1.68 A permanent establishment will also be deemed to exist where an enterprise of one country carries on natural resource exploration or exploitation activities (including operating substantial equipment) in the other country for at least six months in any 24 month period. ***[Article 5, paragraph 4b)]***

1.69 In addition, a permanent establishment is deemed to exist where an enterprise of one country operates substantial equipment in the other country for more than 12 months. ***[Article 5, paragraph 4c)]***

1.70 The meaning of the term 'substantial' in reference to 'substantial equipment' is determined by reference to the relevant facts and circumstances of each case. Factors such as size, quantity or value of the equipment or the role of the equipment in income producing activities are relevant. Examples of such equipment include:

- Industrial earthmoving equipment used in road or dam building;
- Manufacturing or processing equipment used in a factory; or
- Oil or drilling rigs, or platforms and other structures used in the petroleum, gas or mining industry.

1.71 Subparagraphs 4b) and 4c) together reflect Australia's reservation to the OECD Model concerning activities relating to natural resources and the use of substantial equipment. Australia's experience is that the permanent establishment provision in the OECD Model may be inadequate to deal with high value mobile activities, in particular those involving the use of such equipment. The reference to 'operation' and 'operates' have been included to clarify that only the active use of substantial equipment will be captured by subparagraphs 4b) and 4c). This means that an enterprise that merely leases substantial equipment to another person for that other person's own use in a country would not be deemed to have a permanent establishment in that country under these provisions.

1.72 For example, if a Swiss enterprise itself operates a mobile crane at an Australian port for more than12 months, the enterprise would be deemed to have a permanent establishment in Australia under subparagraph 4c). However, if that Swiss enterprise merely leases the mobile crane to another person and that other person operates the crane at an Australian port for its own purposes, the Swiss enterprise would not be deemed to have a permanent establishment in Australia under subparagraph 4c). However, if that other person operates the crane for or on behalf of the Swiss enterprise in Australia, the Swiss enterprise would be considered to operate the crane in Australia.

1.73 The deeming provisions in Article 5 are limited by the terms of paragraph 5.

Where a deemed permanent establishment does not exist

Preparatory and auxiliary activities

1.74 Certain activities do not generally give rise to a permanent establishment. The economic link between such activities and the country in which they are carried on is generally insufficient to warrant the allocation of taxing rights to that country.

1.75 An enterprise will not be deemed to have a permanent establishment solely because of:

- Facilities used solely for the storage, display or delivery of goods or merchandise belonging to an enterprise;
- Maintenance of a stock of goods or merchandise owned by the enterprise solely for the purpose of storage, display or delivery;
- Maintenance of stock of goods or merchandise owned by the enterprise solely for the purpose of processing by another enterprise;
- The maintenance of a fixed place of business for the sole purpose of purchasing goods or merchandise or collecting information for the enterprise; or
- The maintenance of a fixed place of business solely for the purpose of undertaking preparatory or auxiliary activities for the enterprise, such as advertising or scientific research.

Dependent Agents

1.76 An enterprise of one country is deemed to have a permanent establishment in the other country if a person acts on its behalf in that other country where that person has and habitually exercises, an authority to conclude contracts (other than in relation to the mere purchase of goods or merchandise for the enterprise) on behalf of the enterprise. Such persons are referred to as dependent agents.

1.77 Consistent with Australia's reservation to the OECD Model, where a person acts on behalf of another in manufacturing or processing the other's goods, this will give rise to a deemed permanent establishment. An example of this is where a mineral plant refines minerals for a foreign enterprise at cost, so that the plant operations produce no Australian profits. Title to the refined product remains with the foreign enterprise and profits on sale are realised mainly outside of Australia.

1.78 The refining activities performed for the enterprise through such a plant are deemed to be carried on through a permanent establishment of the enterprise because the manufacturing or processing activity (which gives the minerals much of their value) is conducted in Australia on behalf of the enterprise. Accordingly, Australia should have taxing rights over the business profits attributable to the processing activities carried on in Australia. Subparagraph 6b) of Article 5 prevents an enterprise which carries on substantial manufacturing or processing activities in a country through an intermediary from avoiding tax in that country.

1.79 The inclusion of this subparagraph is consistent with Australia's policy of retaining taxing rights over profits from manufacturing or processing on behalf of others, importantly in the exploitation of Australia's mineral resources. ***[Article 5 subparagraph 6b)]***

Independent Agents

1.80 Business conducted through an independent agent will not, of itself, give rise to a permanent establishment, provided that the independent agent is acting in the ordinary course of its business as such an agent. An independent agent includes a broker, general commission agent or any other agent of independent status. ***[Article 5, paragraph 7]***

Subsidiary Companies

1.81 A subsidiary company will not generally be a permanent establishment of its parent company. ***[Article 5, paragraph 8]***

1.82 However a subsidiary company can be regarded as giving rise to a permanent establishment if the subsidiary permits the parent company to operate from its premises such that the tests in paragraphs 1 are met, or the subsidiary acts as an agent such that a dependent agent permanent establishment is constituted. ***[Article 5, paragraph 9]***

Application of the meaning of permanent establishment to other Articles

1.83 The principles set out in this article are also to be applied in determining whether a permanent establishment exists in a third country or whether an enterprise of a third country has a permanent establishment in Australia or Switzerland when applying the source rule contained in paragraph 7 of Article 11 (*Interest*) and paragraph 5 of Article 12 (Royalties). ***[Article 5, paragraph 9]***

Anti-Avoidance Rule

1.84 In order to prevent the misuse of Article 5, particularly the practice of contract splitting in order to avoid the existence of a deemed permanent establishment, an anti-avoidance rule is contained in the Protocol to the Swiss Convention. This applies to the determination of the duration of activities under paragraphs 3 and 4 of Article 5. ***[Protocol, paragraph 4]***

1.85 The anti-avoidance rule provides for duration of connected activities undertaken in a country by associated enterprises to be aggregated for the purpose of applying the relevant time period. Such aggregation will not apply, however, to concurrent activities undertaken by the associated enterprises. An enterprise will be deemed to be

associated with another enterprise if one is controlled, directly or indirectly, by the other or if both are controlled directly or indirectly by a third person or persons. ***[Protocol, paragraph 4]***

CHAPTER 3 – TAXATION OF INCOME

Article 6 – Income from immovable property

1.86 Article 6 of the Swiss Convention adopts the term 'immovable property' in place of Australia's preferred treaty practice wording 'real property'. New subsection 3(5) of the Agreements Act 1953 confirms that the expression 'immovable property' for the purposes of this Convention includes 'real property. In this respect, no difference in meaning between the two terms is intended.

Where income from immovable property is taxable

1.87 This Article provides that the income of a resident of one country, from immovable property situated in the other country, may be taxed by that other country. Thus, income derived from immovable property located in Australia will be subject to Australian tax laws that apply to income derived from real property.

1.88 Generally, Australia's tax treaties exclude profits of an enterprise from agriculture or forestry from the operation of this Article. Such profits are generally dealt with under Article 7 (*Business Profits*) of Australian treaties. However, under the Swiss Convention, the allocation of taxing rights over such profits is determined by Article 6 (*Income from Immovable Property*). Accordingly, profits from the relevant activities may be taxed in Australia where the real property is situated in Australia, irrespective of whether the enterprise has a permanent establishment in Australia. ***[Article 6, paragraph 1]***

1.89 In the case of agriculture and forestry activities, an enterprise would in any event generally have a permanent establishment in the country in which the property is situated.

Definition

1.90 ***Immovable property*** is primarily defined as having the meaning which it has under the domestic law of the country where the property is situated. This includes:

- a lease of land or any other interest in or over land;
- property accessory to immovable property;

- livestock and equipment used in agriculture and forestry;
- rights to which the provisions of general law respecting landed property apply;
- usufruct of immovable property;
- a right to explore for mineral, oil or gas deposits or other natural resources, and a right to mine those deposits or resources; and
- a right to receive variable or fixed payments either as consideration for or in respect of the exploitation of, or the right to explore or exploit, mineral, oil or gas deposits, quarries or other places of extraction or exploitation of natural resources.

Ships and aircraft are excluded from the definition of 'immovable property'. Therefore this Article does not cover income derived from their use. ***[Article 6, paragraph 2]***

Deemed situs

1.91 Under Australian law, the place where an interest in land or natural resources, such as a lease, is situated (situs) is not necessarily where the underlying property is situated. Paragraph 3 of the Article puts the situation of the interest or right beyond doubt by deeming the situs to be where the underlying real property, over which the lease or right is granted, is situated or where any exploration may take place. ***[Article 6, paragraph 3]***

Form of exploitation of immovable property

1.92 Paragraph 4 makes it clear that the general rule in paragraph 1 applies irrespective of the form of exploitation of the immovable property. The Article applies to income derived from the direct use, letting or use in any other form of immovable property. ***[Article 6, paragraph 4]***

Immovable property of an enterprise

1.93 Paragraphs 1, 3 and 4 of Article 6 are extended to income from immovable property of an enterprise or income from immovable property that is used for the performance of independent personal services.

1.94 This article provides that the country in which the immovable property is situated may also impose tax on the income derived from that property by an enterprise of the other country, irrespective of whether that

income is attributable to a fixed base available to that resident in the first-mentioned country.

Article 7 – Business profits

1.95 This Article is concerned with the taxation by one country of business profits derived by an enterprise carried on by a resident of the other country.

1.96 The taxing of these profits depends on whether they are attributable to the carrying on of a business through a permanent establishment in that country. If a resident of one country carries on business through a permanent establishment (as defined in Article 5 (*Permanent Establishment*)) in the other country, the country in which the permanent establishment is situated may tax the profits of the enterprise that are attributable to that permanent establishment. ***[Article 7, paragraph 1]***

1.97 If an enterprise which is a resident of one country derives business profits in the other country that are not attributable to a permanent establishment in that other country, the general principle of this Article is that the enterprise will not be liable to tax in the other country on such profits.

Determination of business profits

1.98 Profits of a permanent establishment are to be determined for the purposes of this Article on the basis of arm's length dealings. The provisions in the Swiss Convention correspond to international practice and corresponding provisions in Australia's other tax treaties. ***[Article 7, paragraphs 2 and 3]***

1.99 No deductions are allowed in respect of expenses which would not be deductible if the permanent establishment were an independent enterprise which incurred the expense. ***[Article 7, paragraph 3]***

1.100 No profits are to be attributed to a permanent establishment merely because it purchases goods or merchandise for the enterprise. Accordingly, profits of a permanent establishment will not be increased by any profits attributable to the purchasing activities undertaken for the head office. It follows, of course, that any expenses incurred by the permanent establishment in respect of those purchasing activities will not be deductible in determining the taxable profits of the permanent establishment. ***[Article 7, paragraph 4]***

1.101 In determining what constitutes business profits, payments received as a consideration for the use of, or the right to use industrial,

commercial or scientific equipment would be covered by this Article and, in the case of Australia, be taxed on a net basis. ***[Protocol, paragraph 7]***

1.102 Subparagraph 5a) of the Protocol excludes the application of Article 7 to profits that are derived from an enterprise carrying on any form of insurance business, other than life insurance. Therefore, each country has the right to continue to apply any provisions in its domestic law relating to the taxation of income from general insurance activities. An effect of this subparagraph is to preserve, in the case of Australia, the application of Division 15 of Part III of the ITAA 1936 (*Insurance with Non-residents*). This is consistent with Australia's reservation to Article 7 (*Business Profits*) of the OECD Model.

Application of domestic law

1.103 The domestic law of the country in which the permanent establishment is situated (for example, Australia's Division 815 of the ITAA 1997) may be applied to determine the tax liability of a person, consistently with the principles stated in this Article. This is of particular relevance where, due to inadequate information, the correct amount of profits attributable on the arm's length principle basis to a permanent establishment cannot be determined, or can only be ascertained with extreme difficulty. This is especially important where there is no data available or the available data is not of sufficient quality to rely on the traditional transaction methods for the attribution of the arm's length profits. ***[Protocol, paragraph 6]***

1.104 Paragraph 6 of the Protocol reflects Australia's reservation to Article 7 (*Business Profits*) of the OECD Model.

Profits dealt with under other Articles

1.105 Where income is specifically dealt with under other Articles of the Swiss Convention, the effect of those particular Articles is not overridden by this Article.

1.106 This provision lays down the general rule of interpretation that categories of income or gains which are the subject of other Articles of the Swiss Convention (for example, Article 8 (*Shipping and Air Transport*), Article 10 (*Dividends*), Article 11 (*Interest*), Article 12 (*Royalties*) and Article 13 (*Alienation of Property*)) are to be treated in accordance with the terms of those Articles. However, under certain articles, for example paragraph 7 of Article 10 (*Dividends*), where the holding in respect of which the income is paid is effectively connected with a permanent establishment that income will be dealt with under Article 7 (*Business Profits*). ***[Article 7, paragraph 5]***

Trust beneficiaries

1.107 The principles of this Article will apply to profits derived by a resident of one of the countries (directly or through one or more interposed trusts) as a beneficiary of a trust, except where the trust is treated as a company for tax purposes. ***[Protocol, subparagraph 5b)(i)]***

1.108 In accordance with this Article, Australia has the right to tax a share of business profits, originally derived by a trustee of a trust estate (other than a trust that is treated as a company for tax purposes) from the carrying on of a business through a permanent establishment situated in Australia, to which a resident of Switzerland is beneficially entitled under the trust. ***[Protocol, subparagraph 5b)(ii)]***

1.109 Subparagraph 5b) of this Protocol ensures that such business profits will be subject to tax in Australia where the trustee of the relevant trust has, or would have if it were a resident of Switzerland, a permanent establishment in Australia in relation to that business. This subparagraph will also apply where relevant to other Articles of the Swiss Convention, such as Article 13 (*Alienation of Property*) in its application to income, profits or gains arising from the alienation of movable property forming part of the property of the permanent establishment or the permanent establishment itself. That is, the beneficiary of the trust will also have a permanent establishment for the purposes of paragraph 2 of Article 13.

Article 8 – Shipping and air transport

Profits from international traffic

1.110 The main effect of this Article is that the right to tax profits from the operation of ships or aircraft, including profits attributable to participation in a pool, joint business or an international operating agency, is generally reserved to the country in which the operator is a resident for tax purposes. ***[Article 8, paragraphs 1 and 3]***

1.111 The profits covered consist in the first place of the profits directly obtained by the enterprise from the transportation of passengers or cargo by ships or aircraft (whether owned, leased or otherwise at the disposal of the enterprise) that it operates in international traffic. However, as international transport has evolved, shipping and air transport enterprises invariably carry on a large variety of activities to facilitate or support their international operations.

1.112 Consistent with the OECD Model commentary on Article 8 (*Shipping, Inland Waterways Transport and Air Transport*), paragraph 1 also covers profits from activities directly connected with such operations as well as profits from activities which are not directly connected with the

operation of the enterprise's ships or aircraft in international traffic but which are ancillary to such operation. An example of such ancillary profits would be profits derived by a ship operator in the business of transport who undertakes a one-off bareboat lease of one of their ships.

1.113 In addition, payments received as a consideration for the use of, or the right to use industrial, commercial or scientific equipment insofar as such use (or the right to use) falls within the scope of international traffic would constitute profits covered by this Article. ***[Protocol, paragraph 7]***

1.114 The definition of 'international traffic' refers only to transport and accordingly limits the scope of paragraph 1 of Article 8 to transport activities. Profits from the operation of ships or aircraft for non-transport activities are treated under Article 7 (*Business Profits*) of the Swiss Convention in the same way as profits derived from the use of other types of substantial equipment, such as mining equipment and trucks. ***[Article 3, subparagraph 1f)]***

Profits from internal traffic

1.115 Profits derived by an enterprise of one country from the operation of ships or aircraft, to the extent that they relate to operations are confined solely to places in the other country, may be taxed in the other country.

1.116 Australia's (and Switzerland's) taxing rights are specifically preserved over profits derived by an enterprise of the other country from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise where the passenger or cargo is shipped and discharged in Australia (or Switzerland). ***[Article 8, paragraph 2]***

1.117 This will also apply to profits derived from leasing a ship or aircraft, on full basis, for the purposes of such carriage. It is understood that 'leasing on a full basis' means that the leased ship or aircraft is provided to the lessee on a fully equipped, crewed and supplied basis.

Example 1.1

A ship operated by a Swiss enterprise, in the course of an international voyage, makes a stop in Perth to pick up cargo. Profits derived from the transport of the goods loaded in Perth and discharged in Sydney would be profits from the carriage of goods shipped and discharged at a place in Australia under paragraph 2. Australia would therefore have the right to tax those profits. Five per cent of the amount paid in respect of the transport of those goods would be deemed to be taxable income of the Swiss enterprise for Australian tax purposes pursuant to Division 12 (*Overseas ships*) of Part III of the ITAA 1936.

Example 1.2

A Swiss enterprise operates sightseeing flights over the Southern Ocean. Passengers aboard the aircraft in Hobart and disembark at the same airport later on the same day. The profits from the carriage of the passengers shipped in and discharged at a place in Australia would be covered by paragraph 2 of Article 8, notwithstanding that the aircraft passes through international airspace. Australia would therefore have the right to tax the profits relating to the carriage of these passengers.

1.118 There is no specified limit on the amount of tax that can be charged on profits from the operation of ships or aircraft in international traffic. However, for Australian tax purposes, Division 12 of Part III of the ITAA 1936 deems 5 per cent of the amount paid in respect of the transport of passengers, livestock, mail or goods shipped in Australia to be the taxable income of a ship owner or charterer who has their principal place of business outside Australia.

Article 9 – Associated enterprises

Reallocation of profits

1.119 This Article deals with associated enterprises (such as parent and subsidiary companies and companies under common control). It authorises the reallocation of profits between related enterprises in Australia and Switzerland on an *arm's length* basis where the commercial or financial arrangements between the enterprises differ from those that might be expected to operate between unrelated enterprises dealing independently with one another. ***[Article 9, paragraph 1]***

1.120 This Article would not generally authorise the rewriting of accounts of associated enterprises where it can be satisfactorily demonstrated that the transactions between such enterprises have taken place on normal, open market commercial terms. The term 'might be expected to operate' in paragraph 1 is included to broadly conform to Australia's treaty practice and allows adjustments where it is not possible to determine the conditions that 'would have been made or occurred' between the associated enterprises.

1.121 The broad scheme of the Australia's domestic law provisions relating to international profit shifting arrangements under which profits are shifted out of Australia, whether by transfer pricing or other means, is to impose arm's length standards in relation to international dealings. Where the Commissioner cannot ascertain the arm's length consideration, it is deemed to be such an amount as the Commissioner determines.

1.122 Each country has the right to apply its domestic law relating to the determination of the tax liability of a person (for example, Australia's

Division 815 of the ITAA 1997) to enterprises, including in cases where the available information is inadequate, provided that such provisions are applied, so far as it is practicable to do so, consistently with the principles of the Article. This is of particular relevance where there is no data available or the available data is not of sufficient quality to rely on the traditional transaction methods for the attribution of arm's length profits. This reflects Australia's reservation to Article 9 (*Associated Enterprises*) of the OECD Model. ***[Protocol, paragraph 6]***

Correlative adjustments

1.123 Where a reallocation of profits is made (either under this Article or, by virtue of paragraph 6 of the Protocol, under domestic law) so that the profits of an enterprise of one country are adjusted upwards, economic double taxation (that is, taxation of the same income in the hands of different persons) would arise if the profits so reallocated continued to be subject to tax in the hands of an associated enterprise in the other country. To avoid this result, the other country is required to make an appropriate compensatory adjustment to the amount of tax charged on the profits involved to relieve any such double taxation.

1.124 It would generally be necessary for the affected enterprise to apply to the competent authority of the country not initiating the reallocation of profits for an appropriate compensatory adjustment to reflect the reallocation of profits made by the other treaty partner country. If necessary, the competent authorities of Australia and Switzerland will consult with each other to determine the appropriate adjustment. ***[Article 9, paragraph 2]***

Article 10 – Dividends

1.125 This Article allocates taxing rights in respect of dividends flowing between Australia and Switzerland. The Article provides that:

- certain cross-border inter-corporate dividends will be either exempt from source taxation or subject to a maximum 5 per cent rate of tax in that country;
- a maximum 15 per cent rate of source country tax may be applied on all other dividends;
- dividends beneficially owned by a State, or political subdivision or a local authority and dividends beneficially owned by a central bank will be exempt from source taxation where the recipient holds directly no more than 10 per cent of the voting power (or capital) of the company paying the dividends;

- dividends paid in respect of a holding which is effectively connected with a permanent establishment or fixed base located in the source country are to be dealt with under Article 7 (*Business Profits*) and Article 14 (*Independent Personal Services*) respectively; and

- the extra-territorial application by either country of taxing rights over dividend income is not permitted.

1.126 The tax treatment of dividends provided in the Swiss Convention fulfils Australia's 'most favoured nation' obligation contained in the Protocol to the existing Agreement, to reduce its dividend withholding tax rates to those agreed to by Australia in a subsequent treaty with another member state of the OECD. In this regard, the dividend withholding tax rates in the Swiss Convention are aligned to the corresponding rates set out in Australia's tax treaty with the United States of America.

Permissible rate of source country taxation

Five per cent rate limit on source country tax of certain cross-border inter-corporate dividends

1.127 This Article allows both Australia and Switzerland to tax dividends flowing between them but limits the rate of tax that the country of source may impose on dividends paid by companies that are resident of that country under its domestic law to companies resident in the other country who are the beneficial owners of the dividends. ***[Article 10, paragraphs 1 and 2]***

1.128 A limit of 5 per cent will apply for dividends paid in respect of company shareholdings that constitute a direct voting interest in the company paying the dividends (in the case of Australia) or capital in the company paying the dividends (in the case of Switzerland), of at least 10 per cent. ***[Article 10, subparagraph 2a)]***

Fifteen per cent rate limit for all other dividends

1.129 In all other cases, the Swiss Convention provides that the source country may tax dividends that are beneficially owned by residents of the other country, but will limit its tax to 15 per cent of the gross amount of the dividend. ***[Article 10, subparagraph 2b)]***

1.130 Although the provisions in Article 10 would allow Australia to impose withholding tax on both franked and unfranked dividends in the specified circumstances, the dividend withholding tax exemption provided by Australia under its domestic law for franked dividends paid to non-

residents will continue to apply. That is, franked dividends paid to Swiss residents will not be subject to Australian dividend withholding tax.

Exemption for certain cross-border inter-corporate dividends

1.131 No tax will be payable in the source country on dividends paid to a company that is the beneficial owner of those dividends and is resident in the other country where the recipient company:

- holds, directly or indirectly, shares representing 80 per cent or more of the voting power (in the case of Australia) or of the capital (in the case of Switzerland), of the company paying the dividends; and
- has held those shares for a 12 month period ending on the date of declaration of the dividend.

[Article 10, paragraph 3]

1.132 To qualify for the exemption, the company that is the beneficial owner of the dividends must either be:

- a company that has its principal class of shares;
  - listed on a recognised stock exchange; and
  - regularly traded on one or more recognised stock exchanges (as defined under Article 3 (*General Definitions*) of the Convention);
- a company that is owned either directly or indirectly by one or more such companies;
- a company that is owned either directly or indirectly by one or more third country resident companies that would be entitled to equivalent treaty benefits (that is, an exemption from source country taxation); or
- a company that does not meet the above requirements but which is nevertheless granted benefits with respect to those dividends by the competent authority of the country in which the dividends arose.

[Article 10, subparagraphs 3a) – c)]

1.133 Provision has also been made to allow the competent authorities to reach agreement that other stock exchanges constitute a recognised

stock exchange for the purpose of the Swiss Convention. ***[Article 3, subparagraph 1k)(iv)]***

Equivalent benefits

1.134 Under subparagraph b) of paragraph 3 of this Article, an exemption applies to dividends:

- paid by a company in a country (the paying company) to a company in the other country (the receiving company); and

- where the receiving company is itself wholly-owned by one or more companies (the owning companies) that are either themselves listed on a recognised stock exchange or would be entitled to equivalent benefits under another treaty between country of which the receiving company is a resident and the country of which the paying company is a resident had the owning companies owned the holding in the paying company directly.

1.135 The exemption would apply to dividends paid by an Australian company to a Swiss company that is itself owned by one or more companies entitled to equivalent benefits under another tax treaty between the country of which that company (or those companies) were a resident and Australia. Similarly, dividends paid by a Swiss company to an Australian company that is itself owned by one or more companies entitled to equivalent benefits under another tax treaty between the country of which that company (or those companies) were a resident and Switzerland, would also be exempt.

Example 1.3

Chiasso Co is an unlisted Swiss company which owns all the shares in Kingston Co, an Australian company, and has done so for more than 12 months. Assume Chiasso Co is the beneficial owner of the dividends paid by Kingston Co.

Kent Co, a company resident in the United Kingdom, is listed on a stock exchange that is a 'recognised stock exchange' within the meaning of Article 3 of the 2003 Australia-United Kingdom Convention, and wholly owns Chiasso Co.

If Kent Co had owned the shares held by Chiasso in Kingston Co directly, then an exemption would apply to the dividends paid on those shares under subparagraph a) of paragraph 3 of Article 10 of the 2003 Australia-United Kingdom Convention. In such case Kent Co is considered to be entitled to equivalent benefits to those provided under paragraph 3. Accordingly, the Australian dividend paid to Chiasso Co will be exempt under sub-subparagraph b)(ii) of paragraph 3.

Example 1.4

Assume Chiasso Co is now owned by a second Swiss resident company, Berne Co, and a Japan resident company, Osaka Co. Berne Co is listed on a stock exchange that is a 'recognised stock exchange' within the meaning of Article 3 of the Convention. Osaka Co is listed on a stock exchange that is a 'recognised stock exchange' within the meaning of Article 23 of the 2008 Australia-Japan Convention. Each company owns 50 per cent of the shares in Chiasso Co.

Chiasso Co owns all the shares in Kingston Co, an Australian company, and has done so for more than 12 months. Assume Chiasso Co is the beneficial owner of the dividends paid by Kingston Co.

If Berne Co had owned the shares held by Chiasso Co directly, then an exemption would apply to the dividends paid on those shares under subparagraph a) of paragraph 3 of Article 10 of the Convention. If Osaka Co had owned the shares held by Chiasso Co directly, then an exemption would apply to the dividends paid on those shares under subparagraph a) of paragraph 3 of Article 10 of the 2008 Australia-Japan Convention.

In both cases, Berne Co and Osaka Co are considered to be entitled to equivalent benefits to those provided under paragraph 3. Accordingly, the Australian dividend paid to Chiasso Co will be exempt under sub-subparagraph b)(ii) of paragraph 3.

Example 1.5

Lucerne Co is an unlisted Swiss company which owns all the shares in Sydney Co, an Australian company, and has done so for more than 12 months. Assume Lucerne Co is the beneficial owner of dividends paid by Sydney Co.

Lucerne Co is owned by a second Swiss resident company, Basel Co, and Oculum Co, a company that is a resident of a treaty partner country. Basel Co and Oculum Co each own 50 per cent of the shares in Lucerne Co.

Basel Co is listed on a stock exchange that is a 'recognised stock exchange' within the meaning of Article 3 of the Convention. If Basel Co had owned the shares held by Lucerne Co directly, then an exemption would apply to the dividends paid on those shares under subparagraph a) of paragraph 3 of Article 10 of the Swiss Convention.

Under the tax treaty between Australia and Oculum Co's country of residence, a withholding tax rate of 15 per cent applies for all dividends. If Oculum Co had owned the shares held by Lucerne Co directly, the dividends would have been subject to dividend withholding tax of 15 per cent.

The requirements of sub-subparagraph b)(ii) of paragraph 3 are not met because one of the companies owning Lucerne Co (that is, Oculum Co) is not entitled to equivalent benefits. Accordingly, that provision will not apply to exempt the Australian dividends paid to Lucerne Co from dividend withholding tax.

Competent authority determination

1.136 Dividends which are beneficially owned by a company that does not meet the conditions in subparagraph a) or b) of paragraph 3 of the article will also be exempt from tax in the source country if the competent authority of that country determines that obtaining the exemption was not one of the principal purposes of any person concerned with creating the arrangement under which the dividend was paid. Before concluding that the company is not entitled to relief under this subparagraph (for example, because the arrangements had a principal purpose of obtaining such relief), the competent authority is required to consult with the competent authority of that company's country of residence. ***[Article 10, subparagraph 3c)]***

Exemption for dividends derived by Governments or a central bank

1.137 Dividends which are beneficially owned by a State, or political subdivision or a local authority (including a government investment fund) will be exempt from tax in the source country if the recipient holds directly no more than 10 per cent of the voting power (in the case of Australia) or capital (in the case of Switzerland), in the company paying the dividends. The exemption is also applicable where the beneficial owner in the company paying the dividends is a central bank. These exemptions complement those provided in respect of interest derived by States, their political subdivisions and local authorities (including government investment funds) or a bank performing central banking functions under Article 11 (*Interest*). In the course of negotiations, the two delegations agreed:

> '…that dividends and interest will be regarded as being derived by a Contracting State, political subdivision, local authority or government investment fund where the investment is made by the Government and the funds are and remain government monies.
>
> The delegations also agreed that this would include dividends and interest paid to, in the case of Australia, the Future Fund, the Building Australia Fund, the Education Fund and the Health and Hospitals Fund, as well as any similar fund the purpose of which is to pre-fund future government liabilities.'

[Article 10, subparagraphs 4a) – b)]

Exemption for dividends derived by superannuation entities or pension schemes

1.138 Subject to satisfying the 10 per cent or less ownership requirements, the exemption that applies to dividends derived by the two governments, government bodies or a central bank also applies to dividends which are beneficially owned by an Australian resident compliant superannuation fund or in the case of Switzerland, a tax exempt Swiss pension scheme. ***[Article 10, subparagraphs 4c) – d)]***

1.139 Paragraph 8 of the Protocol sets out the circumstances under which a complying Australian superannuation fund or a tax exempt Swiss pension fund is exempt from source taxation on dividends, interest and royalties under the Swiss Convention.

- For dividends and interest arising in Switzerland and derived by an Australian pension scheme, that pension scheme shall be regarded as the beneficial owner of such income where that income is treated as the income of that pension scheme for the purposes of Australian tax.

- For dividends, interest and royalties arising in Switzerland and derived by or through a discretionary trust, the trustee of that trust shall not be regarded as the beneficial owner of such income where the trustee subsequently distributes that income to a beneficiary that is not a resident of Australia, unless that income is subject to tax in Australia in the hands of the trustee and the Australian tax paid by the trustee is not subsequently refunded to that beneficiary.

[Protocol, paragraph 8]

1.140 Australian and Swiss 'pension schemes' are defined in paragraph 2 of the protocol to the Swiss Convention.

Definition of dividends

1.141 The term dividends in this Article means income from:

- income from shares, "jouissance" shares or "jouissance" rights, mining shares, founders' shares or other rights participating in profits and are not debt-claims; and

- income or other distributions which are subject to the same taxation treatment as income from shares in the country of which the distributing company is resident for the purposes of its tax.

1.142 The phrase 'for the purposes of its tax', which appears in paragraph 6 of Article 10, refers to the case where a person is a resident of a country under its domestic tax law, even if the person is deemed to be a resident only of the other country for the purposes of the Swiss Convention by virtue of paragraph 2 or 3 of Article 4 (*Resident*). ***[Article 10, paragraph 5]***

1.143 In the case of Australia, the definition is consistent with subsection 3(2A) of the Agreements Act 1953 which clarifies that a reference to income from shares, or to income from other rights participating in profits, does not include a reference to a return on a debt interest as defined in Subdivision 974-B of the ITAA 1997.

Dividends effectively treated as either business profits or profits from independent personal services

1.144 Limitations on the tax of the country in which the dividend is sourced do not apply to dividends derived by a resident of the other country who has a permanent establishment or fixed base in the source country from which the dividends are derived, if the holding giving rise to the dividends is effectively connected with such permanent establishment or fixed base.

1.145 Where the holding is effectively connected with such permanent establishment or fixed base, the dividends are to be treated as business profits or profits from independent personal services respectively, and therefore subject to the full rate of tax applicable in the country in which the dividend is sourced in accordance with the provisions of Articles 7 (*Business Profits*) and 14 (*Independent Personal Services*).

1.146 Franked and unfranked dividends paid by an Australian company will be included in the assessable income of a Swiss company or individual where the dividends are attributable to a permanent establishment or fixed base of that Swiss resident situated in Australia. Expenses incurred in deriving the dividend income are allowable as a deduction from that income when calculating the taxable income of the Swiss resident. Further, a Swiss company or individual may be entitled to tax offsets in respect of any franked dividends received under Australia's domestic law. ***[Article 10, paragraph 7]***

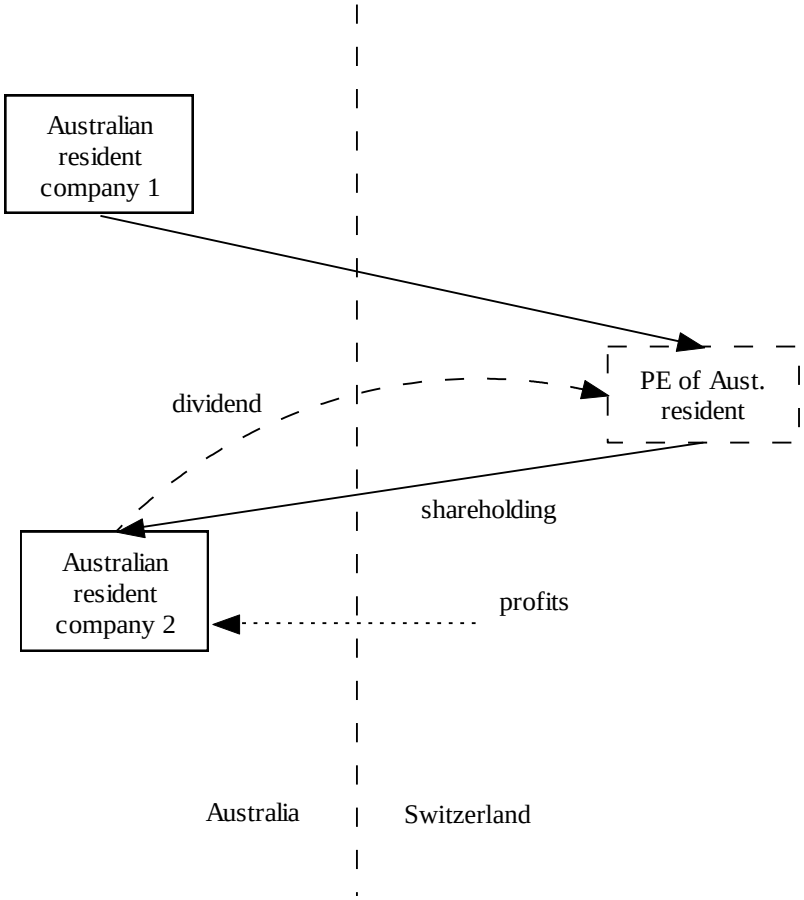
Extra-territorial application precluded

1.147 The extra-territorial application by either country of taxing rights over dividend income is precluded. Broadly, one country (the first country) will not tax dividends paid by a company resident solely in the other country, unless:

- the person deriving the dividends is a resident of the first country; or
- the shareholding giving rise to the dividends is effectively connected with a permanent establishment in the first country.

[Article 10, paragraph 8]

Diagram 1.1



In the diagram above, paragraph 8 would, but for the exception, preclude Switzerland from taxing the dividend paid by Australian resident company 2 to Australian resident company 1 out of profits derived from Swiss sources. However, as the dividends relate to the Australian shareholder's permanent establishment in Switzerland with which the holding is effectively connected, Switzerland may tax the dividends.

[Article 10, paragraph 8]

Dividends paid by dual resident companies

1.148 The restrictions of paragraph 8 do not apply when the company paying the dividends is a dual resident that is deemed to be a resident of Australia or Switzerland on the basis of its place of effective management. In such cases, the dividends paid by the dual resident company may be taxed in the country in which those profits arise in accordance with the domestic law of that country. However, where the dividends are beneficially owned by a resident of the other country, the limits provided for in paragraphs 2 apply as if the company were a resident solely of the country in which the profits out of which the dividends are paid arise.
[Article 10, paragraph 9]

1.149 This provision does not limit taxation in the country of which the dual resident company is deemed to be a resident for treaty purposes in accordance with paragraph 3 of Article 4 (Resident) in the case of dividends paid by the company out of profits from sources outside that country. Paragraph 2 will apply where those dividends are beneficially owned by a resident of the other country.

Article 11 – Interest

1.150 This Article allocates taxing rights in respect of interest flows between Australia and Switzerland. Article 11 provides that:

- an exemption from source country tax applies to certain cross-border interest flows to:
  - government bodies or central banks;
  - financial institutions in certain circumstances; and
  - Australian complying superannuation funds or tax exempt Swiss pension schemes;
- a maximum 10 per cent rate of source country tax may be applied on all other interest income;
- interest paid on a debt-claim which is effectively connected with a permanent establishment or fixed base shall be subject to Articles 7 (*Business Profits*) and 14 (*Independent Personal Services*) respectively;
- interest payments are deemed to have an Australian source (and may therefore be taxed in Australia) where:

- the interest is paid by an Australian resident to a Swiss resident other than where the indebtedness in respect of which the interest is paid is effectively connected with a permanent establishment or fixed base situated in Switzerland; or

- the interest is paid by a non-resident to a Swiss resident and it is an expense of the payer in carrying on business in Australia through a permanent establishment or fixed base; and

• relief will be restricted to the gross amount of interest which would be expected to be paid on an arm's length dealing between independent parties.

1.151 The tax treatment of dividends provided in the Swiss Convention fulfils Australia's 'most favoured nation' obligation contained in the Protocol to the existing Agreement, to reduce its interest withholding tax rate to that agreed to by Australia in a subsequent treaty with another member state of the OECD. In this regard, the interest withholding tax rates in the Swiss Convention are aligned to the rates set out in Australia's tax treaty with the United States.

Permissible rate of source country taxation

Ten percent rate limit

This Article provides for interest income to be taxed by both countries but requires the country in which the interest arises to generally limit its tax to 10 per cent of the gross amount of the interest where a resident of the other country is the beneficial owner of the interest. ***[Article 11, paragraphs 1 and 2]***

Exemptions for interest paid to Governments and central banks

1.152 The exemption for interest paid to the government of a country will apply to interest derived by the Australian or Swiss governments, or by any political subdivision or local authority (including government investment funds) in either Australia or Switzerland. As is the case in relation to dividends, this ensures that interest derived by Australia's Future Fund (and other Funds) from sources in Switzerland will be exempt from Swiss tax.

1.153 The exemption also applies to interest derived by banks performing central banking functions in Australia and Switzerland. ***[Article 11, subparagraph 3a)]***

Exemptions for interest paid to financial institutions

1.154 Source country taxation is not applicable to the gross amount of interest derived by a financial institution which is unrelated to and deals wholly independently with the payer, provided the financial institution is a resident of the other country and is the beneficial owner of the interest.

1.155 The exemption for interest paid to financial institutions recognises that the 10 per cent source country tax rate on gross interest can be excessive given their cost of their funds.

1.156 The term ***financial institution*** means a bank or other enterprise substantially deriving its profits by raising debt finance in the financial markets or by taking deposits at interest and using those funds in carrying on a business of providing finance. This does not include a corporate treasury or a member of a group that performs the financing services of the group. ***[Article 11, subparagraph 3b)]***

1.157 The exemption is not available for interest paid as part of an arrangement involving back-to-back loans or other arrangement that is economically equivalent and intended to have a similar effect. The denial of the exemption for these back-to-back loan type arrangements is directed at preventing related party and other debt from being structured through financial institutions to gain access to such relief. The exemption will only be denied for interest paid on the component of a loan that is considered to be back to back. In such cases, the 10 per cent rate limit will apply. ***[Article 11, paragraph 4a)]***

1.158 An example of a back-to-back arrangement would include, for instance, a transaction or series of transactions structured in such a way that:

- a Swiss financial institution receives or is credited with an item of interest arising in Australia; and

- the financial institution pays or credits, directly or indirectly, all or substantially all of that interest (at any time or in any form, including commensurate benefits) to another person who, if it received the interest directly from Australia, would not be entitled to similar benefits with respect to that interest.

1.159 However, a back-to-back arrangement would generally not include a loan guarantee provided by a related party to a Swiss financial institution.

Exemption for interest derived by superannuation entities or pension schemes

1.160 The exemption from source country taxation that applies to interest derived by the Australian and Swiss Governments, government bodies, central banks and financial institutions also apply to interest beneficially owned by Australian resident compliant superannuation funds and tax exempt Swiss pension schemes. ***[Article 11, subparagraphs 3c) - d)]***

1.161 The exemption may not be available in relation to interest derived by the two governments, government bodies, central banks or financial institutions if the beneficial owner of the interest participates directly or indirectly in the management, control or capital, or has an existing or contingent right to participate in the financial, operating or policy decisions, of the issuer of the debt-claim. This is intended to ensure that these exemptions will only apply where the beneficial owner of the interest holds a portfolio-like interest in the issuer of the debt-claim. They will not apply where the beneficial owner is associated with, or in a position to control or influence the key decision-making of, the issuer of the debt-claim. ***[Article 11, subparagraph 4b); Protocol, paragraph 9]***

Definition of interest

1.162 The term ***interest*** is defined for the purposes of this Article to include:

- income from debt-claims of every kind (whether or not secured by a mortgage or carrying a right to participate in the debtor's profits);
- interest from government securities;
- interest from bonds and debentures; and
- income which is subjected to the same taxation treatment as income from money lent by the law of the source country.

[Article 11, paragraph 5]

Interest effectively treated as business profits or profits derived from independent personal services

1.163 Interest derived by a resident of one country which is paid in respect of a debt-claim which is effectively connected with a permanent establishment or fixed base of that person in the other country, will form part of the profits of that permanent establishment or fixed base and be subject to the provisions of Articles 7 (*Business Profits*) and 14

(*Independent Personal Services*) respectively. Accordingly, the rate limitations on source taxation provided in paragraphs 2 and 4 and subparagraph 3b) of this article do not apply to such interest in the country in which the interest arises. ***[Article 11, paragraph 6]***

Deemed source rules

1.164 The source rules which determine where interest arises for the purposes of this Article are set out in paragraph 7. They operate to allow Australia to tax interest paid by a resident of Australia to a resident of Switzerland who is the beneficial owner of that interest. Australia may also tax interest paid by a non-resident, being interest which is beneficially owned by a resident of Switzerland, if it is an expense incurred by the payer of the interest in connection with a permanent establishment or a fixed base situated in Australia.

1.165 However, consistent with Australia's interest withholding tax provisions, an Australian source is not deemed in respect of interest that is an expense incurred by an Australian resident in carrying on a business through a permanent establishment or fixed base outside both Australia and Switzerland (that is, the permanent establishment or fixed base is in a third country). In that case, the interest is deemed to arise in the country in which the permanent establishment or fixed base is situated. ***[Article 11, paragraph 7]***

1.166 In determining whether a permanent establishment exists in a third country, the principles set out in Article 5 (*Permanent Establishment*) apply. ***[Article 5, paragraph 9]***

Related persons

1.167 This Article includes a general safeguard against payments of excessive interest where a special relationship exists between the persons associated with a loan transaction – by restricting the amount on which the 10 per cent source country tax rate limitation applies to an amount of interest which might have been expected to have been agreed upon if the parties to the loan agreement were dealing with one another at arm's length. Any excess part of the interest remains taxable according to the domestic law of each country but subject to the other articles of the Swiss Convention. ***[Article 11, paragraph 8]***

1.168 Examples of cases where a special relationship might exist include payments to a person (either individual or legal):

- who controls the payer (whether directly or indirectly);
- who is controlled by the payer; or

- who is subordinate to a group having common interests with the payer.

1.169 A special relationship also covers relationships of blood or marriage and, in general, any community of interests.

Article 12 – Royalties

1.170 This Article allocates taxing rights in respect of royalties paid or credited between Australia and Switzerland. The article provides that:

- a maximum 5 per cent rate of source country tax may be levied on the gross amount of the royalties;
- royalties paid in respect of a right or property which is effectively connected with a permanent establishment or fixed base are subject to Articles 7 (*Business Profits*) and 14 (*Independent Personal Services*) respectively;
- royalties are deemed to have an Australian source (and may therefore be taxed in Australia) where:
  - the royalties are paid to a Swiss resident by a person who is an Australian resident, other than a payment made in respect of a right or property which is effectively connected with a permanent establishment or fixed base situated in Switzerland; or
  - the royalties are paid by a non-resident to a Swiss resident and are an expense of the payer in connection with a permanent establishment or fixed base situated in Australia;
- relief will be restricted to the gross amount of royalties which would be expected to be paid on an arm's-length dealing between independent parties;

1.171 The tax treatment of royalties provided in the Swiss Convention fulfils Australia's 'most favoured nation' obligation contained in the Protocol to the existing Agreement, to reduce its royalty withholding tax rate to that agreed to by Australia in a subsequent treaty with another member state of the OECD. In this regard, the maximum royalty withholding tax rate in the Swiss Convention is aligned to the corresponding rate set out in Australia's tax treaty with the United States.

Permissible rate of source country taxation

1.172 This article in general allows both countries to tax royalties but limits such tax in the case of the source country to 5 per cent of the gross amount of royalties beneficially owned by residents of the other country. ***[Article 12, paragraphs 1 and 2]***

1.173 In the absence of a tax treaty, Australia taxes royalties paid to non-residents at 30 per cent of the gross amount of the royalties.

Definition of royalties

1.174 The definition of royalties in this article reflects most elements of the definition in Australia's domestic income tax law. The definition encompasses payments or credits for the use of, or the right to use any copyright, patent or trademark and the supply of scientific, technical, industrial or commercial information. It also encompasses the supply of any related ancillary and subsidiary assistance aimed at facilitating the enjoyment of the foregoing.

1.175 The definition includes payments for the supply of information concerning technical, industrial, commercial or scientific experience but not payments for services rendered, except for those that are ancillary as provided in subparagraph c) of paragraph 3. ***[Article 12, paragraph 3]***

1.176 The definition also includes payments for the use of intellectual property stored on various media and used in connection with television, radio or other broadcasting (for example, satellite, cable and internet broadcasting). ***[Article 12, subparagraph 3d)]***

1.177 The 'royalties' definition includes payments made for the use of, or the right to use, motion picture films. It also covers payments for the use of, or the right to use, images or sounds, however reproduced or transmitted, for use in connection with broadcasting. Such images or sounds may be reproduced on any form of media, such as film, tape, CD or DVD, or transmitted electronically, such as by satellite, cable or Internet. Where the images or sounds are for use in connection with any form of broadcasting, such as television, radio or web-casting, the payments will constitute a royalty. ***[Article 12, subparagraph 3d)]***

Forbearance

1.178 This article expressly treats as a royalty, amounts paid or credited in respect of forbearance to grant to third persons, rights to use property covered by this Article. This provision ensures that such payments are subject to tax as a royalty payment under the terms of the Royalties article. ***[Article 12, subparagraph 3e)]***

Other royalties effectively treated as business profits

1.179 Royalties paid in respect of a right or property which is effectively connected with a permanent establishment or fixed base are subject to Article 7 (*Business Profits*). ***[Article 12, paragraph 4]***

1.180 Royalties paid in respect of independent personal services by a permanent establishment or fixed base are subject to Article 14 (*Independent Personal Services*). ***[Article 12, paragraph 4]***

Deemed Source Rules

1.181 This article deems the source for the royalty to the country of residence of the payer of the royalty. This deeming provision broadly mirrors the source rule for interest income in Article 11 (*Interest*). ***[Article 12, paragraph 5]***

1.182 The Article allows Australia to tax royalties paid by a resident of Australia to a resident of Switzerland who is the beneficial owner of those royalties. Australia may also tax royalties paid by a non-resident being royalties which are beneficially owned by a Swiss resident if the royalties are an expense incurred by the payer in carrying on a business in Australia through a permanent establishment.

1.183 The source rules which determine where royalties arise for the purposes of this Article correspond in Australian law to Section 6C of the *ITAA 1936*, which deems a royalty paid by an Australian resident to a non-resident to have an Australian source.

1.184 Royalty payments that are an expense incurred by an Australian resident carrying on a business through a permanent establishment or fixed base in a third state will not be subject to tax in Australia. Those royalties are deemed to be sourced in the country in which the permanent establishment or fixed base is situated. ***[Article 12, paragraph 5]***

Related Persons

1.185 Where a special relationship exists between the payer and the beneficial owner of the royalties, the 5 per cent source country tax rate limitation will apply only to the extent that the royalties are not excessive. Any excess part of the royalties remains taxable according the domestic law of each country but subject to the other Articles of the Swiss Convention. ***[Article 12, paragraph 6]***

1.186 Special relationships may include where:

- There is a payment to a person who directly or indirectly controls the payer;
- There is a payment to a person who is controlled by the payer;
- There is a payment to a person who is subordinate to a group having common interests with the payer; or
- There is a community of interests, familial or marriage relationships.

Article 13 – Alienation of property

Taxing rights

1.187 This Article allocates between the respective countries' taxing rights in relation to income, profits or gains arising from the alienation of immovable property and other items of property.

1.188 The reference to 'income, profits or gains' in this Article is designed to put beyond doubt that a gain from the alienation of property, which in Australia may be income or a profit under ordinary concepts, will be taxed in accordance with this Article, rather than Article 7 (*Business Profits*), together with relevant capital gains.

Immovable property

1.189 Income, profits or gains from the alienation of immovable property may be taxed by the country in which the property is situated. ***[Article 13, paragraph 1]***

1.190 For the purpose of this Article, the term 'immovable property' has the same meaning as it has under paragraph 2 of Article 6. Where the property is situated is clarified under paragraph 3 of Article 6 (*Income from Immovable Property*).

Permanent establishment or fixed base

1.191 Paragraph 2 deals with income, profits or gains arising from the alienation of movable property forming part of the business assets of a permanent establishment of an enterprise or pertaining to a fixed base for the performance of independent personal services. It also applies where the permanent establishment or fixed base are themselves (alone or with the whole enterprise) alienated. Such income, profits or gains may be taxed in the country in which the permanent establishment or fixed base is

situated. This corresponds to the rules for taxation of business profits contained in Article 7 (*Business Profits*). ***[Article 13, paragraph 2]***

1.192 Consistent with the interpretation contained in paragraph 24 of the Commentary on Article 13 of the OECD Model, the term 'movable property' means all property other than immovable property dealt with in paragraph 1 of this article.

Disposal of ships or aircraft

1.193 Income, profits or gains derived by a resident of a country from the disposal of ships or aircraft operated by that resident in international traffic, or from the disposal of movable property pertaining to the operation of such ships or aircraft, are taxable only in that country. This rule corresponds to the operation of Article 8 (*Shipping and air transport*) in relation to profits derived from the international operation of ships or aircraft. ***[Article 13, paragraph 3]***

1.194 For the purposes of this Article, the term 'international traffic' does not include any transportation which commences at a place in a country and returns to another place in that country, after travelling through international airspace or waters (for example, so-called 'voyages to nowhere' by cruise ships). ***[Article 3, subparagraph 1f)]***

Shares and other interests in land-rich entities

1.195 Paragraph 4 applies to situations involving the alienation, by a resident of one country, of shares or comparable interests that derive more than 50 per cent of their value directly or indirectly from immovable property situated in the other country. Income, profits or gains from the alienation of such shares, comparable interests or other rights may be taxed in the country in which the immovable property is situated. Paragraph 4 complements paragraph 1 of this Article and is designed to cover arrangements involving the effective alienation of incorporated immovable property, or like arrangements.

1.196 This provision ensures that capital or revenue gains on disposal of a foreign resident's indirect, as well as direct, interests in certain targeted assets are taxable by Australia. Such treatment applies whether the immovable property is held directly or indirectly through a chain of interposed entities. ***[Article 13, paragraph 4]***

Resident country sweep-up provision

1.197 Paragraph 5 contains a sweep-up provision which reserves the right to tax any capital gains from the alienation of other types of property (that is, property not otherwise covered by the article) to the country of

which the person deriving the gains is a resident. Such gains derived by Australian residents will be taxable only in Australia, regardless of where the property is situated, and will not be taxed in Switzerland. The liability of the Australian resident to taxation on such capital gains will be determined in accordance with Australia's domestic law. ***[Article 13, paragraph 5]***

Australian residents – residence during a four year period prior to alienation of property

1.198 The Swiss Convention protects Australia's taxing rights in respect of income, profits or gains from the alienation of any property of a person who is, or has been, a resident of Australia during the year in which the property is alienated or during the four years immediately preceding that year. ***[Protocol, paragraph 10]***

1.199 Under Australia's capital gains tax (CGT) regime, ceasing to be an Australian resident can trigger a CGT event (CGT Event I1). However, an individual can elect to disregard any capital gain or capital loss from CGT assets covered by this event. Where this election is made the relevant assets of the individual are deemed to be taxable Australian property and accordingly are subject to tax in Australia when the individual disposes of the asset or again becomes an Australian resident.

1.200 In the absence of this paragraph, the Swiss Convention would not allow Australia to tax the gain that arises from the subsequent disposal of the asset, as the person would no longer be an Australian resident. As Switzerland does not have a comprehensive federal CGT regime, there may be cases where ceasing to be an Australian resident will result in no tax being payable on gains from CGT events arising from the disposal of taxable Australian property in either Australia or Switzerland.

Double tax relief

1.201 In the event that the operation of Article 13 results in an item of income or gain being subjected to tax in both States, the country of which the person deriving the income or gain is a resident (as determined in accordance with Article 4 (*Resident*)) would be obliged by Article 22 (*Elimination of Double Taxation*) to provide double tax relief for the tax imposed by the other country.

Article 14 – Independent personal services

1.202 Article 14 deals with the provision of professional services or other activities of an independent character.

Under this Article, income derived by an individual in respect of professional services or other activities of an independent character will be subject to tax in the country in which the services or activities are performed, if the individual has a fixed base regularly available to him or her in that country for the purpose of performing those activities. If this condition is met, the country in which the services or activities are performed will have the right to tax so much of the income that is attributable to that fixed base (that is, the activities performed through that fixed base). ***[Article 14, paragraph 1]***

1.203 If the above condition is not met, the income will be taxed only in the country of residence of the individual.

1.204 The term ***professional services*** includes independent scientific, literary, artistic, educational or teaching activities as well as the independent activities of physicians, lawyers, engineers, architects, dentists and accountants. ***[Article 14, paragraph 2]***

1.205 Remuneration derived as an employee and income derived by entertainers and sportspersons are the subject of other Articles of the Swiss Convention and are not covered by this Article. However, payments received as a consideration for the use of, or the right to use industrial, commercial or scientific equipment, insofar as they relate to professional services, would constitute income covered by this Article. ***[Protocol, paragraph 7]***

Article 15 – Dependent personal services

Basis of taxation

1.206 This Article generally provides the basis upon which the remuneration of visiting employees is to be taxed. However, the Article does not apply in respect of income dealt with separately in:

- Article 16 (*Directors' fees*);
- Article 18 (*Pensions*); and
- Article 19 (*Government service*).

1.207 Generally, salaries, wages and similar remuneration derived by a resident of one country from an employment exercised in the other country may be taxed in that other country. However, subject to specified conditions, the Article provides for an exemption from tax in the country being visited in respect of short-term employment visits. ***[Article 15, paragraphs 1 and 2]***

Short-term visit exemption

1.208 The conditions for this exemption are that:

- the period of the visit or visits does not exceed, in the aggregate, 183 days in the fiscal year concerned;
- the remuneration is paid by, or on behalf of, an employer who is not a resident of the visited country; and
- the remuneration is not borne by a permanent establishment or a fixed base which the employer has in the country being visited.

1.209 Where all of these conditions are met, the remuneration so derived will be liable to tax only in the country of residence of the recipient. ***[Article 15, paragraph 2]***

Where the short-term visit exemption does not apply

1.210 Where a short-term visit exemption is not applicable, remuneration derived by a resident of Australia from employment in Switzerland may be taxed in Switzerland (and vice versa in the case of remuneration derived by a Swiss resident from employment in Australia). However, this Article does not allocate sole taxing rights to Switzerland (or Australia) in that situation.

1.211 Accordingly, Australia would also be entitled to tax that remuneration, in accordance with the general rule of the ITAA 1997 that a resident of Australia remains subject to tax on worldwide income. However, in accordance with Article 22 (*Elimination of Double Taxation*) Australia would be required in this situation to relieve any resulting double taxation.

Employment on a ship or aircraft

1.212 Income derived by crew members from employment exercised aboard a ship or aircraft operated in international traffic may be taxable in the country of which the enterprise operating the ship or aircraft is a resident. Thus, for example, an Australian resident pilot employed by a Swiss resident airline would be taxable in Switzerland on his or her remuneration in respect of services rendered on international flights, and would be entitled to a tax credit in Australia for the Swiss tax paid under Article 22 (*Elimination of double taxation*). ***[Article 15, paragraph 3]***

Fringe benefits

1.213 Both Australia and Switzerland impose taxation on certain 'fringe' or employee benefits. In Australia, the relevant law is the *Fringe Benefits Tax Assessment Act 1986* (FBTAA 1986). Under the FBTAA 1986, an employer who provides a fringe benefit to an employee or to an associate of an employee (which includes a family member) may have a fringe benefits tax liability. Such a liability is separate from income tax and is calculated on the grossed-up taxable value of the fringe benefits provided. Switzerland taxes fringe benefits as part of the employee's employment income, but it is calculated on its market value at the employee's relevant effective cantonal tax rate.

Paragraph 4 of this Article deals with fringe benefits. In the absence of this paragraph, such benefits may be taxable in both Australia and Switzerland without the possibility of relief. This paragraph ensures that fringe benefits will only be taxable in one country, by providing that the country that would have the sole or primary taxing right if the benefit were ordinary employment income will have the sole taxing right in relation to the fringe benefit. The sole or primary taxing right over the relevant employment income would ordinarily be determined in accordance with paragraphs 1, 2 or 3 of this Article. ***[Article 15, paragraph 4]***

Definition of primary taxing right

1.214 The Article provides that the primary taxing right lies with the country that may impose tax on the relevant employment income, being tax in respect of which the other country is required to provide relief under Article 22 (*Elimination of Double Taxation*). ***[Article 15, paragraph 4]***

Example 1.5

Emilie, a Swiss resident employee of a Swiss company is sent to work in Australia. She is present in Australia for more than 183 days, and receives both employment income and fringe benefits. Under paragraph 2 of Article 15 (*Income from Employment*), Australia has the right to tax the employment income. Switzerland may also tax but, under Article 22 (*Elimination of Double Taxation*), would be obliged to give credit for the Australian tax paid on the fringe benefit if it was ordinary employment income. Therefore, Australia has the primary right to tax in these circumstances.

Definition of fringe benefit

1.215 During the course of negotiations, the delegations concluded that it was not necessary to insert a treaty meaning of the term 'fringe benefit' and that term would therefore take its ordinary domestic law meaning.

1.216 In Australia, the statutory definition of ***fringe benefit*** is set out in section 136(1) of the FBTAA 1986.

Article 16 – Directors' fees

1.217 This Article relates to remuneration received by a resident of one country in the person's capacity as a member of a board of directors of a company which is a resident of the other country. To avoid the difficulties in such cases of ascertaining the country in which a director's services are performed, and consequently where the remuneration is to be taxed, the Article provides that directors' fees may be taxed in the country of residence of the company. ***[Article 16]***

Article 17 – Entertainers and sportspersons

Personal activities

1.218 Income derived by visiting entertainers and sportspersons from their personal activities as such may be taxed in the country in which the activities are exercised, irrespective of the duration of the visit. The term 'entertainer' is intended to have a broad meaning and would include, for example, actors and musicians as well as other performers whose activities have an entertainment character, such as comedians, talk show hosts and participants in chess tournaments. The Article may also apply to income received from activities which involve a political, social, religious or charitable nature, if an entertainment character is present.

1.219 In relation to sportspersons, it is understood that the term is not restricted to participants in traditional athletic events. It also covers, for example, golfers, jockeys, footballers, cricketers and tennis players as well as racing drivers.

1.220 The application of this Article also extends to income derived indirectly by an individual entertainer or sportsperson. For example, amounts generated from promotional and associated kinds of activities engaged in by the entertainer or sportsperson while present in the visited country. ***[Article 17, paragraph 1]***

Safeguard

1.221 Income in respect of personal activities exercised by an entertainer or sportsperson, where derived by another person (for example, a separate enterprise which formally enters into the contractual arrangements relating to the provision of the entertainer's or sportsperson's services), may be taxed in the country in which the entertainer or sportsperson performs, whether or not that other person has a permanent establishment or fixed base in that country. ***[Article 17, paragraph 2]***

1.222 Reflecting Switzerland's reservation on Article 17 of the OECD Model, source country taxation of income derived by such a separate person shall not apply if neither the entertainer or the sportsperson, or persons related to the entertainer or sportsperson participated directly or indirectly in the profits of that separate person.

Exception for activities supported wholly or substantially from public funds

1.223 Income derived by an entertainer or sportsperson from their personal activities, which would be ordinarily taxable in the country of performance under paragraph 1 and 2 of this Article, will be taxable only in the entertainer or sportsperson's country of residence where the activities are supported wholly or substantially from public funds of the country of residence, including any of its political subdivisions or local authorities. This would apply, for example, to State-funded cultural activities performed by visiting entertainers. ***[Article 17, paragraph 3]***

Article 18 – Pensions

General scope

1.224 Pensions, social security payments and annuities will be taxed only in the country of residence of the recipient.

1.225 This is subject to the condition, however, that the recipient is liable to tax on such income in their country of residence. If the recipient is not so liable, the country from which the relevant payments were made may tax the income. ***[Article 18, paragraph 1]***

1.226 The application of this Article extends to pensions and annuities made to dependants, for example, a widow, widower or children of the person in respect of whom the pension, annuity or periodic remuneration entitlement accrued where, upon that person's death, such entitlement has passed to that person's dependants.

1.227 This Article will not apply to pensions and similar remuneration paid by government bodies, or paid from public funds, to individuals in respect of past government services. Such payments are dealt with under Article 19 (*Government service*). ***[Article 18, paragraph 1]***

1.228 Lump sums paid under a pension scheme, or in consequence of retirement, invalidity, disability or death, or by way of compensation for injuries may be taxed in the country in which the lump sums arose (in addition to the country of residence of the recipient). ***[Article 18, paragraph 2]***

1.229 The term ***annuity*** means a stated sum payable periodically at stated times during life or during a specified or ascertainable period of

time under an obligation to make the payments in return for adequate and full consideration in money or money's worth. ***[Article 18, paragraph 3]***

1.230 The term pension scheme is defined in Article 3 of the Swiss Convention. For the purposes of paragraph 2 of Article 18, in respect of payments arising in Australia, a pension scheme includes a retirement savings account and a payment by the Commissioner under the *Superannuation (Unclaimed Money and Lost Members) Act 1999* shall be treated as a lump sum paid under a pension scheme. ***[Protocol, paragraph 11]***

Article 19 – Government service

Salary and wage income

1.231 Salary, wages and other remuneration income, other than government service pensions and other similar remuneration, paid to an individual for services rendered to a government (including a political subdivision or local authority) of one of the countries, will be taxed only in that country. However, such remuneration will be taxable only in the other country if the services are rendered in that other country and;

- the recipient is a resident of, and a national of, that other country; or
- the recipient is a resident of that other country and did not become a resident of that other country solely for the purpose of rendering the services (for example, if the recipient was a permanent resident of that other country prior to rendering the services).

[Article 19, paragraph 1]

Pensions and other similar remuneration

1.232 Pensions or similar remuneration paid by one of the countries, or out of funds created by that country, to an individual in respect of government services rendered to it will be taxable only in that country (the source country), unless the recipient is a resident of, and a national of, the other country and is not a national of the source country. If the recipient is a resident of, and a national of the other country (the residence country), and is not a national of the source country, the income will be taxable exclusively in the residence country. ***[Article 19, subparagraphs 2a) and b)]***

1.233 The term ***pensions and other similar remuneration*** includes both periodic payments and lump sum payments. ***[Protocol, paragraph 12]***

Business income

1.234 Remuneration paid in respect of services rendered in connection with a business carried on by any governmental authority referred to in paragraph 1 of this Article is excluded from the scope of the Article. Such remuneration will remain subject to the provisions of Article 15 (*Dependent Personal Services*), Article 16 (*Directors' Fees*), Article 17 (*Entertainers and Sportspersons*) or Article 18 (*Pensions*). ***[Article 19, paragraph 3]***

Article 20 – Students

Exemption from tax

1.235 This Article applies to students or business apprentices who are temporarily present in one of the countries solely for the purpose of their education or training if they are, or immediately before the visit were, a resident of the other country. In these circumstances, payments from abroad received by the students or business apprentices solely for their maintenance, education or training will be exempt from tax in the country visited. This will apply even though the student or business apprentice may qualify as a resident of that country during the period of their visit.

1.236 The exemption from tax provided by the visited country extends to maintenance payments received by the student or apprentice that are made for maintenance of dependent family members who have accompanied the student or apprentice to the visited country. ***[Article 20]***

Employment income

1.237 Where a Swiss student visiting Australia solely for educational purposes undertakes any employment in Australia, for example:

- some part-time work with a local employer; or
- during a semester break undertakes work with a local employer,

the income earned by that student as a consequence of that employment may, as provided for in Article 15 (*Dependent Personal Services*), be subject to tax in Australia.

1.238 For business apprentices, this Article only applies where the apprentice's remuneration consists solely of subsistence payments to cover training or maintenance. Remuneration for service, that is, salary equivalents, fall for consideration under Article 15 (*Dependent Personal*

Services), as will any income derived from employment with a local employer.

1.239 In the case of a Swiss business apprentice visiting Australia solely for training purposes, it may therefore be necessary to distinguish between remuneration for services and a payment for the apprentice's maintenance, education or training. The quantum of the payment will be relevant in such cases.

1.240 A payment for maintenance, education or training would not be expected to exceed the level of expenses likely to be incurred to ensure the student or business apprentice's maintenance, education or training (that is, a subsistence payment). On the other hand, if the remuneration is similar to the amounts paid to persons who provide similar services that are not business apprentices (that is, a salary equivalent), this would generally indicate that the payments constitute income from employment that would fall for consideration under Article 15 (*Dependent Personal Services*). Likewise, if that business apprentice undertakes any other employment in Australia, the income earned from that employment may be subject to tax in Australia in accordance with Article 15.

1.241 In these situations, the payments received from abroad for the student or business apprentice's maintenance, education or training will not be taken into account in determining the tax payable on the employment income that is subject to tax in Australia. No Australian tax would be payable on the employment income if the student qualifies as a resident of Australia during the visit and the taxable income of the student does not exceed the tax-free threshold applicable to Australian residents for income tax purposes.

Article 21 – Source of income

1.242 Consistent with Australia's treaty practice, this Article effectively deems income, profits or gains derived by a resident of a country which, in accordance with the Swiss Convention, may be taxed in the other country, to have a source in that other country for the purposes of the law of that other country. It therefore avoids any difficulties arising under domestic law source rules in respect of the exercise by Australia of the taxing rights allocated to Australia by the Swiss Convention over income derived by residents of Switzerland.

CHAPTER 4 – RELIEF FROM DOUBLE TAXATION

Article 22 – Elimination of Double Taxation

1.243 Double taxation does not arise in respect of income flowing between Australia and Switzerland:

- Where the terms of the Swiss Convention provide for the income to be taxed in only one country; or

- Where the domestic taxation law of one of the countries exempts the income from its tax.

1.244 It is necessary, however, to prescribe a method for relieving double taxation for other classes of income, profits or gains which, under the terms of the Swiss Convention, remain subject to tax in both countries. In accordance with international practice, Australia's tax treaties provide for double tax relief to be provided by a taxpayer's country of residence by way of an exemption of the foreign income, or a credit or deduction against its tax for tax paid in the source country. This Article also reflects that approach.

Australian Method of Relief

1.245 This Article requires Australia to provide Australian residents with a credit against their Australian tax liability for Swiss tax paid under Swiss laws and in accordance with the Swiss Convention, on income which is also taxable in Australia. The term 'income' in this context is intended to have a broad meaning and includes items of profit or gains which are dealt with under the income tax law. ***[Article 22, paragraph 1]***

1.246 Australia's general foreign income tax offset rules, together with the terms of this Article and of the Swiss Convention generally, will form the basis of Australia's arrangements for relieving an Australian resident from double taxation on income, profits or gains that are also taxed in Switzerland.

1.247 Accordingly, effect is to be given to the tax credit relief obligation imposed on Australia by paragraph 1 of this Article by application of the general foreign income tax offset provisions (Division 770 of the ITAA 1997).

1.248 Dividends and branch profits derived in Switzerland by an Australian resident company that are exempt from Australian tax under the foreign source income measures (for example, sections 23AH or 23AJ of the ITAA 1936) will continue to qualify for exemption from Australian tax under those provisions. As double taxation does not arise in these cases, the credit form of relief will not be relevant.

Swiss method of relief for individuals

1.249 Generally, where a resident of Switzerland derives income which may be taxed in Australia, Switzerland will exempt the income from Swiss tax (subject to the provisions of Article 22, Paragraph 2,

subparagraph b which apply to taxes paid on dividends, interest and royalties)). ***[Article 22, subparagraph 2a)]***

1.250 Switzerland, having exempted the income from tax as described above under Article 22, paragraph 2, subparagraph a), may apply the rate of tax that would have applied if the income had not been exempted in calculating the tax on the remaining income of the resident. ***[Article 22, subparagraph 2a)]***

1.251 In order to maintain consistency with Switzerland's domestic relief provisions, Paragraph 2 of this article is divided into multiple forms of relief (exemption, credit and deduction).

1.252 In situations where a Swiss resident derives dividends, interest or royalties which may be taxed in Australia, Switzerland will provide relief, on request, to that resident. Such relief may consist of a:

- deduction from the tax on the income of that resident of an amount equal to the tax levied in Australia;
- lump sum reduction of the Swiss tax; or
- a partial exemption of such income from Swiss tax, consisting at least of the deduction of the tax levied in Australia from the gross amount of the dividends, interest or royalties.

[Article 22, subparagraphs 2b)(i) – (iii)]

1.253 Switzerland shall determine the type of relief to be afforded to Swiss residents, and regulate such relief, in accordance with its domestic provisions. ***[Article 22, subparagraph 2b)]***

Swiss method of relief for companies

1.254 A Swiss resident company that receives dividends from an Australian resident company will be entitled to the same relief from Swiss tax that would apply if the company paying the dividends were a resident of Switzerland. ***[Article 22, paragraph 3]***

CHAPTER 5 – SPECIAL PROVISIONS

Article 23 – Non-Discrimination

1.255 The Swiss Convention includes rules to prevent tax discrimination.

1.256 This article does not apply to provisions of the laws of Australia and Switzerland, which are intended to prevent tax abuse, address thin capitalisation or to ensure that effective tax collection. **[*Protocol, paragraph 13*]**

Discrimination based on nationality

1.257 This article ensures that nationals of one country are not treated less favourably than nationals of the other country in the same circumstances. This principle applies to both the taxation itself and to its administration. Accordingly, discrimination in the administration of the tax law of a country is also generally precluded. ***[Article 23, paragraph 1]***

1.258 The term national is defined in Article 3 (*General Definitions*) of the Swiss Convention and covers both an individual who is a citizen or national of one country or the other, and any legal person, company, partnership or association deriving its status as such from the laws of that country. Accordingly, a company incorporated in Australia would be a national of Australia while a company incorporated in Switzerland would be a national of Switzerland for the purposes of this paragraph. ***[Article 3, subparagraph 1(h)]***

The meaning of 'in the same circumstances' and 'in particular with respect to residence'

1.259 The expression 'in the same circumstances' refers to persons who, from the point of the application of the ordinary taxation laws, are in substantially similar circumstances both in law and in fact.

1.260 Where a person operates in an industry that is subject to government regulation such as prudential oversight, another person operating in the same industry but not subject to the same oversight, would not be considered to be in the same circumstances.

1.261 The clarification 'in particular with respect to residence' makes clear that the residence of the taxpayer is one of the factors that are relevant in determining whether taxpayers are placed in similar circumstances. This means, different treatment accorded to a Swiss resident compared to an Australian resident will not constitute discrimination for the purposes of this article. A potential breach of paragraph 1 will only occur if two persons who are residents of the same country are treated differently solely by reason of one being a national of Australia and the other a national of Switzerland, or vice versa.

The meaning of 'other or more burdensome'

1.262 'More burdensome' taxation refers to the quantum of taxation while 'other' taxation may refer to some form of income tax other than the form of tax to which a national of the country is subject (*Woodend Rubber Co. v Commissioner of Inland Revenue [1971] A.C. 321 at 332*).

1.263 The phrase 'other or more burdensome' taxation is also applicable to the administrative or compliance requirements that a taxpayer may be called upon to meet where those requirements differ based on nationality.

Non-residents of Australia and Switzerland

1.264 Consistent with paragraph 1 of Article 24 (*Non-discrimination*) of the OECD Model, paragraph 1 of this Article applies to persons who are neither residents of Australia nor Switzerland. Consequently, residents of third countries who are nationals of either Australia or Switzerland are able to seek the benefits of this provision. Paragraph 1 does not, however extend to residents of either country who are not 'nationals' (as defined in subparagraph h) of paragraph 1 of Article 3 (*General Definitions)*) of either country.

Non-discrimination and permanent establishments

1.265 The tax on permanent establishments of the other country will not be levied less favourably than on the country's own enterprises carrying on the same activities in similar circumstances. This applies to all residents of a treaty country, irrespective of their nationality, who have a permanent establishment in the other country ***[Article 23, paragraph 2]***

1.266 For this paragraph to apply, the enterprises of both States must be 'in similar circumstances'. Therefore the comparison must be made between a permanent establishment and local enterprises which are not only carrying on the same activities but are also carrying on those activities 'in similar circumstances'. This is to address situations where resident and non-resident enterprises may be carrying on the same activities but the circumstances in which they do so are very different. For example, one may be conducting dealings on a non-arm's-length basis and the other on an arm's-length basis. This provision recognises that appropriate differences in taxation treatment are not precluded because of the differing circumstances.

1.267 Permanent establishments of non-resident enterprises may be treated differently from resident enterprises as long as the treatment does not result in more burdensome taxation for the former as opposed to the latter. That is, a different mode of taxation may be adopted with respect

to non-resident enterprises, to take account of the fact that they often operate in different conditions to resident enterprises. The provision would not affect, for example, domestic law provisions that tax a non-resident by withholding, provided that calculation of the tax payable is not greater than that applying to a resident taxpayer.

1.268 In determining whether taxation has been less favourably levied, regard would be had only to the rules applicable to the taxation of the permanent establishment's own activities, and how those rules compare with those applicable to the taxation of similar activities carried on by a local enterprise. As noted in paragraph 41 of the Commentary on Article 24 (*Non-discrimination*) of the OECD Model, the equal treatment principle in this paragraph 'does not extend to rules that take account of the relationship between an enterprise and other enterprises (for example, rules that allow consolidation, transfer of losses or tax-free transfers of property between companies under common ownership), since the latter rules do not focus on the taxation of an enterprise's own business activities similar to those of the permanent establishment'. Accordingly, this paragraph does not affect Australia's roll-over rules for capital gains, consolidation rules or loss transfer rules. Nor does it affect rules concerning the allowance of rebates or credits in relation to dividends, since these do not relate to the business activities of the permanent establishment.

Non-resident individuals

1.269 The non-discrimination article as it applies to permanent establishments should not be construed as obliging a country to provide residents of the other country any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.

1.270 That is, non-resident individuals do not have to be granted the personal allowances, reliefs or reductions available to residents of the two countries. This treatment means, for example, that Australia can grant certain tax offsets only to resident individuals, such as the tax offset for dependents contained in Division 13 of the ITAA 1997. It also extends to the tax-free threshold which may be considered not to be based either on civil status or family responsibilities. ***[Article 23, paragraph 2]***

Deductions for payments to foreign residents

1.271 The two countries must allow the same deductions for interest, royalties and other disbursements paid to residents of the other country as they do for payments to their own residents. However, the two countries are allowed to reallocate profits between associated enterprises on an arm's-length basis under Article 9 (*Associated enterprises*), and to limit

deductions in accordance with paragraph 8 or Article 11 (*Interest*) and paragraph 6 of Article 12 (*Royalties*). ***[Article 23, paragraph 3]***

Companies owned or controlled abroad

1.272 A country cannot give less favourable treatment to companies, the capital of which is owned or controlled, wholly or partly, directly or indirectly by one or more residents of the other country. That is Australian companies owned or controlled by Swiss residents may not be given other or more burdensome treatment than locally owned or controlled Australian companies ***[Article 23, paragraph 4]***

1.273 Differential tax treatment based on residency is not affected by this paragraph. Nor does the paragraph require the same treatment of non-resident shareholders in the company as resident shareholders. Accordingly there is no obligation under this article to allow imputation credits to non-resident shareholders.

Taxes to which this Article applies

1.274 This Article applies to taxes of every kind and description imposed on behalf of the two countries or their political subdivisions. It is intended that this Article extend to any identical or substantially similar taxes which are subsequently imposed by either country in addition to, or in place of, these taxes. For Australia, the relevant taxes include the income tax (including tax on capital gains), the fringe benefits tax and the GST. The provisions of this Article also apply to taxes imposed by the Australian states and territories.

Exclusions

1.275 Certain provisions of the law of both countries are not restricted in their application by this Article. The specific exclusion of these provisions will ensure that they can continue to operate for their intended purpose. The provisions which are not restricted by the application of this Article are those that:

- are intended to prevent tax abuse. In the case of Australia these laws include dividend stripping, transfer pricing, controlled foreign companies and transferor trust provisions. Australia's thin capitalisation rules are also explicitly excluded from the scope of the Article. Although it is commonly accepted by most OECD member countries that such provisions do not contravene *Non-discrimination* articles, this outcome is specifically provided for in the Swiss Convention.

- ensure that taxes are effectively collected or recovered. This preserves the rules relating to the enforcement and operation of the various aspects of the withholding tax provisions relating to non-residents. For example, section 26-25 (*Interest or royalty*) of the ITAA 1997 provides that where interest and royalties are paid to a non-resident and the payee fails to withhold tax, the interest or royalty expense cannot be claimed as a deduction. No similar provision exists in relation to payments from a resident to another resident.

More favourable treatment

1.276 Nothing in this Article prevents either country from treating residents of the other country more favourably than its own residents.

Article 24 – Mutual Agreement Procedure

1.277 This article provides for a procedure for resolving difficulties and disputes arising from the application of the Convention.

Consultation on specific cases

1.278 This Article provides for consultation between the competent authorities of the two countries with a view to reaching a solution in cases where a person is able to demonstrate actual or potential imposition of taxation contrary to the provisions of the Swiss Convention. ***[Article 24, paragraph 1]***

1.279 In the case of Australia the competent authority is the Commissioner or an authorised representative of the Commissioner ***[Article 3, subparagraph g)i)]***.

1.280 A person wishing to use this procedure may present a case to the competent authority of the country of which the person is a resident. If the case comes under paragraph 1 of Article 23 (*Non-discrimination*) of the Swiss Convention, the person may present the case to the competent authority of the country of which they are a national.

1.281 Presentation of the case to a competent authority must be made within three years of the first notification of the action which the person considers gives rise to taxation not in accordance with the Convention. Presentation of a case does not deprive the person of access to, or affect their rights in relation to, other legal remedies available under the domestic laws of the two countries. ***[Article 24, paragraph 1]***

1.282 If the person's claim seems to the competent authority to which the case has been presented to be justified, and that competent authority is not itself able to solve the problem, then the competent authority is required to seek to resolve the case by mutual agreement with the competent authority of the other country, with a view to avoiding taxation not in accordance with the Swiss Convention. ***[Article 24, paragraph 2]***

1.283 If, after consideration by the competent authorities, a solution is reached, it must be implemented in accordance with the provisions of the Article.

Consultation on general problems

1.284 This Article also authorises consultation between the competent authorities of the two countries for the purpose of resolving any difficulties that arise regarding the interpretation or application of the Swiss Convention. This may allow, for example, the competent authorities to agree to apply an agreed solution to a broader range of taxpayers, notwithstanding that the original uncertainty may have arisen in connection with an individual case that comes under the procedure outlined in paragraphs 1 and 2 of this Article. ***[Article 24, paragraph 3]***

Methods of communication between competent authorities

1.285 The competent authorities are permitted to communicate directly with each other without having to go through diplomatic channels. This may be done by electronic means (for example, facsimile transmission, e-mail or web conferencing), letter, telephone, direct meetings or any other convenient means. ***[Article 24, paragraph 4]***

General Agreement on Trade in Services dispute resolution process

1.286 This article also deals with disputes that may be brought before the World Trade Organisation Council for Trade in Services under the dispute resolution processes of the General Agreement on Trade in Services (GATS).

1.287 Australia and Switzerland are both parties to the GATS. Article XVII (*National Treatment*) of the GATS requires a party to accord the same treatment to services and service suppliers of other parties as it accords to its own like services and service suppliers.

1.288 Articles XXII (*Consultation*) and XXII (*Dispute Settlement and Enforcement*) of the GATS provide for discussion and resolution of disputes. Where a measure of another party falls within the scope of a tax treaty, paragraph 3 of Article XXII (Consultation) provides that the other party to the tax treaty may not invoke Article XVII (*National Treatment*).

However, if there is a dispute as to whether a measure actually falls within the scope of a tax treaty, either country may take the matter to the Council on Trade in Services for referral to binding arbitration.

1.289 This provision is based, in all essential respects, on an OECD Model commentary recommendation, and is common in recent international tax treaty practice.

Arbitration

1.290 In some instances, the competent authorities may not reach agreement on a solution to a particular case. Paragraph 5 of this Article provides for arbitration to be used to assist in resolving those cases.

1.291 Only those cases presented under paragraph 1 of this Article (that is, where a person contends that the actions of either Australia or Switzerland will result in taxation not in accordance with the Convention) are eligible. Cases which arise under paragraph 3 of this Article, for example a case involving a general difficulty in interpreting or applying the Convention, are not eligible to be resolved through this arbitration mechanism.

1.292 Cases arising under paragraph 1 can only access the arbitration mechanism if the competent authorities are unable to reach agreement within three years from when the case was first presented by the competent authority of one country to the competent authority of the other country. If the case remains unresolved after that time, the person may request that the arbitration mechanism be used. Access to arbitration in such cases is automatic: it is not subject to the specific agreement of the competent authorities.

1.293 It is not intended that the arbitration mechanism be an alternative to the mutual agreement procedure. Where the competent authorities have reached an agreement that does not leave any issues unresolved in the case, that case is not eligible for arbitration even if the taxpayer does not agree with the solution reached. However, if any issue remains outstanding so that taxation contrary to the Convention remains, the competent authorities cannot consider (either alone or together) the case resolved and refuse the person access to the arbitration mechanism.

1.294 Unlike the mutual agreement procedure, which may be invoked where a taxpayer considers that taxation not in accordance with the treaty will or *may* result, the arbitration mechanism is only available in respect of actual taxation contrary to the Convention which has resulted from the actions of Australia or Switzerland or both. This would include instances where an assessment or determination of tax has been made, or otherwise where the taxpayer has been officially notified by the revenue authorities

of Australia or Switzerland that they will be taxed on an item of income. ***[Article 25, paragraph 5]***

1.295 Further, unresolved issues cannot be submitted for arbitration if a decision on those issues has already been reserved or rendered by a court or administrative tribunal of either Australia or Switzerland. This means where a court or administrative tribunal of one of the countries has already rendered a decision that deals with those issues and applies to that person. Paragraph 5 of the Article also covers instances where a court or administrative tribunal has reserved its decision. However it is not intended that a person would be prevented from having unresolved factual issues arising in their case submitted for arbitration merely because another person is pursuing appeals through the domestic courts on similar issues.

1.296 Paragraph 5 provides that unless a person directly affected by the case rejects the arbitration decision, or the competent authorities and that person agree on a different solution within six months of the notification of the arbitration decision, the arbitration decision is binding on both Australia and Switzerland. Further, the two countries are obliged to implement the decision notwithstanding any time limits contained in their respective domestic laws. ***[Article 24, paragraph 5]***

1.297 The operational rules and procedures of the arbitration mechanism will be agreed by the competent authorities of Australia and Switzerland. ***[Article 24, paragraph 5]***

1.298 Paragraph 6 of this Article authorises Australia and Switzerland to release any information to the arbitration board that is necessary for carrying out the arbitration procedure. The confidentiality rules contained in Article 25 (*Exchange of information*) will apply to that information and to the arbitration board. ***[Article 24, paragraph 6]***

Article 25 – Exchange of information

General scope

1.299 The Swiss Convention allows for the competent authorities to exchange information on a wide range of taxes and irrespective of whether the country from which the information was requested has a domestic tax interest in the information sought. The information that may be exchanged does not have to concern a resident of either Australia or Switzerland.

1.300 Article 25 authorises and limits the exchange of information by the competent authorities to information that is foreseeably relevant to carrying out the provisions of the Conventions or to the administration

and enforcement of the two countries domestic tax laws. ***[Article 25, paragraph 1]***

1.301 During the negotiations, the delegations agreed, consistent with Switzerland's treaty practice, not to make reference to the prevention of fiscal evasion in the title or preamble of the Swiss Convention. The delegations noted, however, that this omission would not restrict the application of the Convention to the exchange of information in fiscal evasion cases.

Foreseeably relevant information

1.302 The standard of foreseeable relevance is intended to ensure that information may be exchanged to the widest possible extent. However, the competent authorities are not entitled to request information from the other country which is unlikely to be relevant to the tax affairs of a taxpayer, or the administration and enforcement of tax laws. ***[Article 25, paragraph 1]***

Taxes to which this Article applies

1.303 Under the Swiss Convention, the Australian competent authority can request and obtain information concerning all federal taxes administered by the Commissioner from the Swiss competent authority. This means, for example, that information concerning Australia's GST may be requested and obtained from Switzerland.

1.304 Conversely, the Swiss competent authority can request and obtain information from the Australian competent authority concerning taxes of every kind and description imposed under Switzerland's domestic law. ***[Article 25, paragraph 1]***

1.305 It is intended that the Article extend to any identical or substantially similar taxes which are subsequently imposed by either country in addition to, or in place of, these taxes.

Use of exchanged information

1.306 The purposes for which the exchanged information may be used and the persons to whom it may be disclosed are restricted in a manner which is consistent with the approach taken in the OECD Model. This includes the use of information for other (that is, non-tax) purposes when such use is authorised by the competent authority of the supplying country.

1.307 Any information received by a country must be treated as a secret in the same manner as information obtained under the domestic law

of that country, and can only be disclosed to the persons identified in paragraph 2 of the Article. ***[Article 25, paragraph 2]***

No domestic tax interest required

1.308 When requested, a country is required to obtain information in the same manner as if it were administering its domestic tax system, notwithstanding that the country may not require the information for its own tax purposes. Australia would recognise this obligation to obtain relevant information for its treaty partners even in the absence of a specific provision to this effect. ***[Article 25, paragraph 4]***

Limitations

1.309 The country requested to provide information under this Article is not obliged to do so where:

- it would be required to carry out administrative measures at variance with the laws and administrative practice of Australia or Switzerland;
- such information is not obtainable under the domestic law or in the normal course of administration of Australia or Switzerland;
- the disclosure of the information would disclose any trade, business, industrial, commercial or professional process; or
- the disclosure of the information would be contrary to public policy.

[Article 25, subparagraphs 3a), b) and c)]

Information held by banks and other financial institutions or nominees

1.310 Paragraph 5 of this Article ensures that the limitations to information exchange contained in paragraph 3 cannot be used to prevent the supply of information solely because the information is held by a bank, other financial institution, a nominee a person acting in a fiduciary capacity or because it relates to ownership interests in a person. This is consistent with Article 26 (*Exchange of Information*) of the OECD Model. ***[Article 26, paragraph 5]***

1.311 In making a request for information, the competent authority of the requesting country will be required to provide certain information to the other competent authority. This includes the identity of the person under examination or investigation, the time period for which the information is requested, a statement as to the information sought, the tax

purpose for which the information is sought and details (if known) of any persons believed to possess the information. ***[Protocol, subparagraph 14b)]***

1.312 The Swiss Convention does not restrict the possible methods of exchanging information, but it does not require the Contracting states to exchange information on an automatic or spontaneous basis. ***[Protocol subparagraph 14c)].***

1.313 In addition, any domestic procedures or rights afforded to taxpayers under the laws of a country, for example a right of a person to be notified about an information request, will continue to apply as long as they are not used to prevent or unduly delay the exchange of information process. ***[Protocol, paragraph 14d)]***

Article 26 - Members of diplomatic missions and consular posts

1.314 The purpose of this Article is to ensure that the provisions of the Swiss Convention do not result in members of diplomatic missions or consular posts receiving less favourable treatment than that to which they are entitled in accordance with international conventions. Such persons are entitled, for example, to certain fiscal privileges under the *Diplomatic Privileges and Immunities Act 1967* and the *Consular Privileges and Immunities Act 1972* which reflect Australia's international diplomatic and consular obligations. ***[Article 26, paragraph 1]***

1.315 Under this Article, an individual who is a member of a diplomatic mission, consular post or permanent mission of a country that is situated in the other country will be deemed to be residents of the sending country if.

- in accordance with international law the individual is not liable to tax in the receiving country in respect of income sourced outside that country; and
- the individual has the same obligations in the sending country, with regard to tax on their total income, as residents of that country. ***[Article 26, paragraph 2]***

1.316 The Swiss Convention will not apply to international organisations or their organs or officials, or to members of a diplomatic mission, consular post or permanent mission of a third country, that are present in Australia or Switzerland and which are not treated as residents of Australia or Switzerland. ***[Article 26, paragraph 3]***

Article 27 – Entry into force

1.317 This Article provides for the entry into force of the Swiss Convention. The Convention will enter into force on the last date on which diplomatic notices are exchanged notifying that the relevant legal procedures in the respective countries have been completed. ***[Article 27, paragraph 1]***

1.318 In Australia, enactment of the legislation giving the force of law in Australia to the Swiss Convention, along with tabling the Convention in Parliament, are prerequisites to the exchange of diplomatic notes.

Date of Application for Australian Taxes

Fringe benefits tax

1.319 The Swiss Convention will apply in Australia in respect of fringe benefits provided on or after 1 April next following the date on which the Convention enters into force. ***[Article 27, subparagraph 2 a)(i)]***

Withholding tax

1.320 The Swiss Convention will apply in Australia in respect of withholding tax on income that is derived by a resident of Switzerland, in relation to income derived on or after 1 January following the date on which the Convention enters into force. ***[Article 27, subparagraph 2 a)(ii)]***

Income tax

1.321 The Swiss Convention will apply to Australian income tax in respect of any year of income beginning on or after 1 July following the date on which the Convention enters into force.

Date of Application for Swiss Taxes

Withholding tax on source income

1.322 The Swiss Convention will apply to tax withheld at source on amounts paid or credited on or after 1 January following the entry into force of the Convention. ***[Article 27, subparagraph 2 b)(i)]***

Other Swiss taxes

1.323 The Swiss Convention will apply to other Swiss taxes for taxation years beginning on or after 1 January following the entry into force of the Convention. ***[Article 27, subparagraph 2b)ii)]***

Exchange of information

1.324 With regard to Article 25 (*Exchange of information*), the exchange of information, the Swiss Convention will apply to information relating to taxation or business years in course on, or beginning on or after, 1 January following the entry into force of the Convention. ***[Article 27, subparagraph 2b) iii)]***

Preceding Convention

Termination of the Agreement between Australia and Switzerland for the avoidance of double taxation with respect to taxes on income, with Protocol of 1980

1.325 The existing tax treaty between Australia and Switzerland and its Protocol (which were signed in1980) will terminate upon entry into force of the Swiss Convention. The provisions of the existing treaty will however continue to have effect for taxable years and periods which expired prior to time at which the provisions of the Swiss Convention become effective. ***[Article 27, paragraph 3]***

Article 28 – Termination

1.326 The Swiss Convention will continue in effect until terminated. Either country may terminate the Convention by giving notice of termination at least six months before the end of any calendar year. Termination is by notice through the diplomatic channel.

Cessation

1.327 In the event of termination of the Swiss Convention, it would cease to be effective in respect of withholding taxes paid after 1 January following the notice of termination. ***[Article 28, paragraph a)]***

1.328 In the event of termination, the Swiss Convention would cease to be effective in respect of other taxes for taxation years beginning on or after 1 January following the notice of termination. ***[Article 28, paragraph b)]***

Denial of benefits

1.329 A general integrity rule will apply to deny treaty benefits in cases involving treaty abuse. Unlike corresponding rules in other Australian treaties, this rule will apply generally and is not limited to specific articles such as Articles 10 (*Dividends*), 11 (*Interest*) or 12 (*Royalties*).

1.330 The benefits of the Swiss Convention will not apply if it was one of the principle purposes of any person concerned with the creation or assignment of the property or right in respect of which the income is paid, or if a person has become a resident of a country, to take advantage of the provisions of the Convention by means of such creation, assignment or residence. ***[Protocol, paragraph 1]***

Chapter 2
Amendments to the International Tax Agreements Act 1953

Part 1: Amendments in relation to the Swiss Convention

2.1 Part 1 of Schedule 1 of this Bill amends the *International Tax Agreements Act 1953* (Agreements Act 1953) to give the force of law in Australia to the *Convention between Australia and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, with Protocol* (the Swiss Convention), which was signed in Sydney on 30 July 2013.

2.2 Part 1 of Schedule 1 prescribes the Swiss Convention as an agreement that is to have the force of law according to its terms. ***[Schedule 1, item 4, Agreements Act 1953 subsection 5(1)]***

2.3 Part 1 also provides that the *Agreement between Australia and Switzerland for the Avoidance of Double Taxation with respect to Taxes on Income*, and its *Protocol* (Swiss 1980 Agreement), which entered into force on 13 February 1981, continue to have the force of law for transitional purposes (see paragraph **Error! Reference source not found.**). ***[Schedule 1, items 6 and 7, Agreements Act 1953 section 11E]***

Consequential amendments

2.4 New definitions are created to refer to the Swiss Convention and the Swiss 1980 Agreement. ***[Schedule 1, items 2 and 3, Agreements Act 1953 subsections 3AAA(1) and 3AAB(1)]***

2.5 The current definition for the Swiss 1980 Agreement, the 'Swiss agreement, is repealed. ***[Schedule 1, item 1, Agreements Act 1953 subsection 3AAA(1)]***

2.6 A minor amendment is also made to include a note to section 5A. Section 5A provides that a number of past agreements continue to have the force of law. The note informs the reader that some earlier agreements may continue to have force of law because of other provisions of the Act, i.e. the Swiss 1980 agreement under section 11E. ***[Schedule 1, item 5, Agreements Act 1953 subsection 3AAA(1)]***

Part 2: Minor Amendments to the Agreements Act 1953

2.7 Part 2 of Schedule 1 makes a number of minor amendments to the Agreements Act 1953.

2.8 An amendment is made to clarify that any reference, in an international agreement, to the concept of 'immovable property' having its Australian domestic law meaning, includes a reference to real property. ***[Schedule 1, item 8, Agreements Act 1953 subsection 3(5)]***

2.9 This amendment will apply to the reference to immovable property in Article 6 of the Swiss Convention (see paragraphs **Error! Reference source not found.** to **Error! Reference source not found.**). It is also intended that the amendment will apply to any future agreements that use the same concept.

2.10 None of Australia's current international agreements use the term 'immovable property' exclusively.

2.11 Part 2 of Schedule 1 also makes a number of minor amendments to add notes containing the Australian Treaty Series citations for a number of recently enacted agreements. ***[Schedule 1, items 9 to 12, Agreements Act 1953 subsection 3AAA(1)]***