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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

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INTERNATIONAL TAX AGREEMENTS AMENDMENT BILL 2016

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EXPLANATORY MEMORANDUM

(Circulated by authority of the  
Treasurer, the Hon Scott Morrison MP)



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## **Glossary**

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

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
Agreements Act 1953	<i>International Tax Agreements Act 1953</i>
CGT	capital gains tax
German 1972 agreement	<i>Agreement between the Commonwealth of Australia and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital and to Certain Other Taxes and Protocol, signed at Melbourne on 24 November 1972.</i>
German agreement	<i>Agreement between Australia and the Federal Republic of Germany for the Elimination of Double Taxation with respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance and Protocol, signed at Berlin on 12 November 2015.</i>
Germany	The Federal Republic of Germany
FBTAA 1986	<i>Fringe Benefits Tax Assessment Act 1986</i>
GATS	General Agreement on Trade in Services
GST	goods and services tax
ITAA 1936	<i>Income Tax Assessment Act 1936</i>
ITAA 1997	<i>Income Tax Assessment Act 1997</i>
OECD	Organisation for Economic Cooperation and Development
OECD Model	<i>Organisation for Economic Cooperation and Development Model Tax Convention on Income and on Capital</i>
PE	permanent establishment
TAA 1953	<i>Tax Administration Act 1953</i>
United Kingdom convention	<i>Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains, signed at Canberra on 21 August 2003</i>



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## ***General outline and financial impact***

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### **German agreement**

Schedule 1 to this Bill amends the *International Tax Agreements Act 1953* (Agreements Act 1953) to give the force of law in Australia to the *Agreement between Australia and the Federal Republic of Germany for the Elimination of Double Taxation with respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance* and its Protocol (the German agreement), which were signed in Berlin on 12 November 2015.

***Date of effect:*** The German agreement must first enter into force. For entry into force, Australia and Germany must exchange instruments of ratification on the completion of the necessary implementing domestic procedures. Once the German agreement enters into force, it will take effect in Australia in three stages, namely:

- in respect of withholding tax on income that is derived by a non-resident, in relation to income derived on or after 1 January next following entry into force;
- in respect of fringe benefits tax, in relation to fringe benefits provided on or after 1 April next following entry into force;
- in respect of other Australian tax, in relation to income, profits or gains of any year of income beginning on or after 1 July next following entry into force.

***Proposal announced:*** The Government announced negotiations to update the existing tax treaty between Australia and Germany in a joint Media Release by the then Treasurer and the Minister for Finance on 16 June 2015 ('Beginning tax treaty negotiations with Germany'). Signature of the German agreement was announced in a joint Media Release by the Treasurer and the Minister for Finance on 13 November 2015 ('New tax treaty signed with Germany').

***Financial impact:*** [to be inserted].

***Human rights implications:*** This Bill engages and is compatible with human rights. See *Statement of Compatibility with Human Rights* — Chapter 2, paragraphs 2.1 to 2.28.

***Compliance cost impact:*** The text of the German agreement is broadly consistent with international norms and no significant additional compliance costs are expected to result from its entry into force.



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# **Chapter 1. The Australia-Germany agreement**

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## **Outline of chapter**

1.1. Schedule 1 to this Bill amends the *International Tax Agreements Act 1953* (Agreements Act 1953) to give the force of law in Australia to the *Agreement between Australia and the Federal Republic of Germany for the Elimination of Double Taxation with respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance* and its Protocol (the German agreement), which were signed in Berlin on 12 November 2015.

## **Context of amendments**

1.2. The German agreement was signed in Berlin on 12 November 2015. Once in force, it will replace the *Agreement between the Commonwealth of Australia and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital and to Certain Other Taxes* and its Protocol (the German 1972 agreement), which entered into force on 15 February 1975.

1.3. The German agreement modernises the bilateral tax arrangements between Australia and the Federal Republic of Germany (Germany) for the purpose of eliminating double taxation. It also aims to prevent fiscal evasion and avoidance, through the inclusion of a range of integrity provisions and by enabling the respective tax authorities to exchange taxpayer information and provide mutual assistance to each other in the collection of both countries' outstanding tax debts. It broadly follows the Organisation for Economic Cooperation and Development (OECD) *Model Tax Convention on Income and on Capital* (OECD Model) and, in doing so, broadly reflects current Australian and international tax policy settings.

1.4. Accordingly, the German agreement establishes greater legal and fiscal certainty within which cross-border trade and investment between Australia and Germany can be carried on and promoted.

## **Tax evasion and avoidance**

1.5. Australia is a longstanding supporter of international cooperation to prevent tax evasion and avoidance. This Bill reinforces Australia's support for international tax transparency and cooperation between revenue authorities to help prevent tax evasion and avoidance and improve global tax compliance. This is consistent with ongoing international efforts to improve tax system integrity.

1.6. As a member of both the G20 and the OECD, Australia has committed to the implementation of the OECD/G20 *Base Erosion and Profit Shifting Project* (the BEPS Project).

1.7. The BEPS Project 2015 Final Reports on:

- *Action 2 (Neutralising the Effects of Hybrid Mismatch Arrangements)*,
- *Action 6 (Preventing the Granting of Treaty Benefits in Inappropriate Circumstances)*,
- *Action 7 (Preventing the Artificial Avoidance of Permanent Establishment Status)* and
- *Action 14 (Making Dispute Resolution Mechanisms More Effective)*

recommended a range of integrity provisions be adopted in bilateral tax treaties to address base erosion and profit shifting practices, as well as other treaty provisions intended to make tax treaty dispute resolution mechanisms more effective. Several of these recommended treaty provisions form part of the new minimum standards on treaty shopping (intended to put an end to the use of conduit companies to channel investments) and effective mutual agreement procedures (intended to ensure that the fight against double non-taxation does not result in double taxation) to which OECD and G20 countries have committed.

1.8. The German agreement includes the treaty provisions which form part of the minimum standards for protecting against treaty shopping (included in the Action 6 2015 Final Report) and ensuring effective mutual agreement procedures (included in the Action 14 2015 Final Report), as well as many of the other treaty provisions recommended in the 2015 Final Reports on Actions 2, 6, 7 and 14.

1.9. The following table summarises the provisions of the German agreement that reflect BEPS Project treaty recommendations.

<i>German agreement provisions</i>	<i>BEPS Project 2015 Final Reports</i>
Title	Action 6
Preamble	Action 6
Paragraph 2 of Article 1 ( <i>Persons Covered</i> )	Action 2
Paragraphs 5, 6, 7, 9, 10 and subparagraph 8(a) of Article 5 ( <i>Permanent Establishment</i> )	Action 7
Paragraph 8 of Article 7 ( <i>Business Profits</i> )	Action 14
Paragraphs 2 and 3 of Article 9 ( <i>Associated Enterprises</i> )	Action 14
Subparagraph 2(a) and paragraph 3 of Article 10 ( <i>Dividends</i> )	Action 6
Paragraph 4 of Article 13 ( <i>Alienation of Property</i> )	Action 6
Paragraph 2 of Article 23 ( <i>Limitation of Benefits</i> )	Action 6
Paragraphs 1, 2, 3 and 5 of Article 25 ( <i>Mutual Agreement Procedure</i> )	Action 14

## Double taxation

1.10. Australia and Germany, like most countries, tax income on both a ‘source’ and ‘residence’ basis. For example, Australia usually taxes Australian residents on income from both domestic and foreign sources, and only taxes non-residents on domestic source income.

1.11. Double taxation is generally due to residence-source jurisdictional conflicts. This occurs when a person who is resident in one country derives income from another. Consider the example of a business that has a branch in another country. The residence country (the country in which the business is resident) exercises its residence jurisdiction and taxes the foreign branch income. The source country (the country in which the branch is carrying on business) exercises its source jurisdiction and also taxes the income made by the foreign branch. This results in the business paying tax on the same income twice.

1.12. Double taxation can also occur where both countries classify a person as their own resident, consider the same income to have a source in their jurisdiction, or consider the same income to have been derived by different taxable entities.

1.13. Under the German agreement, Australia and Germany agree to restrict their respective taxing rights to avoid double taxation. Taxing rights are ‘allocated’ over different categories of income including business profits, dividends, interest, royalties and pensions.

1.14. The German agreement also provides for relief from double taxation where both countries have a right to tax the same income, and for the resolution of disputes where the two countries attempt to tax the same income.

### **Purpose of the amendments**

1.15. This Bill will give the German agreement the force of law in Australia.

1.16. The German agreement governs when it will enter into force, binding Australia and Germany. However, despite this entry into force for international law purposes, the German agreement will not be enforceable as part of Australia’s domestic law unless and until it is given effect by an Act of Parliament. This Bill therefore provides for the German agreement to have the force of law in Australia.

### **Summary of new law**

1.17. This Bill amends the *International Tax Agreements Act 1953* (the Agreements Act 1953) to give the German agreement the force of law in Australia. It also makes consequential and technical amendments relating to international tax agreements.

1.18. The main features of the German agreement are as follows:

- The express purpose of the German agreement is to eliminate double taxation with respect to taxes on income and on capital without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the German agreement for the indirect benefit of residents of a third country). *[Preamble]*
- Treaty benefits will be available for income (including profits or gains) derived by or through fiscally transparent entities or arrangements but only to the extent that the income is treated as the income of a resident of one of the

countries under that country's domestic law. *[Article 1, paragraph 2]*

- The German agreement applies to taxes on income, as well as German taxes on capital. Certain existing taxes imposed by each country are explicitly covered. Australian federal taxes covered are income tax, fringe benefits tax and resource rent taxes. German taxes explicitly covered, including German federal taxes and those German taxes imposed on behalf of Germany's States, political subdivisions or local authorities, are income tax, corporate income tax, trade tax and capital tax including supplements levied thereon. *[Article 2]*
- The German agreement also applies to any identical or substantially similar taxes to the existing taxes imposed under a federal law of Australia or the law of Germany that are imposed after the signing of the German agreement. *[Article 2, paragraph 4]*
- The definitions used throughout the treaty have been modernised, including the definition of 'Australia' *[Article 3]*
- Dual resident individuals (for example, individuals who are residents of both Australia and Germany according to the domestic taxation laws of each country) are, in accordance with the specified criteria, to be treated for the purposes of the German agreement 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, the German agreement deems the entity to be a resident of the country in which its place of effective management is situated. In instances where the place of effective management for dual resident entities cannot be determined or is in neither country, a mutual agreement procedure will apply to determine the treaty residence, with the benefits of the German agreement denied in the absence of such mutual agreement. *[Article 4, paragraphs 2 and 3]*
- Prescribed treaty benefits will also be available for certain widely-held Australian and German collective investment vehicles. *[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 German residents from natural resource activities and the operation of substantial equipment in Australia. New rules will apply to prevent enterprises artificially avoiding permanent establishment status. These include new integrity provisions to prevent related enterprises from circumventing the permanent establishment time thresholds by splitting contracts and to prevent an enterprise or its closely related enterprises fragmenting activities to avoid having a permanent establishment. *[Article 5]*

- Income from immovable property (including income from agriculture or forestry) may be taxed by the country in which the property is situated. *[Article 6]*
- Business profits are generally taxable 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 a German resident who is beneficially entitled to a share of business profits of an enterprise carried on through a permanent establishment in Australia by the trustee of a trust estate (other than a trust estate that is treated as a company for tax purposes). Adjustments to profits attributable to an Australian or German permanent establishment may only be made, generally, within ten years after the end of the taxable year in which the profits would have been attributable to the permanent establishment. *[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. However, profits derived from the operation of ships or aircraft, to the extent that they relate to operations that are confined solely to places in the other country, may be taxed in the other country. *[Article 8]*
- Profits of associated enterprises may be adjusted by the Australian and German taxation authorities where transactions have been entered into on terms other than at arm's length. The ability to make adjustments is generally limited to ten years from the end of the taxable year in which the profits would have accrued to the enterprise. *[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 source country taxation on dividends:
  - No source country tax is payable on intercorporate dividends where the beneficial owner of those dividends is a company (other than partnership) that is a resident of the other country which holds directly at least 80 per cent of the voting power of the paying company throughout a 12 month period, subject to certain conditions. *[Article 10, paragraph 3]*
  - A 5 per cent limitation applies to intercorporate dividends where the beneficial owner of those dividends is a company (other than a partnership) that is a resident of the other country that holds directly at least 10 per cent of the voting power of the company paying the dividends throughout a specified 6 month period. *[Article 10, subparagraph 2(a)]*
  - A 15 per cent limitation applies to all other dividends. *[Article 10, subparagraph 2(b)]*
- 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 bodies exercising governmental functions and banks performing central banking functions; *[Article 11, subparagraph 3(a)]*; and
  - financial institutions that are unrelated to and dealing wholly independently with the payer, subject to certain conditions. *[Article 11, subparagraph 3(b)]*
- With respect to royalties, the rate limit on source country taxation is 5 per cent. 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, paragraphs 2 and 3]*

- Income, profits or gains from the alienation of immovable property may be taxed by the country in which the property is situated. This is also the case for shares or comparable interests that derive more than 50 per cent of their value from immovable property. *[Article 13, paragraphs 1 and 4]*
- There are also rules on income, profits or gains from the alienation of movable property that is the business property of a permanent establishment or of the permanent establishment itself. Such income, profits or gains may also be taxed by the country in which the permanent establishment is located. *[Article 13, paragraph 2]*
- Income, profits or gains derived by an enterprise of a country on alienation of ships or aircrafts and related movable property is only taxable in that country. *[Article 13, paragraph 3]*
- Both countries may tax capital gains of former resident individuals in certain circumstances. *[Article 13, paragraphs 6 and 7]*
- All other capital gains are taxable only in the country of residence of the alienator. *[Article 13, paragraph 5]*
- Income from employment (that is, salaries, wages and other similar remuneration) will generally be taxable in the country where the employment is exercised. However, where the employment is exercised during certain short visits to one country by a resident of the other country, the income is taxable only in the country of residence. Fringe benefits will be taxable only in the country which has the sole or primary taxing right in respect of income from the employment to which the fringe benefit relates. *[Article 14]*
- Directors' fees and other similar payments derived by a resident of one country in that person's capacity as a director of a company which is a resident of the other country may be taxed in that other country. *[Article 15]*
- Income derived by entertainers and sportspersons from the person's personal activities in that capacity may be taxed by the country in which the activities are performed. However, where the person's visit to a country in which the activities are performed is wholly or mainly supported by public funds of the other country of which the person is a resident,



the income will be taxable only in the country in which the entertainer or sports person is a resident. *[Article 16]*

- Pensions, social security payments and annuities generally will be taxable only in the country of residence of the recipient. However, there are specific rules under which certain pensions, social security payments and annuities may also be taxed in the source country. Additionally, certain compensation payments (which are exempt from tax in the country making the payment) will also be exempt from tax in the country of residence of the recipient. Alimony or similar payments are taxable only in the country in which they arise. *[Article 17]*
- As a general rule, salaries, wages and similar remuneration (other than a pension) from government service will be taxable only by the country to which the services were rendered. However, the income will be taxable only in the other country if the services are rendered in that other country by an individual that is both a resident and a national of that other country or who became a resident of that other country for reasons other than solely to render the services. *[Article 18, paragraph 1]*
- Government service pensions will be taxable only in the country to which the services were rendered unless the individual is both a resident and a national of the other country, in which case the pension will be taxable only in the country of residence of the recipient. *[Article 18, paragraph 2]*
- These rules also extend to the payment of such income and pensions for services rendered to the Deutsche Bundesbank and the Association of Chambers of Industry and Commerce. *[Article 18, paragraph 3]*
- Remuneration received by visiting professors and teachers, for visits for a period not exceeding two years, will be exempt from tax in the country visited if the remuneration is wholly or mainly supported by public funds of the resident country or by a tax exempt charitable or benevolent organisation, and the remuneration is exempt from tax in the country of residence. In addition, 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 if they are or were

immediately before the visit a resident of the other country.  
*[Article 19]*

- Other income of a resident of a country not otherwise dealt with by the German agreement is taxable only in that country of residence. However, the other country may also tax that other income if it arises in that other country.  
*[Article 20, paragraphs 1 and 3]*
- Article 7 (*Business Profits*) applies to other income attributable to a permanent establishment (other than income from immovable property). However for other income comprising certain dividends, interest and royalties attributable to a permanent establishment, the country from which dividends are paid, or interest or royalties arise, may tax that other income at the rates prescribed in paragraph 2 of Article 10 (*Dividends*), paragraph 2 of Article 11 (*Interest*) and paragraph 2 of Article 12 (*Royalties*).  
*[Article 20, paragraph 2]*
- Rules will apply to determine the circumstances in which Germany may apply Germany's capital tax to capital owned by Australian residents. *[Article 21]*
- Relief from double taxation will be provided for income, profits or gains which, under the German agreement, may be taxed in both countries. Broadly, 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 German tax paid, against Australian tax payable, on income derived by an Australian resident from sources in Germany *[Article 22, paragraph 1]*; and
  - in Germany, in some cases, by exempting from German tax certain income, profits or gains derived by a German resident from sources in Australia, which may be taxed in Australia or is exempt from Australian tax under paragraph 3 of Article 10 (*Dividends*). In other cases, by allowing a credit against German tax for Australian tax paid on certain income, profits or gains, derived by a German resident from sources in Australia. However, there are certain circumstances where relief by way of an exemption, which may ordinarily be granted in Germany, is specifically not to be provided, and relief by way of a tax credit relief is to be provided instead. *[Article 22, paragraph 2]*

- There are also specific rules dealing with the denial of an exemption or the provision of a credit in cases involving possible double taxation and non-taxation (or lower taxation) that may arise due to the two countries applying different provisions of the German agreement to an item of income, profits or gains or elements thereof. [*Article 22, paragraph 3*]
- Treaty relief is not available for income, profits or gains derived by an individual who is exempt from tax on the income, profits or gains in a country solely on the basis of being a temporary resident of that country. [*Article 23, paragraph 1*]
- Treaty benefits under the German agreement will not be granted in respect of an item of income, or in respect of an item of capital in the case of Germany, if it can be reasonably concluded that the obtaining of the benefit was one of the primary purposes of an arrangement or transaction that resulted in that benefit, unless it is established that the granting of that benefit is in accordance with the object and purpose of the relevant provisions of the German agreement. [*Article 23, paragraph 2*]
- Nothing in the German agreement will prevent either country from applying their domestic laws which are designed to prevent evasion or avoidance of taxes. The competent authorities will consult for the elimination of any double taxation which arises from the application of such domestic laws. [*Article 23, paragraph 3*]
- The German agreement will not prevent Germany from imposing German tax on amounts included in a German resident's income under parts 4, 5 and 7 of the German External Tax Relations Act. [*Protocol, subparagraph 1(b)*]
- The German agreement will protect nationals and businesses from one country from tax discrimination in the other country while ensuring that laws intended to maintain tax system integrity continue to apply. [*Article 24*]
- The German agreement will provide for a mutual agreement procedure for resolving disputes arising from the application of the agreement. Taxpayers may, within three years of first being notified by a country of an action, present a case to the competent authority of either country where they consider the action of one or both countries

results or will result in taxation not in accordance with the German agreement, irrespective of the remedies provided by the domestic law of the two countries. Any agreement reached by the competent authorities shall be implemented notwithstanding any time limits in the domestic law of the two countries. The taxpayer may seek arbitration if the matter is not resolved within two years – although arbitration is not available to the extent that that the unresolved issues involve the application of the principle purpose test rule in paragraph 2 of Article 23 (*Limitation of Benefits*) or a provision designed to prevent the evasion or avoidance of taxes.

- The competent authorities of the two countries are required to endeavour to resolve any interpretive issues or issues on the application of the German agreement by mutual agreement. *[Article 25]*
- The German agreement provides for exchange of information between the two competent authorities. It authorises and requires the competent authorities to exchange information which is foreseeably relevant for the carrying out the provisions of the German agreement or for administering or enforcing the laws of each country concerning taxes of any kind or description imposed on behalf of Australia or Germany or their political subdivisions or local authorities or Germany's States. *[Article 26]*
- Under the German agreement, the two countries are required to provide assistance to each other in the collection of tax debts. *[Article 27]*
- The German agreement provides for procedural rules governing how a resident of a country may seek a refund of withholding taxes paid in respect of dividends, interest, royalties or other items of income arising in the other country where those dividends, interest, royalties or other items of income are subject to withholding tax in that other country at withholding rates higher than provided for in the German agreement. *[Article 28]*
- The German agreement will not affect the fiscal privileges of members of diplomatic missions or consular posts under international law or under special international agreement. *[Article 29]*

- The German agreement sets out additional specific rules for an individual's personal information exchanged under the agreement. There are strict rules for the handling, use and protection of such information, including in cases where inaccurate information is supplied, and the subsequent deletion of that information. There is also an obligation to keep official records of the supply and receipt of personal information. The rules also set out the circumstances in which the individual should be informed about the information exchanged and how it will be used. The receiving agency is required to bear any liability that may arise for a breach of privacy. *[Article 30]*
- The German agreement will enter into force on the day of the exchange of the instruments of ratification. *[Article 32]*
- For Australian withholding tax, it will apply to income derived by residents of Germany on or after 1 January next following the date on which the German agreement enters into force. *[Article 32, sub-subparagraph 2(a)(i)]*
- For Australian fringe benefits tax, it will apply to fringe benefits provided on or after 1 April next following the date of which the German agreement enters into force. *[Article 32, sub-subparagraph 2(a)(ii)]*
- For other Australian taxes, it will apply in relation to income, profits or gains of any year of income beginning on or after 1 July next following the date on which the German agreement enters into force. *[Article 32, sub-subparagraph 2(a)(iii)]*
- The German agreement will continue in effect until terminated. Either country may terminate the German agreement by giving notice of termination at least six months before the end of any calendar year. Termination is by notice through diplomatic channels. *[Article 33]*
- Income, profits or gains derived by a resident of Germany which, in accordance with specified Articles in the German agreement, may be taxed in Australia, are deemed to have a source in Australia for the purposes of Australian law. *[Protocol, subparagraph 1(a)]*

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<p>This Schedule implements a revised treaty: the <i>Agreement between Australia and the Federal Republic of Germany for the Elimination of Double Taxation with respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance</i> and its Protocol (the German agreement), signed in Berlin on 12 November 2015, which will replace the existing Australia-Germany tax treaty.</p>	<p>The existing treaty between Australia and Germany: the <i>Agreement between the Commonwealth of Australia and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital and to Certain Other Taxes</i> and its Protocol (the German 1972 agreement), which entered into force on 15 February 1975 will terminate upon the entry into force of the German agreement. However, the German 1972 Agreement will continue to have effect for taxable years and periods which expired before the time when the German agreement takes effect.</p>
<p>All Articles have been updated, having regard to Australian, German and international tax treaty developments since the German 1972 agreement was entered into.</p>	<p>Not applicable.</p>
<p>The express purpose of the German agreement is to eliminate double taxation with respect to taxes on income and on capital without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the German agreement for the indirect benefit of residents of a third country).</p>	<p>The German 1972 agreement's purpose is to avoid double taxation and prevent fiscal evasion with respect to taxes on income and capital and to certain other taxes.</p>
<p>Under Article 1 (<i>Persons Covered</i>), treaty benefits will be available for income (including profits or gains) derived by or through fiscally transparent entities or arrangements but only to the extent that the income is treated as the income of a resident of one of the countries under that country's domestic law.</p>	<p>No equivalent</p>

<p>Article 2 (<i>Taxes Covered</i>) both clarifies and expands the taxes the German Agreement applies to.</p> <p>The German agreement applies to taxes on income imposed by Australia and Germany, and by Germany's States, political subdivisions and local authorities. The German agreement also applies to taxes on capital imposed by Germany, or its States, political subdivisions and local authorities.</p> <p>The German agreement clarifies that it applies to taxes on income that are imposed on total income or total capital, or on elements of income or capital (including taxes on gains from the alienation of property), taxes on wages or salaries paid by enterprises, as well as taxes on capital appreciation.</p> <p>In the case of Australia, the existing taxes on income expressly include income tax, fringe benefits tax and resource rent taxes imposed under the federal law of Australia.</p> <p>The German agreement will also apply to any identical or substantially similar taxes imposed under the federal law of Australia or the law of Germany.</p> <p>Article 24 (<i>Non-discrimination</i>), Article 26 (<i>Exchange of Information</i>) and Article 27 (<i>Assistance in the Collection of Taxes</i>), however, apply to a broader range of taxes.</p>	<p>In respect of Australia, the German 1972 agreement applies to Commonwealth income tax (including the former additional tax upon the undistributed amount of distributable income of a private company) and any identical or substantially similar taxes on income subsequently imposed under the law of the Commonwealth of Australia.</p>
<p>The term 'Australia' in Article 3 (<i>General Definitions</i>) expressly refers to the exclusive economic zone.</p>	<p>No express reference.</p>
<p>The term 'tax' in Article 3 (<i>General Definitions</i>) does not include any penalty imposed under the law of either country.</p>	<p>For the purposes of Articles 10 to 12 and paragraph 1 and subparagraph 2(b) of Article 22 of the German 1972 agreement, the term 'tax' does not include any penalty or interest imposed under the law of either country.</p>

<p>Article 3 (<i>General Definitions</i>) contains definitions of the following terms:</p> <ul style="list-style-type: none"> <li>• ‘enterprise’;</li> <li>• ‘business’;</li> <li>• ‘international traffic’;</li> <li>• ‘national’;</li> <li>• ‘collective investment vehicle’;</li> <li>and</li> <li>• ‘recognised stock exchange’.</li> </ul>	<p>No equivalent.</p>
<p>Article 4 (<i>Resident</i>) 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 the individual's permanent home, centre of vital interests or place of habitual abode. If the individual is a dual national (or a national of neither country), the competent authorities shall attempt to determine the individual's residence by mutual agreement.</p> <p>For dual resident entities (other than individuals), the entity will be deemed to be resident of the country where its place of effective management is situated. Where the place of effective management cannot be determined or is in neither country, a mutual agreement procedure will apply to determine the treaty residence, with the benefits of the German agreement denied in the absence of such mutual agreement.</p>	<p>Article 4 of the German 1972 agreement seeks to resolve cases of dual residence for individuals by giving consideration only to the location of the individual's permanent home, habitual abode or centre of vital interests.</p> <p>In cases of dual resident entities (other than individuals) the German 1972 agreement only prescribes a rule to deem residence in the country where the effective management is situated.</p>
<p>defines the term ‘permanent establishment’ to no longer include assembly projects. A building site or construction or installation project will constitute a permanent establishment only if it lasts for more than 9 months.</p>	<p>The definition of ‘permanent establishment’ in the German 1972 agreement is deemed to include a building site or construction, installation or assembly project that lasts for more than 6 months.</p>



<p>Article 5 (<i>Permanent Establishment</i>)</p> <p>The Article also deems a permanent establishment to exist in relation to the following activities undertaken in a country by an enterprise that is a resident of the other country:</p> <ul style="list-style-type: none"> <li>• supervisory or consultancy activities carried on in connection with a building site or installation or construction project for more than 9 months;</li> <li>• natural resource exploration or exploitation activities (including the operation of substantial equipment) carried on for more than 90 days in any 12 month period; or</li> <li>• the operation of substantial equipment for more than 183 days in any 12 month period.</li> </ul> <p>A permanent establishment will be deemed not to include certain activities but only where those activities have a preparatory or auxiliary character.</p> <p>A permanent establishment is deemed to exist where a person (agent) acts on behalf an enterprise and habitually concludes contracts or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, or manufactures or processes goods or merchandise belonging to the enterprise, unless that agent is acting in a truly independent capacity.</p> <p>Integrity provisions are included to prevent related enterprises from circumventing the permanent establishment time thresholds by splitting contracts and to prevent an enterprise or its closely related</p>	<p>A permanent establishment is deemed to exist if an enterprise carries on supervisory activities in a country for more than 6 months in connection with a building site or a construction, installation or assembly project undertaken in that country.</p> <p>No equivalent.</p> <p>No equivalent.</p> <p>No equivalent.</p> <p>There is no equivalent overarching preparatory or auxiliary condition for most of the excepted activities.</p> <p>A permanent establishment is deemed to exist where a person (agent) has an authority to conclude contracts binding an enterprise or in acting on behalf on an enterprise the person manufacture or process goods or merchandise belonging to the enterprise, unless that agent is an independent agent acting in the ordinary course of the agent's business as such.</p> <p>No equivalent.</p>
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<p>enterprises fragmenting activities to avoid having a permanent establishment.</p>	
<p>Article 6 (<i>Income from Immovable Property</i>) applies to the taxation of income from immovable property (including income from agriculture or forestry activities).</p> <p>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; rights to which the general law applicable to landed property apply; usufruct of immovable property; certain rights in connection with natural resource activities; and rights to receive variable or fixed payments in respect of certain natural resource activities.</p>	<p>Article 6 of the German 1972 agreement applies to the taxation of income from real property, including royalties or similar payments in respect of the exploitation of mines, quarries or other natural resources. Real property is taken to include income from leases of land.</p>
<p>Article 7 (<i>Business Profits</i>) applies to the taxation of business profits and provides that such profits are taxable only in the country of residence of the person carrying on the enterprise that derives the profits unless that enterprise carries on business in the other country through a permanent establishment located in that other country. Any profits attributable to that permanent establishment may also be taxed by the other country.</p> <p>Profits from carrying on insurance business of any form (other than life insurance) are excluded from the operation of Article 7 and may be taxed in accordance with the law of the other country.</p> <p>Article 7 will apply to a resident of Germany who is beneficially entitled to a share of the business profits of an enterprise carried on through a permanent establishment in Australia by the trustee of a trust estate (other than a trust estate that is treated as a company for tax purposes).</p>	<p>No change.</p> <p>No change.</p> <p>No equivalent in German 1972 agreement but equivalent clause in Agreements Act 1953.</p>

<p>A ten year limit will generally apply for the adjustments of profits attributable to a permanent establishment, with no time limit in the case of fraud, willful default or negligence or if an audit has been initiated within that ten year period.</p>	<p>No equivalent.</p>
<p>Article 8 (<i>Shipping and Air Transport</i>) applies to the taxation of profits from the operation of ships or aircraft in international traffic.</p> <p>Generally, such profits 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 places in the other country may also be taxed in that other country.</p> <p>Profits derived by a resident of a country from the leasing of containers used for the transport of goods or merchandise will be taxable only in that country, provided the lease is directly connected or ancillary to the operation of ships or aircraft in international traffic.</p>	<p>No substantive change.</p> <p>The amount of tax that the other country may charge cannot exceed 5 per cent of the amount paid or payable in respect of the carriage (unless the relevant enterprise has its principal place of business in that other country or its profits are derived otherwise than from certain transport activities, in which case the provisions of Article 7 of the German 1972 agreement apply instead, with an exclusion for profits on which Australian tax is charged to any amount of profits taxed in the Territory of Papua or the Trust Territory of New Guinea.)</p> <p>No equivalent.</p>
<p>Article 9 (<i>Associated Enterprises</i>) applies to profits of associated enterprises and authorises the taxation authorities of the two countries to adjust such profits on arm's length basis.</p> <p>Where such an adjustment is made to increase the profits of an enterprise of one country and taxed accordingly, and those profits have also been taxed in the hands of an associated enterprise that is a resident of the</p>	<p>No change.</p> <p>No equivalent.</p>

<p>other country, the taxation authority of the other country is required to make an appropriate compensatory adjustment to the profits of the associated enterprise.</p> <p>A ten year limit will generally apply for the adjustments of profits, with no time limit where an audit has been initiated within that ten year period, or in the case of fraud, willful default or negligence.</p>	<p>No equivalent.</p>
<p>Article 10 (<i>Dividends</i>) will limit source country taxation of cross-border dividends as follows:</p> <ul style="list-style-type: none"> <li>• zero for intercorporate dividends paid to a company, which holds 80 per cent or more of the voting power of the paying company, subject to certain conditions;</li> <li>• 5 per cent for intercorporate dividends paid to a company that holds 10 per cent or more of the paying company; and</li> <li>• 15 per cent in all other cases.</li> </ul> <p>The zero and 5 per cent rates are conditional on the shares being held for a minimum period of 12 or 6 months respectively.</p>	<p>The German 1972 agreement prescribes a single source country tax rate limit of 15 per cent for all dividends.</p>
<p>Article 11 (<i>Interest</i>) will limit source country taxation of cross-border interest as follows:</p> <ul style="list-style-type: none"> <li>• zero for interest paid to bodies exercising governmental functions (i.e. sovereign investment), and to banks performing central banking functions;</li> <li>• zero for interest paid to unrelated financial institutions that are dealing wholly independently with the payer, subject to certain conditions;</li> <li>• 10 per cent in all other cases.</li> </ul>	<p>The German 1972 agreement prescribes a single source country tax rate limit of 10 per cent on interest, with a zero rate for interest paid to bodies exercising governmental functions and to banks performing central banking functions.</p>

<p>Each country's domestic law will apply instead of Article 11 (<i>Interest</i>) to income derived from rights or debt-claims carrying the right to participate in profits which is deductible to the payer.</p>	<p>No equivalent</p>
<p>Article 12 (<i>Royalties</i>) will limit source country taxation of cross-border royalties to 5 per cent.</p> <p>The definition of 'royalties' now includes payments for the right to use spectrum licenses as well as for forbearance, and excludes the right to use industrial, commercial or scientific equipment. Payments for the right to use industrial, commercial or scientific equipment therefore fall for consideration under Articles 7 (<i>Business Profits</i>) and 8 (<i>Shipping and Air Transport</i>)</p>	<p>The German 1972 agreement prescribes a single source country tax rate limit on all royalties of 10 per cent.</p> <p>The definition of 'royalties' does not include the right to use spectrum licenses but includes the right to use industrial, commercial or scientific equipment.</p>
<p>Under Article 13 (<i>Alienation of Property</i>), income, profits or gains from the alienation of immovable property may be taxed in the country where the property is situated.</p> <p>Income, profits or gains from the alienation of interests in land-rich entities (that is, where more than 50 per cent of the value of those interests is derived from immovable property) may be taxed in the country where the underlying immovable property is situated.</p> <p>Where certain requirements are satisfied, the German agreement will not affect Germany's right to tax former German resident individuals on the deemed alienations of shares and comparable interests at the time the individual ceased to be a German resident and became an Australian resident. If Germany taxes the individual, Australia will generally calculate the capital gain on any subsequent alienation using the value Germany applied at the time of the</p>	<p>The German 1972 agreement does not expressly cover income, profits or gains from the alienation of property.</p>

<p>change of residence.</p> <p>Australia may continue to tax its former resident individuals on their capital gains if they alienate movable property (such as shares, artworks etc.) within five years of leaving Australia. Generally, where the individual is a German resident at the time of the alienation, the amount of the gain that Australia may tax will be limited to the gain that would have been derived at the time the individual ceased to be an Australian resident.</p> <p>Residual capital gains will be taxable only in the country of residence of the alienator.</p>	
<p>Under Article 14 (<i>Income from Employment</i>), salaries, wages and other similar remuneration will generally be taxable in the country where the employment is exercised. If the employment is exercised in the country other than the country of residence then it may be taxable in both countries.</p> <p>Employment income derived by a resident of one country in respect of employment exercised in the other country is not taxable in the other country if the employee is present in the other country for 183 days or less in any 12 month period (commencing or ending in the fiscal year concerned), the remuneration is paid by or on behalf of an employer that is not a resident of the country where the employment is exercised and the remuneration is not borne by a permanent establishment of the employer in that country.</p> <p>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.</p>	<p>No change.</p> <p>No change.</p> <p>No equivalent.</p>

<p>Under Article 16 (<i>Entertainers and Sportspersons</i>), income derived by visiting entertainers and sportspersons will be taxable only in the person's country of residence where the visit to the other country is wholly or mainly supported by public funds of the resident country. Otherwise the income may be also taxed in the country where the personal activities of the person in their capacity as an entertainer or sportsperson are exercised.</p>	<p>The German 1972 agreement provides that income derived by visiting public entertainers (including athletes) may be taxed in the country where the personal activities of the person in their capacity as a public entertainer are exercised. There is no exception for a visit that is wholly or mainly supported by public funds of the resident country.</p>
<p>Under Article 17 (<i>Pensions, Annuities and Similar Payments</i>), pensions, annuities and social security payments will generally be taxable only in the recipient's country of residence.</p> <p>This Article does not apply to pensions paid for government service that are dealt with under Article 18 (<i>Government Service</i>).</p> <p>Certain pensions and annuities first paid after 31 December 2016 which received tax relief or other beneficial treatment in the source country for more than 15 years may also be taxed in the country of source.</p> <p>Social security payments which were first paid on or after 1 January 2017 may also be taxed in the country of source but the tax charged in the source country cannot exceed 15 per cent of the gross payment.</p> <p>Payments made by one country to a resident of the other country as compensation for political persecution, injustices or damage sustained in war, or for similar reasons, and which are exempt from tax in the source country, will also be exempt from tax in the recipient's country of residence.</p>	<p>The German 1972 agreement allocates exclusive taxing rights over all pensions and annuities to the country of residence of the recipient.</p> <p>No equivalent.</p> <p>No equivalent.</p> <p>No equivalent.</p> <p>No equivalent.</p>

<p>Alimony or similar payments are taxable only in the country in which they arise.</p>	<p>No equivalent.</p>
<p>Under Article 18 (<i>Government Service</i>), government service income is generally taxable only by the country to which the services were rendered. However, the income will be taxable only in the other country if the individual is both a resident and a national of that other country or became a resident of that other country for reasons other than solely to render those services.</p> <p>Government service pensions will be taxable only in the country to which the services were rendered. However, the pension will be taxable only in the other country if the individual is both a resident and national of that other country.</p> <p>This Article extends to salaries, wages and pensions paid to an individual for services rendered to the Deutsche Bundesbank and the Association of Chambers of Industry and Commerce, and other comparable institutions mutually agreed between Australia and Germany.</p>	<p>No substantive change.</p> <p>No equivalent</p> <p>No equivalent</p>
<p>Under Article 19 (<i>Professors, Teachers and Students</i>), remuneration received by visiting professors and teachers for visits up to two years will not be taxed in the country visited if the remuneration is wholly or mainly supported by public funds of the resident country, or by a tax exempt charitable or benevolent organisation, and the remuneration is exempt from tax in the country of residence.</p>	<p>Under the German 1972 agreement, there is no requirement for the remuneration to be supported by public funds or by a tax exempt charitable or benevolent organization, or for the remuneration to be exempt from tax in the country of residence.</p>



<p>Article 19 (<i>Professors, Teachers and Students</i>) also exempts payments from abroad received by visiting students or business apprentices for the purposes of their maintenance, education or training if they are or were immediately before the visit a resident of the other country.</p>	<p>Under the German 1972 agreement, the exemption does not cover payments received by business apprentices.</p>
<p>Under Article 20 (<i>Other Income</i>), income of a resident not otherwise dealt with by the German agreement is taxable only in the country of residence unless that other income is from sources in the other country. In that case, the other country may also tax the income.</p> <p>The Article states that Article 7 (<i>Business Profits</i>) will instead apply to other income (but not income from immovable property) of a resident of one country in respect of a right or property that is effectively connected with that resident's permanent establishment in the other country. Other income attributable to that permanent establishment comprising dividends, interest or royalties may be taxed in the country from which the income is paid or arises in accordance with the rates set by paragraph 2 of Article 10 (<i>Dividends</i>), paragraph 2 of Article 11 (<i>Interest</i>) or paragraph 2 of Article 12 (<i>Royalties</i>).</p>	<p>No equivalent</p>
<p>Under Article 21 (<i>Capital</i>), capital represented by immovable property referred to in Article 6 (Income from Immovable Property) owned by a resident of Australia and situated in Germany, and movable property forming part of the business property of a permanent establishment which an Australian enterprise has in Germany, may be taxed in Germany.</p> <p>All other elements of capital, including capital represented by ships and aircraft operated by an Australian enterprise in international traffic and movable property pertaining to the</p>	<p>No substantial change, although Article 21 in the German 1972 agreement is expressed bilaterally.</p> <p>Capital represented by ships and aircraft operated in international traffic and movable property pertaining to the operation of such ships and aircraft shall be taxable</p>

<p>operation of such ships and aircraft, shall not be taxable in Germany.</p>	<p>only in the country of residence of the operator.</p>
<p>Article 22 (<i>Methods of Elimination of Double Taxation</i>) provides rules on how double taxation may be relieved. In Australia, relief from double taxation will be provided by allowing a credit for German tax paid, against Australian tax payable, on income derived in Germany by an Australian resident.</p> <p>In Germany, relief from double taxation will be provided, in some cases, by exempting certain income, profits or gains derived by German resident which may be taxed in Australia or is exempt from Australian tax under paragraph 3 of Article 10. In other cases, by allowing a credit for Australian tax paid on certain income, profits or gains derived by a German resident from sources in Australia.</p> <p>In relation to Germany, exemption will be provided in the case of dividends, only where the dividend is paid to a German resident company (not including a partnership) which directly owns 10 per cent or more of the voting power of the Australian resident company paying the dividend</p> <p>There are certain circumstances where relief by way of an exemption, which may ordinarily be granted in Germany, is specifically not to be provided, and relief by way of a credit is to be provided instead to eliminate double taxation. This includes, for example, dividend income which the distributing company may deduct for Australian tax purposes, or income, profits or gains which Australia may tax under the German agreement but does not actually do so.</p>	<p>Under the German 1972 agreement, in Australia a credit may be provided for German tax paid directly or by deduction, and, in the case of dividends, no credit will be provided for tax paid on profits out which the dividend is paid.</p> <p>In Germany, an exemption will be provided for certain items of income from sources within Australia and certain item of capital falling under paragraphs (1) and (2) of Article 21 situated in Australia. A credit will be provided for Australian tax on certain specified items of income.</p> <p>Under the German 1972 agreement, exemption will be provided in the case of dividends, only where the dividend is paid to a German resident company which own at least 25 per cent of the voting shares or total shares issued in the Australian resident company paying the dividend.</p> <p>No equivalent.</p>

<p>Germany retains the right to take into account in determining its rate of tax items of income, profits or gains that are exempted from German tax under the provision of the German agreement.</p> <p>This Article also contain specific rules dealing with the denial of an exemption or the provision of a credit in cases involving possible double taxation and non-taxation (or lower taxation) that may arise due to the two countries applying different provisions of the German agreement.</p>	<p>No change.</p> <p>No equivalent.</p>
<p>Article 23 (<i>Limitation on Benefits</i>) will limit the relief available under the German agreement for income, profits or gains derived by an individual who is a temporary resident of the other country if that other country exempts that income, or those profits or gains, solely on the basis of that individual being a temporary resident.</p> <p>Treaty benefits under the German agreement will not be granted in respect of an item of income, or in the case of Germany in respect of an item of capital, if it can be reasonably concluded that the obtaining of the benefit was one of the primary purposes of an arrangement or transaction that resulted in that benefit, unless it is established that the granting of that benefit is in accordance with the object and purpose of the relevant provisions of the German agreement.</p> <p>Nothing in the German agreement will prevent either country from applying their domestic laws which are designed to prevent evasion or avoidance of taxes. The competent authorities will consult for the elimination of any double taxation which arises from the application of such domestic laws.</p>	<p>No equivalent.</p>

<p>The German agreement will not prevent Germany from imposing German tax on amounts included in a German resident's income under parts 4, 5 and 7 of the German External Tax Relations Act.</p>	
<p>Under Article 24 (<i>Non-discrimination</i>), a country cannot treat nationals from the other country less favorably for tax or connected requirements purposes than its own nationals in the same circumstances.</p> <p>Similar non-discrimination rules apply in respect of taxation of a permanent establishment or for an enterprise, the capital of which is owned or controlled, wholly or partly, directly or indirectly by one or more residents of the other country.</p> <p>Interest, royalties and other disbursements paid by an enterprise of one country to a resident in the other country shall be deductible on the same basis as if the payment was made to a resident of the same country in which the enterprise is located. A similar rule applies for German capital tax purposes, so that where an enterprise owes a debt to a resident of Australia, the debt will be deductible in determining the taxable capital under the same conditions as if the debt was owned to a resident of Germany.</p>	<p>No equivalent</p>
<p>Under Article 25 (<i>Mutual Agreement Procedure</i>) a person may, within three years, present a case to the competent authority of either country where the person considers the actions of one or both countries result or will result in taxation not in accordance with the German agreement, irrespective of the remedies provided by the domestic law of the two countries.</p> <p>Any agreement reached by the competent authorities shall be</p>	<p>Under Article 23 of the German 1972 agreement, taxpayers may only present a case to the competent authority of the country of which they are a resident and there is no prescribed time limit.</p> <p>No equivalent.</p>

<p>implemented notwithstanding any time limits in the domestic law of the two countries.</p> <p>The competent authority may also consult for the elimination of double taxation in cases not provided for in the German agreement.</p> <p>Unresolved tax disputes may, in some cases, be referred to independent arbitration. However, arbitration is not available to the extent the unresolved issues involve the application of the principle purpose test rule in paragraph 2 of Article 23 (Limitation of Benefits) or either country's domestic rules designed to prevent evasion or avoidance of tax.</p> <p>The competent authorities shall endeavor to resolve any interpretative issues or issues regarding the application of the German agreement by mutual agreement.</p>	<p>No equivalent.</p> <p>No equivalent.</p> <p>No change</p>
<p>Under Article 26 (<i>Exchange of Information</i>), the German agreement provides a legal basis for the exchange of taxpayer information in respect of taxes of any kind or description imposed on behalf of Australia or Germany or their political subdivisions or local authorities or Germany's States, as long as the taxation is not contrary to the German agreement.</p> <p>The information may be used for purposes other than for the assessment, collection and enforcement of taxation laws if that use is permitted under the laws of either country and the competent authority of the supplying country authorises that use.</p>	<p>The German 1972 agreement only provides for exchange of taxpayer information in respect only of taxes that are subject to the German 1972 agreement.</p> <p>That information can only be disclosed to authorised persons concerned with the assessment or collection of taxes which are subject to the German 1972 agreement, or in the determination of appeals or prosecution relating to those taxes.</p>
<p>Under Article 27 (<i>Assistance in the Collection of Taxes</i>), the two countries are required to provide assistance to each other in the collection of tax debts.</p>	<p>No equivalent.</p>

<p>Under Article 28 (<i>Procedural Rules for Taxation at Source</i>) a country may impose withholding tax at source at rates higher than provided for under the German agreement in respect of dividends, interest, royalties or other items of income.</p> <p>The resident of the other country may seek a refund, within four years from the end of the calendar year in which the relevant income is received, for the amount of withholding tax that exceeds the rate provided for in the German agreement.</p> <p>The country providing the refund may require the taxpayer to provide an administrative certification from the other country identifying the taxpayer as a resident of that other country.</p> <p>The German agreement allows for the competent authorities to implement by mutual agreement the provisions of this Article and, if necessary, establish alternative procedures to give effect to the refund of tax reductions or exemptions provided for in the agreement.</p>	<p>No equivalent.</p>
<p>Article 30 (<i>Protection of Personal Information</i>) sets out rules for the purpose of ensuring personal information is protected and used only for intended purposes, requiring the supplying agency to exercise vigilance as to the accuracy of the information and, upon application, to inform the individual what information has been supplied and for what purpose it will be used.</p> <p>The agencies are also required to keep official records of the supply and receipt of personal information.</p> <p>Information is also required to be deleted in accordance with the domestic laws of the agency in the receiving country once the</p>	<p>No equivalent</p>

information is no longer required for the purpose it was obtained.	
Income, profits or gains derived by a resident of Germany which, in accordance with specified Articles in the German agreement, may be taxed in Australia, are deemed to have a source in Australia for the purposes of Australian law.	Income, profits or gains derived by a resident of one country which, in accordance with the German 1972 agreement, may be taxed in the other country, are deemed to have a source in that other country for the purposes of the law of that other country.

## **The German agreement**

1.1. A full transcript of the German agreement and detailed explanation follows:

‘AGREEMENT BETWEEN AUSTRALIA AND THE FEDERAL REPUBLIC OF GERMANY FOR THE ELIMINATION OF DOUBLE TAXATION WITH RESPECT TO TAXES ON INCOME AND ON CAPITAL AND THE PREVENTION OF FISCAL EVASION AND AVOIDANCE’

Australia and the Federal Republic of Germany,

Desiring to further develop their economic relationship and to enhance their cooperation in tax matters,

Intending to conclude an Agreement for the elimination of double taxation with respect to taxes on income and on capital without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Agreement for the indirect benefit of residents of third States), —

Have agreed as follows:

ARTICLE 1

Persons Covered

1 This Agreement shall apply to persons who are residents of one or both of the Contracting States.

2 For the purposes of this Agreement, income (including profits or gains) derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either Contracting State shall be considered to be income of a resident of a Contracting State but only to the extent that the income is treated, for purposes of taxation by that State, as the income of a resident of that State.

ARTICLE 2

Taxes Covered

1 This Agreement shall apply to taxes on income, and, in the case of the Federal Republic of Germany, taxes on capital, imposed on behalf of a Contracting State and, in the case of the Federal Republic of Germany, on behalf of one of its States (Länder) or one of its political subdivisions or local authorities, irrespective of the manner in which they are levied.

2 There shall be regarded as taxes on income and on capital all taxes imposed on total income, on total capital, or on elements of income or of capital, including taxes on gains from the alienation of movable or immovable property, taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation.



3 The existing taxes to which this Agreement shall apply are in particular:

(a) in Australia:

the income tax, the fringe benefits tax and resource rent taxes imposed under the federal law of Australia;

(hereinafter referred to as "Australian tax");

(b) in the Federal Republic of Germany:

(i) the income tax (Einkommensteuer);

(ii) the corporate income tax (Körperschaftsteuer);

(iii) the trade tax (Gewerbesteuer); and

(iv) the capital tax (Vermögensteuer);

including the supplements levied thereon

(hereinafter referred to as "German tax").

4 This Agreement shall apply also to any identical or substantially similar taxes which are imposed under the federal law of Australia or the law of the Federal Republic of Germany after the date of signature of this Agreement in addition to, or in place of, the existing taxes. The competent authorities of the Contracting States shall notify each other of significant changes which have been made in their taxation laws.

ARTICLE 3  
General Definitions

1 For the purposes of this Agreement, unless the context otherwise requires:

(a) the term "Australia", when used in a geographical sense, means the territory of the Commonwealth of Australia, including the following external territories:

- (i) the Territory of Norfolk Island;
- (ii) the Territory of Christmas Island;
- (iii) the Territory of Cocos (Keeling) Islands;
- (iv) the Territory of Ashmore and Cartier Islands;
- (v) the Territory of Heard Island and McDonald Islands; and
- (vi) the Coral Sea Islands Territory,

and includes any area adjacent to the territorial limits of Australia (including the Territories specified in this subparagraph) in respect of which there is for the time being in force, consistently with international law, a law of Australia dealing with the exploration for or exploitation of any of the natural resources of the exclusive economic zone or the seabed and subsoil of the continental shelf;

(b) the term "Federal Republic of Germany", when used in a geographical sense, includes the territory of the Federal Republic of Germany as well as the area of the seabed, its subsoil and the superjacent water column adjacent to the territorial sea, wherein the Federal Republic of

Germany exercises sovereign rights or jurisdiction in conformity with international law and its national legislation for the purposes of exploring, exploiting, conserving and managing the living and non-living natural resources or for the production of energy from renewable sources;

- (c) the term "tax" means Australian tax or German tax as the context requires, but does not include any penalty imposed under the law of either Contracting State relating to its tax;
- (d) the term "person" includes an individual, a company and any other body of persons;
- (e) the term "company" means any body corporate or any entity which is treated as a company or body corporate for tax purposes;
- (f) the term "enterprise" applies to the carrying on of any business;
- (g) the term "business" includes the performance of professional services and of other activities of an independent character;
- (h) the terms "enterprise of a Contracting State" and "enterprise of the other Contracting State" mean respectively an enterprise carried on by a resident of a Contracting State and an enterprise carried on by a resident of the other Contracting State;
- (i) the term "international traffic" means any transport by a ship or aircraft operated by an enterprise of a Contracting State, except when the ship or aircraft is operated solely between places in the other Contracting State;

- (j) the term "competent authority" means:
  - (i) in the case of Australia, the Commissioner of Taxation or an authorised representative of the Commissioner;
  - (ii) in the case of the Federal Republic of Germany, the Federal Ministry of Finance or the agency to which it has delegated its powers;
  
- (k) the term "national" means:
  - (i) in relation to Australia, any individual who is a citizen of Australia and any legal person, company, partnership or association deriving its status as such from the laws in force in Australia;
  - (ii) in relation to the Federal Republic of Germany, any German within the meaning of the Basic Law for the Federal Republic of Germany and any legal person, partnership or association deriving its status as such from the laws in force in the Federal Republic of Germany;
  
- (l) the term "collective investment vehicle" means a vehicle that is widely-held, holds a diversified portfolio of securities or invests directly or indirectly in immovable property for the main purpose of deriving rent, and is subject to investor-protection regulation in the State in which it is established and is:
  - (i) in the case of Australia, a trust that is a managed investment trust for the purposes of Australian tax;

- (ii) in the case of the Federal Republic of Germany, an investment vehicle within the meaning of the Investment Act (Kapitalanlagegesetzbuch), other than a vehicle that has been established as a partnership; and
  - (iii) any other investment fund or vehicle established in either Contracting State which the Government of Australia and the Government of the Federal Republic of Germany agree, in an Exchange of Notes, to regard as a collective investment vehicle;
- (m) the term "recognised stock exchange" means:
- (i) the Australian Securities Exchange and any other Australian stock exchange recognised as such under Australian law;
  - (ii) any German stock exchange on which registered dealings in shares take place; and
  - (iii) any other stock exchange agreed upon by the competent authorities.

2 As regards the application of the Agreement at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State concerning the taxes to which the Agreement applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

ARTICLE 4

Resident

1 For the purposes of this Agreement, the term "resident of a Contracting State" means any person who:

- (a) in the case of Australia, is liable to tax as a resident of Australia; and
- (b) in the case of the Federal Republic of Germany, is liable to tax therein by reason of the person's domicile, residence, place of management or any criterion of a similar nature.

The term "resident of a Contracting State" also includes a Contracting State and, in the case of the Federal Republic of Germany, its States (Länder), and any political subdivision or local authority thereof. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated in the Federal Republic of Germany.

2 Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then that individual's status shall be determined as follows:

- (a) the individual shall be deemed to be a resident only of the State in which a permanent home is available to that individual; if a permanent home is available in both States, that individual shall be deemed to be a resident only of the State with which the individual's personal and economic relations are closer (centre of vital interests);
- (b) if the State in which the centre of vital interests is situated cannot be determined, or if a permanent home is not available to the individual in either State, the individual shall be deemed to be a resident only of the State in which that individual has an habitual abode;

- (c) if the individual has an habitual abode in both States or in neither of them, the individual shall be deemed to be a resident only of the State of which the individual is a national;
- (d) if the individual is a national of both States or of neither of them, the competent authorities of the Contracting States shall endeavour to settle the question by mutual agreement.

3 Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident solely of the State in which its place of effective management is situated. If the State in which the place of effective management is situated cannot be determined, or the place of effective management is in neither State, then the competent authorities of the Contracting States shall endeavour to determine by mutual agreement in accordance with Article 25 the Contracting State of which the person shall be deemed to be a resident for purposes of the Agreement, having regard to its places of management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be considered to be a resident of either Contracting State for purposes of enjoying benefits under this Agreement.

4 Notwithstanding the other provisions of this Agreement, a collective investment vehicle which is established in a Contracting State and which receives income (including profits and gains) arising in the other Contracting State shall be treated, for the purposes of applying the Agreement to such income, as an individual who is a resident of the Contracting State in which it is established and as the beneficial owner of the income it receives (provided that, if an individual who is a resident of the first-mentioned State had received the income in the same circumstances, such individual would have been considered to be the beneficial owner thereof), but only to the extent that the beneficial interests in the collective investment

vehicle are owned by residents of the Contracting State in which the collective investment vehicle is established and equivalent beneficiaries. However, if:

- (a) in the case of a collective investment vehicle established in Australia, the principal class of shares, units or other comparable interests in the collective investment vehicle is listed and regularly traded on a recognised stock exchange in Australia;
- (b) at least 75 per cent of the value of the beneficial interests in the collective investment vehicle is owned by residents of the Contracting State in which the collective investment vehicle is established; or
- (c) at least 90 per cent of the value of the beneficial interests in the collective investment vehicle is owned by equivalent beneficiaries,

the collective investment vehicle shall be treated as an individual who is a resident of the Contracting State in which it is established and as the beneficial owner of all the income it receives (provided that, if an individual who is a resident of that State had received the income in the same circumstances, such individual would have been considered to be the beneficial owner thereof).

5 For purposes of paragraph 4, the term "equivalent beneficiary" means:

- (a) a resident of the Contracting State in which the collective investment vehicle is established; and
- (b) a resident of any other State with which the Contracting State in which the income arises has a tax agreement that provides for effective and comprehensive information exchange who would, if such resident received the particular item of income for which benefits are being claimed under this Agreement, be entitled under that agreement, or



under the domestic law of the Contracting State in which the income arises, to a rate of tax with respect to that item of income that is at least as low as the rate claimed under this Agreement by the collective investment vehicle with respect to that item of income.

## ARTICLE 5

### Permanent Establishment

1 For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which the business of the enterprise is wholly or partly carried on.

2 The term "permanent establishment" includes especially:

- (a) a place of management;
- (b) a branch;
- (c) an office;
- (d) a factory;
- (e) a workshop;
- (f) a mine, an oil or gas well, a quarry or any other place relating to the exploration for or exploitation of natural resources; and
- (g) an agricultural, pastoral or forestry property.

3 A building site or construction or installation project constitutes a permanent establishment only if it lasts more than nine months.

4 Notwithstanding the preceding provisions of this Article, where an enterprise of a Contracting State:

- (a) carries on supervisory or consultancy activities in the other State for more than nine months in connection with a building site, or a construction or installation project, which is being undertaken in that other State;
- (b) carries on activities (including the operation of substantial equipment) in the other State in the exploration for or exploitation of natural resources situated in that other State for a period or periods exceeding in the aggregate 90 days in any 12 month period; or
- (c) operates substantial equipment in the other State (including as provided in subparagraph (b)) for a period or periods exceeding in the aggregate 183 days in any 12 month period,

such activities shall be deemed to be carried on through a permanent establishment that the enterprise has in that other State, unless the activities are limited to those mentioned in paragraph 6 and are, in relation to the enterprise, of a preparatory or auxiliary character.

5 Where an enterprise of a Contracting State carries on any of the activities referred to in paragraphs 3 and 4 in the other Contracting State, any connected activities carried on in that other Contracting State during different periods of time, each exceeding 30 days, by one or more enterprises closely related to the first-mentioned enterprise will be added to the period of time during which the first-mentioned enterprise has carried on the activities for the purpose of determining whether the periods referred to in paragraphs 3 and 4 have been exceeded.

6 Notwithstanding the preceding provisions of this Article, the term "permanent establishment" shall be deemed not to include:

- (a) the use of facilities solely for the purpose of storage, display or delivery of goods or merchandise belonging to the enterprise;
- (b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;
- (c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
- (d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or for collecting information, for the enterprise;
- (e) the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity,
- (f) the maintenance of a fixed place of business solely for any combination of activities mentioned in subparagraphs (a) to (e),

provided that such activity or, in the case of subparagraph (f), the overall activity of the fixed place of business, is of a preparatory or auxiliary character.

7 Paragraph 6 shall not apply to a fixed place of business that is used or maintained by an enterprise if the same enterprise or a closely related enterprise carries on business activities at the same place or at another place in the same Contracting State and

- (a) that place or other place constitutes a permanent establishment for the enterprise or the closely related enterprise under the provisions of this Article, or
- (b) the overall activity resulting from the combination of the activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, is not of a preparatory or auxiliary character,

provided that the business activities carried on by the two enterprises at the same place, or by the same enterprise or closely related enterprises at the two places, constitute complementary functions that are part of a cohesive business operation.

8 Notwithstanding the provisions of paragraphs 1 and 2 but subject to the provisions of paragraph 9, where a person is acting in a Contracting State on behalf of an enterprise and

- (a) in doing so, habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are:
  - (i) in the name of the enterprise, or
  - (ii) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or
  - (iii) for the provision of services by that enterprise, or
- (b) manufactures or processes in a Contracting State for the enterprise goods or merchandise belonging to the enterprise,

that enterprise shall be deemed to have a permanent establishment in that State in respect of any activities which that person undertakes for the enterprise, unless the activities of such person are limited to those mentioned in paragraph 6 which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph.

9 Paragraph 8 shall not apply where the person acting in a Contracting State on behalf of an enterprise of the other Contracting State carries on business in the first-mentioned State as an independent agent and acts for the enterprise in the ordinary course of that business. Where, however, a person acts exclusively or almost exclusively on behalf of one or more enterprises to which it is closely related, that person shall not be considered to be an independent agent within the meaning of this paragraph with respect to any such enterprise.

10 For the purpose of this Article, a person is closely related to an enterprise if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same persons or enterprises. In any case, a person shall be considered to be closely related to an enterprise if one possesses directly or indirectly more than 50 per cent of the beneficial interests in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) or if another person possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise.

11 The fact that a company which is a resident of a Contracting State controls or is controlled by a company which is a resident of the other Contracting State, or which carries on business in that other State (whether through a permanent establishment or otherwise), shall not of itself make either company a permanent establishment of the other.

12 The principles set forth in the preceding paragraphs of this Article shall be applied in determining for the purposes of paragraph 7 of Article 11 and paragraph 5 of Article 12 whether there is a permanent establishment outside both Contracting States, and whether an enterprise, not being an enterprise of a Contracting State, has a permanent establishment in a Contracting State.

## ARTICLE 6

### Income from Immovable Property

1 Income derived by a resident of a Contracting State from immovable property (including from agriculture or forestry) situated in the other Contracting State may be taxed in that other Contracting State.

2 The term "immovable property" shall have the meaning which it has under the law of the Contracting State in which the property in question is situated. The term shall in any case include:

- (a) a lease of land or any other interest in or over land;
- (b) property accessory to immovable property;
- (c) livestock and equipment used in agriculture and forestry;
- (d) rights to which the provisions of general law respecting landed property apply;
- (e) usufruct of immovable property;
- (f) a right to explore for mineral, oil or gas deposits or other natural resources, and a right to mine those deposits or resources; and

- (g) 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 shall not be regarded as immovable property.

3 Any interest or right referred to in paragraph 2 shall be regarded as situated where the immovable property, landed property, land, mineral, oil or gas deposits, quarries, mineral resources or natural resources, as the case may be, are situated or where the exploration may take place.

4 The provisions of paragraph 1 shall apply to income derived from the direct use, letting, or use in any other form of immovable property.

5 The provisions of paragraphs 1, 3 and 4 shall also apply to income from immovable property of an enterprise.

## ARTICLE 7

### Business Profits

1 The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.

2 Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same

or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment or with other enterprises.

3 In determining the profits of a permanent establishment, there shall be allowed as deductions expenses of the enterprise, being expenses which are incurred for the purposes of the permanent establishment (including executive and general administrative expenses so incurred), whether incurred in the State in which the permanent establishment is situated or elsewhere.

4 No profits shall be attributed to a permanent establishment by reason of the mere purchase by that permanent establishment of goods or merchandise for the enterprise.

5 Where profits include items of income or gains which are dealt with separately in other Articles of this Agreement, then the provisions of those Articles shall not be affected by the provisions of this Article.

6 Notwithstanding the preceding provisions of this Article, profits of an enterprise of a Contracting State from carrying on a business of any form of insurance other than life insurance may be taxed in the other Contracting State in accordance with the law of that other State.

7 Where:

- (a) a resident of the Federal Republic of Germany is beneficially entitled, whether directly or through one or more interposed trust estates, to a share of the business profits of an enterprise carried on in Australia by the trustee of a trust estate other than a trust estate which is treated as a company for tax purposes; and
- (b) in relation to that enterprise, that trustee would, in accordance with the principles of Article 5, have a permanent establishment in Australia,



the enterprise carried on by the trustee shall be deemed to be a business carried on in Australia by that resident through a permanent establishment situated therein and that share of business profits shall be attributed to that permanent establishment.

8 A Contracting State shall make no adjustment to the profits that are attributable to a permanent establishment of an enterprise of one of the Contracting States after the expiration of 10 years from the end of the taxable year in which the profits would have been attributable to the permanent establishment. The provisions of this paragraph shall not apply in the case of fraud, wilful default or, in the case of Australia, gross negligence, or, in the case of the Federal Republic of Germany, negligence, or where, within that period of 10 years, an audit into the profits of the enterprise has been initiated by either State.

## ARTICLE 8

### Shipping and Air Transport

1 Profits of an enterprise of a Contracting State derived from the operation of ships or aircraft in international traffic shall be taxable only in that State.

2 Notwithstanding the provisions of paragraph 1, profits of an enterprise of a Contracting State derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise which are shipped in the other Contracting State and are discharged at a place in that other State, or from leasing on a full basis of a ship or aircraft for purposes of such carriage, may be taxed in that other State.

3 The provisions of paragraphs 1 and 2 shall also apply to profits from the operation of ships or aircraft derived through participation in a pool, a joint business or an international operating agency.

4 Profits derived by a resident of a Contracting State (being an operator of ships or aircraft or a provider of transport services) from the lease of containers (including trailers and related equipment for the transport of containers) used for the

transport of goods or merchandise shall be taxable only in that State, provided such lease is directly connected or ancillary to the operation of ships or aircraft in international traffic.

ARTICLE 9  
Associated Enterprises

1 Where:

- (a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State; or
- (b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State,

and in either case conditions operate between the two enterprises in their commercial or financial relations which differ from those which might be expected to operate between independent enterprises dealing wholly independently with one another, then any profits which, but for those conditions, might have been expected to accrue to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

2 Where a Contracting State includes in the profits of an enterprise of that State — and taxes accordingly — profits on which an enterprise of the other Contracting State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first mentioned State if the conditions made between the enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Agreement and for

this purpose the competent authorities of the Contracting States shall if necessary consult each other.

3 A Contracting State shall not include in the profits of an enterprise, and tax accordingly, profits that would have accrued to the enterprise but by reason of the conditions referred to in paragraph 1 have not so accrued, after the expiration of 10 years from the end of the taxable year in which the profits would have accrued to the enterprise. The provisions of this paragraph shall not apply in the case of fraud, wilful default or, in the case of Australia, gross negligence, or, in the case of the Federal Republic of Germany, negligence, or where, within that period of 10 years, an audit into the profits of an enterprise has been initiated by either State.

## ARTICLE 10

### Dividends

1 Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2 However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the tax so charged shall not exceed:

- (a) 5 per cent of the gross amount of the dividends, if the beneficial owner of the dividends is a company (other than a partnership) which holds directly at least 10 per cent of the voting power of the company paying the dividends throughout a 6 month period that includes the day of payment of the dividend;
- (b) 15 per cent of the gross amount of the dividends in all other cases.

In the case of dividends paid by a German Real Estate Aktiengesellschaft with listed share capital, only subparagraph (b) applies. This paragraph shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

3 Notwithstanding the provisions of paragraph 2, dividends shall not be taxed in the Contracting State of which the company paying the dividends is a resident if the beneficial owner of the dividends is a company (other than a partnership) that is a resident of the other Contracting State that has held directly shares representing 80 per cent or more of the voting power of the company paying the dividends for a 12 month period ending on the date the dividend is declared and the company that is the beneficial owner of the dividends:

- (a) has its principal class of shares listed on a recognised stock exchange specified in sub-subparagraph 1(m)(i) or (ii) of Article 3 and regularly traded on one or more recognised stock exchanges;
- (b) is owned directly or indirectly by one or more companies (provided that where the beneficial owner company is so owned indirectly, each intermediate company is a resident of a Contracting State or a company referred to in sub-subparagraph (ii)):
  - (i) whose principal class of shares is listed on a recognised stock exchange specified in sub-subparagraph 1(m)(i) or (ii) of Article 3 and regularly traded on one or more recognised stock exchanges; or
  - (ii) each of which, if it directly held the shares in respect of which the dividends are paid, would be entitled to equivalent benefits in respect of such dividends under a tax treaty between the State of which that company is a resident and the Contracting State of which the company paying the dividends is a resident; or

- (c) does not meet the requirements of subparagraphs (a) or (b) of this paragraph but the competent authority of the first-mentioned Contracting State determines that the conditions of paragraph 2 of Article 23 are not met. The competent authority of the first-mentioned Contracting State shall consult the competent authority of the other Contracting State before refusing to grant benefits of this Agreement under this subparagraph.

4 The term "dividends" as used in this Article means income from shares or other rights, not being debt-claims, participating in profits, as well as other amounts which are subjected to the same taxation treatment as income from shares by the laws of the Contracting State of which the company making the distribution is a resident for the purposes of its tax, and shall include, in the case of the Federal Republic of Germany, distributions on certificates of a German collective investment vehicle.

5 The provisions of paragraphs 1, 2 and 3 shall not apply if the beneficial owner of the dividends, being a resident of a Contracting State, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated therein and the holding in respect of which the dividends are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

6 Where a company which is a resident of a Contracting State derives profits or income from the other Contracting State, that other State may not impose any tax on the dividends paid by the company — being dividends beneficially owned by a person who is not a resident of the other Contracting State — except insofar as the holding in respect of which such dividends are paid is effectively connected with a permanent establishment situated in that other State, nor subject the company's undistributed profits to a tax on the company's undistributed profits, even if the dividends paid or the undistributed profits consist wholly or partly of profits or income arising in such other State.

7 Notwithstanding paragraph 6, dividends paid by a company that is deemed to be a resident only of one Contracting State pursuant to paragraph 3 of Article 4 may be taxed in the other Contracting State, but only to the extent that the underlying profits arising in that State out of which the dividends are paid are not subject to tax at the corporate level. Where such dividends are beneficially owned by a resident of the first-mentioned State, paragraph 2 of this Article shall apply as if the company paying the dividends were a resident only of the other State.

## ARTICLE 11

### Interest

1 Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.

2 However, that interest may also be taxed in the Contracting State in which it arises, and according to the laws of that State, but if the beneficial owner of the interest is a resident of the other Contracting State, the tax so charged shall not exceed 10 per cent of the gross amount of the interest.

3 Notwithstanding paragraph 2, interest arising in a Contracting State and beneficially owned by a resident of the other Contracting State may not be taxed in the first-mentioned State if:

- (a) the interest is derived by a Contracting State or by a political or administrative subdivision or a local authority thereof, or by any other body exercising governmental functions in a Contracting State, or by a bank performing central banking functions in a Contracting State; or
- (b) the interest is derived by a financial institution which is unrelated to and dealing wholly independently with the payer. For the purposes of this Article, 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.

4 Notwithstanding paragraph 3, interest referred to in subparagraph (b) of that paragraph may be taxed in the State in which it arises at a rate not exceeding 10 per cent of the gross amount of the interest if the interest is 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 to back-to-back loans.

5 The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, interest from government securities and income from bonds or debentures, as well as income which is subjected to the same taxation treatment as income from money lent by the law of the Contracting State in which the income arises. However, the term "interest" does not include income dealt with in Article 10.

6 The provisions of paragraphs 1 and 2, subparagraph (b) of paragraph 3 and paragraph 4 shall not apply if the beneficial owner of the interest, being a resident of a Contracting State, carries on business in the other Contracting State in which the interest arises, through a permanent establishment situated therein and the debt-claim in respect of which the interest is paid is effectively connected with that permanent establishment. In such case the provisions of Article 7 shall apply.

7 Interest shall be deemed to arise in a Contracting State when the payer is a resident of that State for the purposes of its tax. Where, however, the person paying the interest, whether the person is a resident of a Contracting State or not, has in a Contracting State or outside both Contracting States a permanent establishment in connection with which the indebtedness on which the interest is paid was incurred, and

that interest is borne by that permanent establishment, then the interest shall be deemed to arise in the State in which the permanent establishment is situated.

8           Where, by reason of a special relationship between the payer and the beneficial owner of the interest, or between both of them and some other person, the amount of the interest paid, having regard to the debt-claim for which it is paid, exceeds the amount which might reasonably have been expected to have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last mentioned amount. In such case the excess part of the payments paid shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.

## ARTICLE 12

### Royalties

1           Royalties arising in a Contracting State and paid or credited to a resident of the other Contracting State may be taxed in that other State.

2           However, those royalties may also be taxed in the Contracting State in which they arise and according to the laws of that State, but if the beneficial owner of the royalties is a resident of the other Contracting State, the tax so charged shall not exceed 5 per cent of the gross amount of the royalties.



3 The term "royalties" as used in this Article means payments or credits, whether periodical or not, and however described or computed, to the extent to which they are made as consideration for:

- (a) the use of, or the right to use, any copyright, patent, design or model, plan, secret formula or process, trademark or other like property or right;
- (b) the supply of scientific, technical, industrial or commercial knowledge or information;
- (c) the supply of any assistance that is ancillary and subsidiary to, and is furnished as a means of enabling the application or enjoyment of, any such property or right as is mentioned in subparagraph (a) or any such knowledge or information as is mentioned in subparagraph (b);
- (d) the use of, or the right to use:
  - (i) motion picture films;
  - (ii) films or audio or video tapes or disks, or any other means of image or sound reproduction or transmission for use in connection with television, radio or other broadcasting;
- (e) the use of, or the right to use, some or all of a radio frequency spectrum or band as specified in a spectrum licence of a Contracting State, where the payment or credit arises in that State; or
- (f) total or partial forbearance in respect of the use or supply of any property or right referred to in this paragraph.

4 The provisions of paragraphs 1 and 2 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise through a permanent establishment situated therein and the property or right in respect of which the royalties are paid or credited is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

5 Royalties shall be deemed to arise in a Contracting State when the payer is a resident of that State for the purposes of its tax. Where, however, the person paying the royalties, whether the person is a resident of a Contracting State or not, has in a Contracting State or outside both Contracting States a permanent establishment in connection with which the liability to pay the royalties was incurred, and the royalties are borne by the permanent establishment, then the royalties shall be deemed to arise in the State in which the permanent establishment is situated.

6 Where, by reason of a special relationship between the payer and the beneficial owner of the royalties, or between both of them and some other person, the amount of the royalties paid or credited, having regard to what they are paid or credited for, exceeds the amount which might reasonably have been expected to have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last mentioned amount. In such case, the excess part of the payments or credits shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Agreement.

## ARTICLE 13

### Alienation of Property

1 Income, profits or gains derived by a resident of a Contracting State from the alienation of immovable property referred to in Article 6 and situated in the other Contracting State may be taxed in that other State.

2 Income, profits or gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State, including income, profits or gains from the alienation of that permanent establishment (alone or with the whole enterprise), may be taxed in that other State.

3 Income, profits or gains of an enterprise of a Contracting State from the alienation of ships or aircraft operated by that enterprise in international traffic, or of movable property pertaining to the operation of those ships or aircraft, shall be taxable only in that State.

4 Income, profits or gains derived by a resident of a Contracting State from the alienation of shares or comparable interests may be taxed in the other Contracting State if, at any time during the 365 days preceding the alienation, these shares or comparable interests derived more than 50 per cent of their value directly or indirectly from immovable property, as defined in Article 6, situated in that other State.

5 Gains of a capital nature from the alienation of any property, other than that referred to in the preceding paragraphs of this Article, shall be taxable only in the Contracting State of which the alienator is a resident.

6 Where an individual was a resident of the Federal Republic of Germany for a period of at least 5 years and who, at the time of giving up residence in the Federal Republic of Germany, has become a resident of Australia, paragraph 5 shall not affect the right of the Federal Republic of Germany to treat the individual as having alienated shares or comparable interests at the time of the change of residence. If the individual is so taxed in the Federal Republic of Germany, Australia shall, in the event of an alienation of shares or comparable interests after the change of residence, calculate the capital gain on the basis of the value which the Federal Republic of Germany applied at the time of the change of residence unless the shares derived more than 50 per cent of their value directly or indirectly from immovable property situated in Australia to

which paragraph 4 applies. In the case of shares or comparable interests deriving more than 50 per cent of their value directly or indirectly from immovable property situated in Australia to which paragraph 4 applies, the German tax shall be reduced pursuant to subparagraph 2(c) of Article 22 by the amount of Australian tax which would have been payable under the applicable Australian law if the shares or comparable interests had been sold at the value which the Federal Republic of Germany applied at the time of the change of residence.

7 The provisions of paragraph 5 shall not affect the right of Australia to tax, in accordance with its laws, gains of a capital nature from the alienation of any movable property derived by an individual who is a resident of Australia at any time during the year of income in which the property is alienated, or was a resident at any time during the preceding 5 years. However, where that individual is a resident of the Federal Republic of Germany at the time of alienation, the amount of the gain that may be taxed by Australia shall not exceed the amount that would have been derived had the individual alienated the property at the time the individual ceased to be a resident of Australia unless the movable property consists of shares or comparable interests deriving more than 50 per cent of their value directly or indirectly from immovable property situated in Australia to which paragraph 4 applies. If the individual is so taxed in Australia, the Federal Republic of Germany shall, in the event of an alienation of movable property after the change of residence, calculate the capital gain on the basis of the value which Australia applied at the time of the change of residence unless the movable property consists of shares or comparable interests deriving more than 50 per cent of their value directly or indirectly from immovable property situated in the Federal Republic of Germany to which paragraph 4 applies.

#### ARTICLE 14

##### Income from Employment

1 Subject to the provisions of Articles 15, 17 and 18, salaries, wages and other similar remuneration derived by an individual who is a resident of a Contracting State

in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. If the employment is so exercised, such remuneration as is derived from that exercise may be taxed in that other State.

2 Notwithstanding the provisions of paragraph 1, remuneration derived by an individual who is a resident of a Contracting State in respect of an employment exercised in the other Contracting State shall be taxable only in the first mentioned State if:

- (a) the recipient is present in the other State for a period or periods not exceeding in the aggregate 183 days in any twelve month period commencing or ending in the fiscal year concerned; and
- (b) the remuneration is paid by, or on behalf of, an employer who is not a resident of that other State; and
- (c) the remuneration is not borne by a permanent establishment which the employer has in that other State.

3 Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic may be taxed in the Contracting State of which the enterprise operating the ship or aircraft is a resident.

4 Where, except for the application of this paragraph, a fringe benefit is taxable in both Contracting States, the fringe benefit will be taxable only in the Contracting State that has the sole or primary taxing right in accordance with the Agreement in respect of salary, wages or other similar remuneration from the employment to which the fringe benefit relates. A Contracting State has a "primary taxing right" to the extent that a taxing right in respect of salary, wages or other similar remuneration from the relevant employment is allocated to that State in accordance with this Agreement and

the other Contracting State is required to provide relief for the tax imposed in respect of such remuneration by the first-mentioned State.

#### ARTICLE 15

##### Directors' Fees

1 Directors' fees and other similar payments derived by a resident of a Contracting State in that person's capacity as a member of the board of directors of a company which is a resident of the other Contracting State may be taxed in that other State.

#### ARTICLE 16

##### Entertainers and Sportspersons

1 Notwithstanding the provisions of Articles 7 and 14, income derived by a resident of a Contracting State as an entertainer, such as a theatre, motion picture, radio or television artiste or a musician, or as a sportsperson, from that person's personal activities as such exercised in the other Contracting State, may be taxed in that other State.

2 Where income in respect of personal activities exercised by an entertainer or a sportsperson in that person's capacity as such accrues not to that person but to another person, that income may, notwithstanding the provisions of Articles 7 and 14, be taxed in the Contracting State in which the activities of the entertainer or sportsperson are exercised.

3 The provisions of paragraphs 1 and 2 shall not apply to income derived from activities performed in a Contracting State by entertainers or sportspersons if the visit to that State is wholly or mainly supported by public funds of the other Contracting State or, in the case of the Federal Republic of Germany, of its States (Länder), or

political subdivisions or local authorities thereof. In such a case, the income is taxable only in the Contracting State in which the entertainer or sports person is a resident.

## ARTICLE 17

### Pensions, Annuities and Similar Payments

1 Subject to the provisions of paragraph 2 of Article 18, pensions, payments made under the social security legislation and annuities paid to a resident of a Contracting State shall be taxable only in that State.

2 Notwithstanding the provisions of paragraph 1 but subject to the provisions of paragraph 3, such a pension or annuity arising in a Contracting State which is attributable in whole or in part to contributions which, for more than 15 years in that State,

- (a) did not form part of the taxable income from employment,
- (b) were tax-deductible, or
- (c) in the case of a pension or annuity arising in the Federal Republic of Germany, were afforded some other form of beneficial treatment by the Federal Republic of Germany

may also be taxed in that State provided the pension or annuity was first paid after 31 December 2016. This paragraph shall not apply if the tax relief or other form of beneficial treatment was clawed back for any reason, or if the 15 year condition is fulfilled in both Contracting States.

3 Notwithstanding the provisions of paragraphs 1 and 2, benefits paid under the social security legislation of a Contracting State may also be taxed in that State but the tax so charged shall not exceed 15 per cent of the gross amount of the benefit.

However, this paragraph shall not apply if the benefits were first paid before 1 January 2017.

4 Notwithstanding the provisions of paragraph 1, recurrent or non-recurrent payments made by a Contracting State or, in the case of the Federal Republic of Germany, its States (Länder), or a political subdivision or local authority thereof, being payments which are exempt from tax in that State and which are paid to a resident of the other Contracting State as compensation for political persecution (including restitution payments) or for injustice or damage sustained as a result of war or for damage as a result of military or civil alternative service or of a crime, a vaccination or for similar reasons shall be exempt from tax in that other State.

5 Any alimony or other maintenance payment arising in a Contracting State and paid to a resident of the other Contracting State shall be taxable only in the first mentioned State.

6 The term "annuities" means a stated sum payable periodically at stated times, for life or for 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

##### Government Service

1 (a) Salaries, wages and other similar remuneration, other than a pension, paid by a Contracting State or, in the case of the Federal Republic of Germany, by its States (Länder), or a political subdivision or local authority thereof to an individual in respect of services rendered to that State or subdivision or local authority shall be taxable only in that State.



1 (b) However, such salaries, wages and other similar remuneration shall be taxable only in the other Contracting State if the services are rendered in that State and the individual is a resident of that State who:

- (i) is a national of that State; or
- (ii) did not become a resident of that State solely for the purpose of rendering the services.

2 (a) Any pension paid by, or out of funds created by, a Contracting State or a political subdivision or a local authority thereof to an individual in respect of services rendered to that State or subdivision or authority shall be taxable only in that State.

2 (b) However, such pensions shall be taxable only in the other Contracting State if the individual is a resident of, and a national of, that State.

3 The provisions of paragraphs 1 and 2 shall also apply to salaries, wages and pensions paid to an individual in respect of services rendered to the Deutsche Bundesbank (Federal Central Bank) and the Association of Chambers of Industry and Commerce for the promotion of Foreign Economic Relations through the Network of Foreign Chambers of Commerce, or to other comparable institutions mutually agreed in an Exchange of Notes between the Contracting States.

4 The provisions of Articles 14, 15, 16 or 17, as the case may be, shall apply to salaries, wages and other similar remuneration, or to pensions, in respect of services rendered in connection with any business carried on by a Contracting State or, in the case of the Federal Republic of Germany, by its States (Länder), or a political subdivision or a local authority thereof.

#### ARTICLE 19

#### Professors, Teachers and Students

1 Remuneration which a professor or teacher who is a resident of a Contracting State and who visits the other Contracting State for a period not exceeding two years for the purpose of carrying out advanced study or research, or of teaching, at a university, college, school or other educational institution receives for those activities shall not be taxed in that other State, provided that such remuneration is wholly or mainly supported by public funds of the first-mentioned Contracting State or by a tax exempt charitable or benevolent organisation and such remuneration is exempt from taxation in the first-mentioned State.

2 Payments which a student or business apprentice who is or was immediately before visiting a Contracting State a resident of the other Contracting State and who is present in the first-mentioned State solely for the purpose of their education or training receives for the purpose of their maintenance, education or training shall not be taxed in that State, provided that such payments arise from sources outside that State.

ARTICLE 20  
Other Income

1 Items of income of a resident of a Contracting State, wherever arising, not dealt with in the foregoing Articles of this Agreement shall be taxable only in that State.

2 The provisions of paragraph 1 shall not apply to income, other than income from immovable property as defined in paragraph 2 of Article 6, derived by a resident of a Contracting State who carries on business in the other Contracting State through a permanent establishment situated therein and the right or property in respect of which the income is paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply. Where, however, the income comprises dividends paid by a company which is a resident of the first-mentioned State, or interest or royalties arising in that State, the income may be taxed in that State at the

rates provided in paragraphs 2 of Article 10, paragraph 2 of Article 11 or paragraph 2 of Article 12 respectively.

3 Notwithstanding the provisions of paragraphs 1 and 2, items of income of a resident of a Contracting State not dealt with in the foregoing Articles of this Agreement from sources in the other Contracting State may also be taxed in the other Contracting State.

## ARTICLE 21

### Capital

1 Capital represented by immovable property referred to in Article 6, owned by a resident of Australia and situated in the Federal Republic of Germany, may be taxed in the Federal Republic of Germany.

2 Capital represented by movable property forming part of the business property of a permanent establishment which an Australian enterprise has in the Federal Republic of Germany may be taxed in the Federal Republic of Germany.

3 Capital represented by ships and aircraft operated by an Australian enterprise in international traffic, and by movable property pertaining to the operation of such ships and aircraft, shall not be taxed in the Federal Republic of Germany.

4 All other elements of capital of a resident of Australia shall not be taxed in the Federal Republic of Germany.

## ARTICLE 22

### Methods of Elimination of Double Taxation

1 Subject to the provisions of the laws of Australia which relate to the allowance of a credit against Australian tax of tax paid in a country outside Australia

(which shall not affect the general principle of this Article), German tax paid under the laws of the Federal Republic of Germany and in accordance with this Agreement, in respect of income derived by a resident of Australia shall be allowed as a credit against Australian tax payable in respect of that income.

2 Where a resident of the Federal Republic of Germany derives income, profits or gains which, in accordance with the provisions of this Agreement, may be taxed in Australia or is exempt from Australian tax under paragraph 3 of Article 10, German tax shall be determined as follows:

- (a) Except as provided in subparagraph (c), the income, profits or gains shall be excluded from the basis upon which German tax is imposed. In the case of dividends, this applies only to such dividends as are paid to a company (not including a partnership) resident in the Federal Republic of Germany by a company resident in Australia at least 10 percent of the voting power of which is owned directly by the company resident in the Federal Republic of Germany. The exemption from the basis provided by the first sentence of this subparagraph shall not apply to dividends paid by a tax exempt company or to dividends that the distributing company may deduct for Australian tax purposes or for dividends that are attributed under the law of the Federal Republic of Germany to a person that is not a company resident in the Federal Republic of Germany.
- (b) The Federal Republic of Germany retains the right to take into account in the determination of its rate of tax the items of income, profits or gains which under the provisions of this Agreement are exempted from German tax.
- (c) With respect to the following items of income, there shall be allowed as a credit against German tax on income, subject to the provisions of

German tax law regarding credit for foreign tax, the Australian tax paid in accordance with Australian law and with the provisions of this Agreement on the following items of income:

- (i) dividends within the meaning of Article 10 to which subparagraph (a) does not apply;
- (ii) interest;
- (iii) royalties;
- (iv) income, profits or gains to which paragraph 4 of Article 13 applies;
- (v) income to which Articles 15 and 16 apply;
- (vi) income to which paragraphs 2 and 3 of Article 17 apply;
- (vii) income to which paragraph 3 of Article 20 applies.

For the purposes of application of this subparagraph (c), items of income of a resident of the Federal Republic of Germany that, under this Agreement, may be taxed in Australia shall be deemed to be income from sources within Australia.

- (d) The provisions of subparagraph (a) are to be applied to profits within the meaning of Article 7, dividends within the meaning of Article 10 and to income, profits or gains from the alienation of property within the meaning of paragraph 2 of Article 13 only to the extent that the items of income, profits or gains were derived from the production, processing, working or assembling of goods and merchandise, the exploration and extraction of natural resources, banking and insurance,

trade or the rendering of services or if the items of income, profits or gains are economically attributable to these activities. This applies only if a business undertaking that is adequately equipped for its business purpose exists, except where profits may be taxed in Australia pursuant to paragraph 6 of Article 7. If subparagraph (a) is not to be applied, double taxation shall be eliminated by means of a tax credit as provided for in subparagraph (c).

- (e) Notwithstanding subparagraph (a), double taxation shall be eliminated by a tax credit as provided for in subparagraph (c), if
  - (i) Australia may, under the provisions of the Agreement, tax items of income, profits or gains, or elements thereof, but does not actually do so;
  - (ii) after consultation, the Federal Republic of Germany notifies Australia through diplomatic channels of items of income, profits or gains, or elements thereof, to which it intends to apply the provisions on tax credit under subparagraph (c). Double taxation is then eliminated for the notified items of income, profits or gains, or elements thereof, by allowing a tax credit from the first day of the calendar year following that in which the notification was made.

3 If in the Contracting States items of income, profits or gains, or elements thereof,

- (a) are placed, due to differences in their domestic laws, under different provisions of this Agreement and if, as a consequence of this different placement such income, profits or gains would be subject to double taxation and this conflict cannot be resolved by a procedure pursuant to paragraphs 2 or 3 of Article 25, the State of which the person is a

resident shall avoid such double taxation by allowing a tax credit following the procedures laid down in this Article;

- (b) are placed under different provisions of this Agreement and if, as a consequence of this different placement such income, profits or gains would be subject to non-taxation or lower taxation than without this conflict, the State of which the person is a resident shall not be obliged to exempt such income, profits or gains, or, in the case of lower taxation only, that State shall allow a tax credit, following the procedures laid down in this Article in respect of such income, profits or gains.

## ARTICLE 23

### Limitation of Benefits

1 Where an item of income, profits or gains derived by an individual is exempt from tax in a Contracting State by reason only of the status of that individual as a temporary resident under any applicable taxation laws of that State, no relief shall be available under this Agreement in the other Contracting State in respect of that item of income, profits or gains.

2 Notwithstanding the other provisions of this Agreement, a benefit under this Agreement shall not be granted in respect of an item of income, or, in the case of the Federal Republic of Germany, of capital, if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Agreement.

3 Nothing in this Agreement shall prevent the application of any provision of the laws of a Contracting State which is designed to prevent the evasion or avoidance of taxes. Where double taxation arises as a result of the application of any such provision, the competent authorities shall consult for the elimination of such double taxation in accordance with paragraph 3 of Article 25.

#### ARTICLE 24

##### Non-discrimination

1 Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected. This provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the Contracting States.

2 The taxation of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State shall not be less favourably levied in that other State than the taxation levied on enterprises of that other State carrying on the same activities. This provision shall not be construed as obliging a Contracting State to grant to individuals who are residents of the other Contracting State any personal allowances, reliefs and reductions for taxation purposes on account of civil status or family responsibilities which it grants to its own residents.

3 Except where the provisions of paragraph 1 of Article 9, paragraph 8 of Article 11, or paragraph 6 of Article 12, apply, interest, royalties and other disbursements paid by an enterprise of a Contracting State to a resident of the other Contracting State shall, for the purpose of determining the taxable profits of such enterprise, be deductible under the same conditions as if they had been paid to a resident of the first-mentioned State. Similarly, any debts of a German enterprise to a



resident of Australia shall, for the purpose of determining the taxable capital of that enterprise, be deductible under the same conditions as if they had been contracted to a resident of the Federal Republic of Germany.

4 Enterprises of a Contracting State, the capital of which is wholly or partly owned or controlled, directly or indirectly, by one or more residents of the other Contracting State, shall not be subjected in the first-mentioned State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which other similar enterprises of the first-mentioned State in similar circumstances are or may be subjected.

5 The provisions of this Article shall, notwithstanding the provisions of Article 2, apply to taxes of every kind and description.

#### ARTICLE 25

##### Mutual Agreement Procedure

1 Where a person considers that the actions of one or both of the Contracting States result or will result for the person in taxation not in accordance with the provisions of this Agreement, the person may, irrespective of the remedies provided by the domestic law of those States, present a case to the competent authority of either Contracting State. The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Agreement.

2 The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Agreement. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

3 The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Agreement. They may also consult together for the elimination of double taxation in cases not provided for in the Agreement.

4 The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs.

5 Where,

- (a) under paragraph 1, a person has presented a case to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Agreement, and
- (b) the competent authorities are unable to reach an agreement to resolve that case pursuant to paragraph 2 within two years from the presentation of the case to the competent authority of the other Contracting State,

any unresolved issues arising from the case shall be submitted to arbitration if the person so requests. These unresolved issues shall not, however, be submitted to arbitration if a decision on these issues has already been rendered by a court or administrative tribunal of either State. Unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that decision shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States. However, this paragraph shall not apply to an unresolved issue to the extent it involves the application of paragraph 2 of Article 23 or a provision designed to prevent the evasion or avoidance of taxes referred to in paragraph 3 of Article 23. The competent

authorities of the Contracting States shall by mutual agreement settle the mode of application of this paragraph.

6 For the purposes of paragraph 3 of Article XXII (Consultation) of the General Agreement on Trade in Services of 15 April 1994, the Contracting States agree that, notwithstanding that paragraph, any dispute between them as to whether a measure falls within the scope of this Agreement may be brought before the Council for Trade in Services, as provided by that paragraph, only with the consent of both Contracting States. Any doubt as to the interpretation of this paragraph shall be resolved under paragraph 3 of this Article or, failing agreement under that procedure, pursuant to any other procedure agreed to by both Contracting States.

## ARTICLE 26

### Exchange of Information

1 The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Agreement or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States and, in the case of the Federal Republic of Germany, on behalf of its States (Länder), or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Agreement. The exchange of information is not restricted by Articles 1 and 2.

2 Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing,

information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.

3 In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

- (a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
- (b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
- (c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (ordre public).

4 If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5 In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

ARTICLE 27

Assistance in the Collection of Taxes

1 The Contracting States shall lend assistance to each other in the collection of revenue claims. This assistance is not restricted by Articles 1 and 2. The competent authorities of the Contracting States may by mutual agreement settle the mode of application of this Article.

2 The term "revenue claim" as used in this Article means an amount owed in respect of taxes of every kind and description imposed on behalf of the Contracting States and, in the case of the Federal Republic of Germany, on behalf of its States (Länder) or one of its political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to this Agreement or any other instrument to which the Contracting States are parties, as well as interest, administrative penalties and costs of collection or conservancy related to such amount.

3 When a revenue claim of a Contracting State is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of collection by the competent authority of the other Contracting State. That revenue claim shall be collected by that other State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other State.

4 When a revenue claim of a Contracting State is a claim in respect of which that State may, under its law, take measures of conservancy with a view to ensure its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of taking measures of conservancy by the competent authority of the other Contracting State. That other State shall take measures of conservancy in respect of that revenue claim in accordance with the provisions of its laws as if the revenue claim were a revenue claim of that other State even if, at the time

when such measures are applied, the revenue claim is not enforceable in the first-mentioned State or is owed by a person who has a right to prevent its collection.

5 Notwithstanding the provisions of paragraphs 3 and 4, a revenue claim accepted by a Contracting State for purposes of paragraph 3 or 4 shall not, in that State, be subject to the time limits or accorded any priority applicable to a revenue claim under the laws of that State by reason of its nature as such. In addition, a revenue claim accepted by a Contracting State for the purposes of paragraph 3 or 4 shall not, in that State, have any priority applicable to that revenue claim under the laws of the other Contracting State.

6 Proceedings with respect to the existence, validity or the amount of a revenue claim of a Contracting State shall not be brought before the courts or administrative bodies of the other Contracting State.

7 Where, at any time after a request has been made by a Contracting State under paragraph 3 or 4 and before the other Contracting State has collected and remitted the relevant revenue claim to the first-mentioned State, the relevant revenue claim ceases to be

- (a) in the case of a request under paragraph 3, a revenue claim of the first-mentioned State that is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, or
- (b) in the case of a request under paragraph 4, a revenue claim of the first-mentioned State in respect of which that State may, under its laws, take measures of conservancy with a view to ensure its collection

the competent authority of the first-mentioned State shall promptly notify the competent authority of the other State of that fact and, at the option of the other State, the first-mentioned State shall either suspend or withdraw its request.

8. In no case shall the provisions of this Article be construed so as to impose on a Contracting State the obligation:

- (a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
- (b) to carry out measures which would be contrary to public policy (ordre public);
- (c) to provide assistance if the other Contracting State has not pursued all reasonable measures of collection or conservancy, as the case may be, available under its laws or administrative practice;
- (d) to provide assistance in those cases where the administrative burden for that State is clearly disproportionate to the benefit to be derived by the other Contracting State;
- (e) to provide assistance if that State considers that the taxes with respect to which assistance is requested are imposed contrary to generally accepted taxation principles.

#### ARTICLE 28

##### Procedural Rules for Taxation at Source

1 If in one of the Contracting States the taxes on dividends, interest, royalties, or other items of income derived by a resident of the other Contracting State are levied by withholding tax at source, then the right to initially collect the withholding tax at a higher rate provided for under the domestic law of the first-mentioned State is not affected by the provisions of this Agreement.

2 The tax so withheld at source shall be refunded on the taxpayer's application to the extent that its levying is limited or eliminated by this Agreement. The period for application for a refund is four years from the end of the calendar year in which the dividends, interest, royalties, or other items of income have been received.

3 The Contracting State in which the income arises may require the taxpayer to provide an administrative certification by the Contracting State of which the taxpayer is a resident, with respect to residence for tax purposes in that State.

4 The competent authorities may by mutual agreement implement the provisions of this Article and if necessary establish other procedures for the implementation of tax reductions or exemptions provided for under this Agreement.

#### ARTICLE 29

##### Members of Diplomatic Missions and Consular Posts

1 Nothing in this Agreement shall affect the fiscal privileges of members of diplomatic missions and consular posts under the general rules of international law or under the provisions of special international agreements.

#### ARTICLE 30

##### Protection of Personal Information

Where personal information is exchanged under this Agreement, the following additional provisions shall apply:

- (a) The receiving agency may use such information in compliance with paragraph 2 of Article 26.
- (b) The supplying agency shall be obliged to exercise vigilance as to the accuracy of the information to be supplied and its foreseeable



relevance within the meaning of paragraph 1 of Article 26 and the proportionality to the purpose for which it is supplied. If it emerges that inaccurate information or information which should not have been supplied has been supplied, the receiving agency shall be informed of this without delay. That agency shall be obliged to correct or erase such information without delay.

- (c) The receiving agency shall on request inform the supplying agency on a case-by-case basis about the use of the supplied information and the results achieved thereby.
- (d) Upon application the person concerned shall be informed of the supplied information relating to that person and of the use to which such information is to be put. There shall be no obligation to furnish this information if on balance it turns out that the public interest in withholding it outweighs the interest of the person concerned in receiving it. In all other respects, the right of the person concerned to be informed of the existing information relating to that person shall be governed by the domestic law of the Contracting State in whose sovereign territory the application for the information is made.
- (e) The receiving agency shall bear liability in accordance with its domestic laws in relation to any person suffering unlawful damage in connection with the supply of information under the exchange of information pursuant to this Agreement. In relation to the damaged person, the receiving agency may not plead to its discharge that the damage had been caused by the supplying agency.

ARTICLE 31  
Protocol

The attached Protocol shall be an integral part of this Agreement.

ARTICLE 32

Entry into Force

1 This Agreement shall be subject to ratification and the instruments of ratification shall be exchanged as soon as possible.

2 The Agreement shall enter into force on the day of the exchange of the instruments of ratification and shall thereupon have effect:

(a) in the case of Australia:

- (i) in respect of withholding tax on income that is derived by a non-resident, in relation to income derived on or after 1 January next following the date on which this Agreement enters into force;
- (ii) in respect of fringe benefits tax, in relation to fringe benefits provided on or after 1 April next following the date on which this Agreement enters into force;
- (iii) in respect of other Australian tax, in relation to income, profits or gains of any year of income beginning on or after 1 July next following the date on which this Agreement enters into force;

(b) in the case of the Federal Republic of Germany:

- (i) in respect of taxes withheld at source, in relation to amounts paid or credited on or after 1 January next following the date on which this Agreement enters into force;
- (ii) in respect of taxes on income, for the taxes levied on income derived during the periods of time beginning on or after 1 January next following the date on which this Agreement enters into force;
- (iii) in respect of the tax on capital, for the tax levied for periods beginning on or after 1 January next following the year in which this Agreement enters into force.

3 The Agreement between the Commonwealth of Australia and the Federal Republic of Germany for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital and to certain other taxes, signed at Melbourne on 24 November 1972 and the Protocol to that Agreement, also signed at Melbourne on 24 November 1972, shall terminate upon the entry into force of this Agreement. However, the provisions of the first-mentioned Agreement and the Protocol shall continue to have effect for taxable years and periods which expired before the time at which the provisions of this Agreement shall be effective.

#### ARTICLE 33

##### Termination

1 This Agreement shall remain in force until terminated by a Contracting State. Either Contracting State may terminate the Agreement, through diplomatic channels, by giving notice of termination at least six months before the end of any calendar year beginning after the expiration of five years from the date of its entry into force. In such event, the Agreement shall cease to have effect:

- (a) in Australia:
  - (i) in respect of withholding tax on income that is derived by a non-resident, in relation to income derived on or after 1 January in the calendar year next following that in which the notice of termination is given;
  - (ii) in respect of fringe benefits tax, in relation to fringe benefits provided on or after 1 April next following the date on which the notice of termination is given;
  - (iii) in respect of other Australian tax, in relation to income, profits or gains of any year of income beginning on or after 1 July in the calendar year next following that in which the notice of termination is given;
  
- (b) in the Federal Republic of Germany:
  - (i) in respect of taxes withheld at source, in relation to amounts paid or credited on or after 1 January of the calendar year following the year in which the notice of termination is given;
  - (ii) in respect of taxes on income, for the taxes levied on income derived during the periods of time beginning on or after 1 January of the calendar year following the year in which the notice of termination is given;
  - (iii) in respect of the tax on capital, for the tax levied for periods beginning on or after 1 January of the calendar year following the year in which the notice of termination is given.

Notice of termination shall be regarded as having been given by a Contracting State on the date of receipt of such notice by the other Contracting State.

DONE at Berlin, this 12<sup>th</sup> day of November, 2015, in duplicate in the English and German languages, both texts being equally authentic.

Senator the Hon. Mathias Cormann  
Minister for Finance  
FOR AUSTRALIA

Dr Wolfgang Schäuble  
Minister for Finance  
FOR THE FEDERAL REPUBLIC OF  
GERMANY

PROTOCOL

TO THE AGREEMENT

BETWEEN  
AUSTRALIA

AND

THE FEDERAL REPUBLIC OF GERMANY

FOR THE ELIMINATION OF DOUBLE TAXATION WITH RESPECT TO TAXES  
ON INCOME AND ON CAPITAL AND THE PREVENTION OF FISCAL  
EVASION AND AVOIDANCE

Australia and the Federal Republic of Germany have in addition to the Agreement of 12 November 2015 for the Elimination of Double Taxation with respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance agreed on the following provisions, which shall form an integral part of the Agreement:

1 With reference generally to the application of the Agreement

- (a) Income, profits or gains derived by a resident of the Federal Republic of Germany which, under any one or more of Articles 6 to 8 and 10 to 18, may be taxed in Australia shall for the purposes of the law of Australia relating to its tax be deemed to arise from sources in Australia.
- (b) This Agreement shall not be interpreted as preventing the Federal Republic of Germany from imposing German tax on amounts included in the income of a resident of the Federal Republic of Germany under parts 4, 5, and 7 of the German External Tax Relations Act (Außensteuergesetz).

2 With reference to paragraph 2 of Article 1

If, in accordance with paragraph 2 of Article 1, income is taxed in a Contracting State in the hands of an entity or arrangement that is treated as wholly or partly fiscally transparent under the laws of the other Contracting State and is also taxed in the hands of a resident of that other State as a participant in such entity or arrangement, and this results in double taxation, the competent authorities of the Contracting States shall consult each other pursuant to Article 25 to find an appropriate solution.

3 With reference to paragraph 2 of Article 1 and Article 10

It is understood that where dividends derived by or through a fiscally transparent entity or arrangement are treated, for the purposes of taxation by a Contracting State, as the income, profits or gains of a resident of that State, Article 10 shall apply as if that resident had derived the dividends directly.

4 With reference to paragraph 3 of Article 7

For the purposes of paragraph 3 of Article 7, only those expenses which would be deductible if the permanent establishment were an independent entity which paid those expenses will be regarded as having been incurred for the purposes of the permanent establishment.

5 With reference to paragraph 2 of Article 9

The reference to the conditions which "would have been made between independent enterprises" shall be construed to mean conditions which would have been made if the enterprises had been dealing wholly independently with one another.

6 With reference to Article 10 and 11

Notwithstanding the provisions of Article 10 and 11 of this Agreement, dividends and interest may be taxed in the Contracting State in which they arise, and according to the law of that State, if they

- (a) are derived from rights or debt claims carrying a right to participate in profits, including income derived by a silent partner ("stiller Gesellschafter") from that partner's participation as such, or income from loans with an interest rate linked to the borrower's profit ("partiarische Darlehen") or profit sharing bonds ("Gewinnobligationen") within the meaning of the tax law of the Federal Republic of Germany, and
- (b) are deductible in the determination of profits of the payer of such dividends or interest.

7 With reference to paragraph 3 of Article 23 and paragraph 5 of Article 25

- (1) For the purposes of paragraph 3 of Article 23 and paragraph 5 of Article 25, provisions of the laws of a Contracting State which are designed to prevent evasion or avoidance of taxes include:
- (a) measures designed to prevent improper use of the provisions of tax agreements;
  - (b) measures designed to address thin capitalisation, dividend stripping and transfer pricing;
  - (c) in the case of Australia, controlled foreign company, transferor trusts and foreign investment fund rules; and
  - (d) measures designed to ensure that taxes can be effectively collected and recovered, including conservancy measures.
- (2) If the application of the foregoing provisions results in double taxation, the competent authorities of the Contracting States shall consult each other pursuant to Article 25 to find an appropriate solution.

8 With reference to paragraph 4 of Article 24

It is understood that paragraph 4 of Article 24 shall not be construed as obligating a Contracting State to permit cross-border consolidation of income between enterprises.



## **Detailed explanation of new law**

### **The German agreement**

#### *Title and preamble*

1.1. The BEPS treaty shopping minimum standard requires countries to include in their tax treaties an express statement that their common intention is to eliminate double taxation without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance, including through treaty shopping arrangements.

1.2. Consistent with the BEPS treaty shopping minimum standard and the commitments of both Australia and Germany to implement that minimum standard:

- the title of the German agreement provides that the German agreement is for the elimination of double taxation with respect to taxes on income and on capital and the prevention of fiscal evasion and avoidance, and
- the preamble of the German agreement further provides that Australia and Germany, in desiring to further develop the bilateral economic relationship and enhance the bilateral cooperation in tax matters, intend to conclude the German agreement for the elimination of double taxation with respect to taxes on income and on capital without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the German agreement for the indirect benefit of residents of third States).

1.3. Both the title and the preamble specifically adopt the title and preamble wording recommended in paragraph 72 of the Action 6 2015 Final Report. The explanation of that wording which will be included in the revised Introduction to the OECD Model as set out in paragraph 74 of the Action 6 2015 Final Report is therefore relevant for the interpretation of the German agreement. For ease of understanding, key guidance from that Introduction is set out in paragraphs 1.5 to 1.7 below. The OECD intends that the BEPS Project's recommended changes to the OECD Model and its Introduction and Commentary will be included in the next update to the OECD Model.

1.4. The title and preamble of the German agreement recognise that the purpose of the German agreement is not limited to the elimination of

double taxation and Australia and Germany do not intend the provisions of the German agreement to create opportunities for non-taxation or reduced taxation through tax avoidance and evasion.

1.5. In recognition of the particular base erosion and profit shifting concerns that arise from treaty-shopping arrangements, the preamble expressly refers to such arrangements as an example of tax avoidance that should not result from tax treaties. Treaty shopping arrangements are only one example of tax avoidance arrangements to which the preamble is intended to apply.

1.6. The title and preamble form part of the context of the German agreement and constitute a general statement of the object and purpose of the German agreement – refer Article 31(2) of the Vienna Convention on the Law of Treaties. The title and preamble therefore play an important role in the interpretation of the provisions of the German agreement. According to the general rule of treaty interpretation contained in Article 31(1) of the Vienna Convention on the Law of Treaties, a ‘treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’

#### ***Article 1 – Persons covered***

1.7. This Article establishes the scope of the application of the German agreement by providing for it to apply to ‘persons’ (defined to include individuals, companies and any other body of persons) who are residents of one or both of the countries. It generally precludes extra-territorial application of the German agreement. [*Article 1, paragraph 1*]

1.8. The German agreement also applies to third country residents in relation to Article 24 (*Non-discrimination*) in its application to nationals of one of the treaty countries, Article 25 (*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 26 (*Exchange of Information*) and the assistance in collection of tax debts under Article 27 (*Assistance in the Collection of Taxes*).

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

#### ***Fiscally transparent entities and arrangements***

1.10. The BEPS Action 2 2015 Final Report recommends a new provision which will be included in the OECD Model to ensure that income of transparent entities is treated, for the purposes of the OECD

Model, in accordance with the principles of the 1999 OECD report on *The Application of the OECD Model Tax Convention to Partnerships* (the Partnership Report). That provision is intended to ensure not only that the benefits of tax treaties are granted in appropriate cases but also that these benefits are not granted where neither country treats, under its domestic law, the income of an entity as the income of one of its residents.

1.11. Paragraph 2 of Article 1 (*Persons Covered*) of the German agreement specifically adopts the wording in the new OECD Model provision as recommended in paragraph 435 of the Action 2 2015 Final Report. The recommended additional Commentary on the provision set out in paragraph 435 of the Action 2 2015 Final Report, including the examples in that Commentary, is therefore relevant for the interpretation of paragraph 2 of Article 1 (*Persons Covered*) of the German agreement. For ease of understanding, key guidance from that recommended additional Commentary is set out in paragraphs 1.14 to 1.26 below. The OECD intends that changes to the OECD Model and its Commentary recommended in the BEPS 2015 Final Reports will be included in the next update to the OECD Model.

1.12. Paragraph 2 of this Article addresses the situation of the income of entities or arrangements that one or both countries treat as wholly or partly fiscally transparent for tax purposes. The provisions of the paragraph ensure that income of such entities or arrangements is treated, for the purposes of the German agreement, in accordance with the principles reflected in the Partnership Report. That report therefore provides guidance and examples on the interpretation and application of paragraph 2 in various situations.

1.13. In the case of Australia, entities that are treated as wholly or partly fiscally transparent for Australian tax purposes include partnerships which are subject to Division 5 of Part III of the *Income Tax Assessment Act 1936* (ITAA 1936) (but not corporate limited partnerships that are subject to Division 5A of Part III), and trusts which are subject to Division 6 of Part III of the ITAA 1936 where the beneficiary of the trust is presently entitled to the income and assessable accordingly (but not a corporate unit trust or public trading trust that are subject to Division 6B or 6C of Part III).

1.14. The inclusion of the words ‘wholly or partly’ addresses the situation where the entity or arrangements is partly treated as a taxable unit and partly disregarded for tax purposes. In Australia, this can occur, for example, in the case of a trust, the income of which is assessable under Division 6 of Part III of the ITAA 1936 (see paragraph 1.22 below for further explanation). Paragraph 2 not only serves to confirm the conclusions of the Partnership Report but also extends the application of

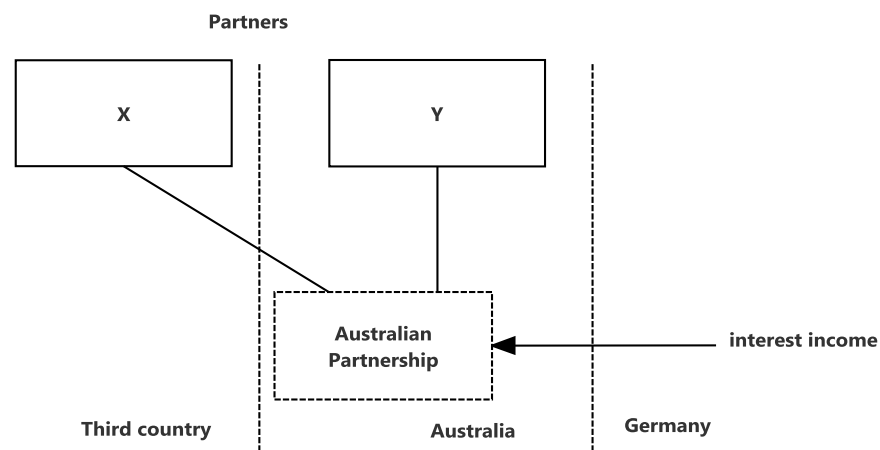
these conclusions to situations that were not directly covered by the Partnership Report.

1.15. The paragraph not only ensures that the benefits of the German agreement are granted in appropriate cases but also ensures that these benefits are not granted where neither country treats, under its domestic law, the income of an entity or arrangement as the income of one of its residents. The paragraph therefore confirms the conclusions of the Partnership Report in such a case (see, for example, example 3 of the Partnership Report). Also, as recognised in the Partnership Report, neither country should be expected to grant the benefits of the German agreement in cases where they cannot verify whether a person is truly entitled to these benefits. Thus, if an entity is established in a jurisdiction from which Australia cannot obtain tax information, Australia would need to be provided with all the necessary information in order to be able to grant the benefits of the German agreement.

1.16. Where the same income is taxed in the hands of different persons under paragraph 2 of Article 1 (*Persons Covered*) and this results in double taxation, paragraph 2 of the Protocol provides that the two competent authorities will consult pursuant to Article 25 (*Mutual Agreement Procedure*) to find an appropriate solution. [*Protocol, paragraph 2*]

1.17. The following example illustrates the application of paragraph 2 of this Article where income (including profits or gains) is derived from sources in one country through an entity organised in the other country which is treated as fiscally transparent in that other country (that is, income derived through that entity is taxed in the hands of the beneficiaries, members or participants of the entity).

### Example 1.1



In the above diagram, interest income is paid to an Australian partnership from Germany. The Australian partnership includes two partners who share equally in all the partnership's income: an Australian partner (Y) who is a resident of Australia for the purposes of the German agreement and a non-resident partner (X) who is a resident of a third country. Under Australian law, the income is treated as the income of the partners.

As such, in this example, half the interest income paid to the partnership will be considered, for purposes of the German agreement, to be derived by the Australian resident partner as the Australian resident partner (Y) is assessable under Australian income tax law. Therefore the Australian partner would be eligible for the benefits of the German agreement in respect of half of the German sourced interest income.

Treaty relief will not apply to income derived by any partners that are not residents of Australia for purposes of the German agreement (in this example, non-resident partner X Co).

In this example, paragraph 2 of Article 1 (*Persons Covered*) provides that half of the interest shall be considered, for the purposes of Article 11 (*Interest*), to be income of a resident of Australia.

Eligibility for the treaty benefits will also be subject to the Australian partner meeting the other requirements set out in Article 11 (*Interest*) to qualify for the relevant treaty benefits, as well as the potential application of the anti-avoidance and limitation of benefits provisions contained in the German agreement.

1.18. The reference to 'income (including profits or gains) derived by or through an entity or arrangement' has a broad meaning and covers any income that is earned by or through an entity or arrangement, regardless of the view taken by either Australia or Germany as to who derives that income for domestic tax purposes and regardless of whether or not that entity or arrangement has legal personality or constitutes a person as defined in subparagraph 1(d) of Article 3 (*General Definitions*). It would cover, for example, income of any partnership or trust that Australia and/or Germany treat as wholly or partly fiscally transparent. Also, as illustrated in example 2 of the Partnership Report, it does not matter where the entity or arrangement is established: the paragraph applies to an entity established in a third country to the extent that, under the domestic tax law of Australia or Germany, the entity is treated as wholly or partly fiscally transparent and income of that entity is attributed to a resident of that country.

1.19. The term 'income' is given the wide meaning that it has for the purposes of the German agreement – with the term 'income' expressly clarified to include 'profits or gains' – and therefore applies to the various

items of income that are covered by Articles 6 to 20 of the German agreement.

1.20. The reference to ‘by or through’ takes account of the fact that the same income may be regarded as derived by the entity in one country, while the other country considers that, notwithstanding that it is received by the entity or arrangement, it is derived by the persons who have an interest in the entity or arrangement.

1.21. The concept of ‘fiscally transparent used in paragraph 2 of this Article refers to situations where, under the domestic law of either Australia or Germany, the income (or part thereof) of the entity or arrangement is not taxed at the level of the entity or the arrangement but at the level of the persons who have an interest in that entity or arrangement. This will normally be the case where the amount of tax payable on a share of the income of an entity or arrangement is determined separately in relation to the personal characteristics of the person who is entitled to that share so that the tax will depend on whether that person is taxable or not, on the other income that the person has, on the personal allowances to which the person is entitled and on the tax rate applicable to that person; also, the character and source, as well as the timing of the realisation, of the income for tax purposes will not be affected by the fact that it has been earned through the entity or arrangement. The fact that the income is computed at the level of the entity or arrangement before the share is allocated to the person will not affect that result.

1.22. In the case of an entity or arrangement which is treated as partly fiscally transparent under the domestic law of one of the two countries, only part of the income of the entity or arrangement will be taxed at the level of the persons who have an interest in that entity or arrangement as described in the preceding paragraph whilst the rest will remain taxable at the level of the entity or arrangement. This is consistent with the tax treatment of some trusts in Australia. Under Division 6 of the ITAA 1936, beneficiaries of the trust are assessed on a share of the net income of the trust estate based on their present entitlement to a share of the income of the trust estate and the trustee is assessed on any residual net income, as well as in respect of some beneficiaries, such as non-residents and beneficiaries under a legal disability. Similarly, in some countries, income derived through a limited partnership is taxed in the hands of the general partner as regards that partner’s share of that income but is considered to be the income of the limited partnership as regards the limited partners’ share of the income. To the extent that the entity or arrangement qualifies as a resident of either Australia or Germany, paragraph 2 will ensure that the benefits of the treaty also apply to the share of the income that is attributed to the entity or arrangement under the domestic law of that country (subject to the German agreement’s anti-avoidance and limitation of benefits provisions).

1.23. As with other provisions of the German agreement, the provision applies separately to each item of income (or profits or gains) of the entity or arrangement.

1.24. By providing that the income to which paragraph 2 of this Article applies will be considered to be income of a resident of one of the two countries for the purposes of the German agreement, paragraph 2 ensures that the relevant income is attributed to that resident for the purposes of the application of the various allocative rules of the German agreement. Depending on the nature of the income, this will therefore allow the income to be considered, for example, as ‘income derived by’ for the purposes of Articles 6, 11, 13 and 16, ‘profits of an enterprise’ for the purposes of Articles 7, 8 and 9 or dividends or interest ‘paid to’ for the purposes of Articles 10, 11 and 12. The fact that the income is considered to be derived by a resident of one country for the purposes of the German agreement also means that where the income constitutes a share of the income of an enterprise in which that resident holds a participation, such income shall be considered to be the income of an enterprise carried on by that resident (for example, for the purposes of the definition of ‘enterprise of a Contracting State’ in Article 3 (General Definitions) and paragraph 2 of Article 20 (Other Income)).

1.25. Paragraph 2 of this Article does not prejudice the issue of whether the recipient is the beneficial owner of the relevant income. Where, for example, a fiscally transparent partnership receives dividends as an agent or nominee for a person who is not a partner, the fact that the dividend may be considered as income of a resident of one country under the domestic law of that country will not preclude the country of source from considering that neither the partnership nor the partners are the beneficial owners of the dividend.

1.26. Similarly, paragraph 2 of this Article is not intended to in any way change the need to separately satisfy any other requirements set out in the other relevant provisions of the German agreement in order to obtain the treaty benefits. For instance, in order to access the dividends exemption set out in paragraph 3 of Article 10 (*Dividends*), all the requirements of paragraph 3 would still need to be met.

1.27. Paragraph 2 of this Article only applies for the purposes of the German agreement and does not, therefore, require either country to change the way in which it attributes income or characterises entities for the purposes of its domestic law. [*Article 1, paragraph 2*]

1.28. Additionally, paragraph 2 of this Article is not intended to operate to alter the specific treaty benefit that would be available for an item of income in the absence of this paragraph. For instance, where German dividends are derived through a third country limited liability

company that is treated as fiscally transparent by Australia and Germany and those dividends are taxed by Australia in the hands of an Australian resident individual participant in the limited liability company, paragraph 2 does not operate to require Germany to apply the dividend exemption set out in paragraph 3 of Article 10 (*Dividends*). This is confirmed by the understanding set out in paragraph 3 of the Protocol to the German agreement:

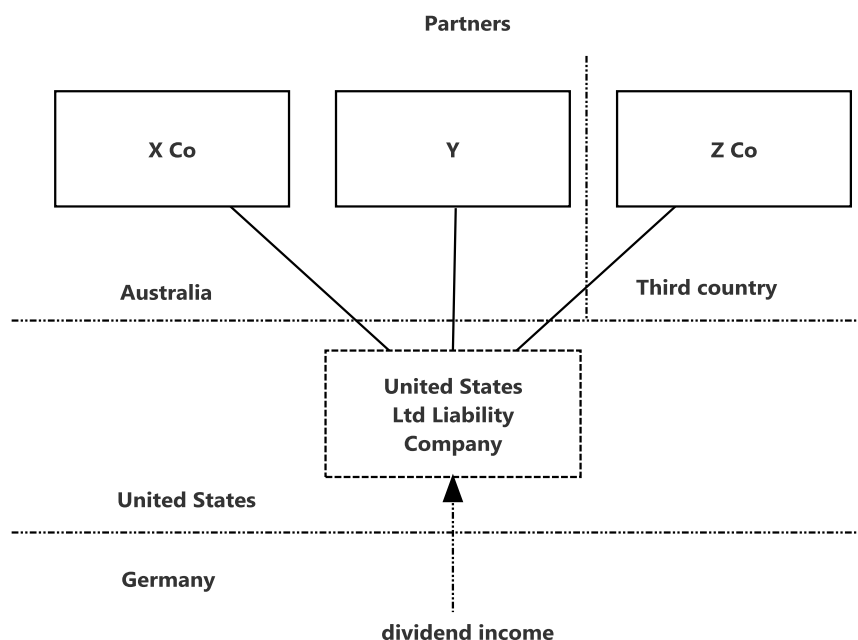
‘It is understood that where dividends derived by or through a fiscally transparent entity or arrangement are treated, for the purposes of taxation by a Contracting State, as the income, profits or gains of a resident of that State, Article 10 shall apply as if that resident had derived the dividends directly.’

1.29. Like paragraph 2 of this Article itself (see paragraph 1.27 above), this understanding was not intended to in any way change the need to separately satisfy any other requirements set out in the other relevant provisions of the German agreement in order to obtain the treaty benefits, including the requirements set out in Article 10 (*Dividends*).  
*[Protocol, paragraph 3]*

1.30. The following example illustrates both the application of paragraph 3 of the Protocol and the application of paragraph 2 of Article 1 (*Persons Covered*) where income (including profits or gains) is derived from sources in one country through a third country entity which is treated as fiscally transparent in the other country (that is, income derived through that entity is taxed in that other country in the hands of the beneficiaries, members or participants of the entity).



**Example 1.2**



In the above diagram, a German company pays dividend income to a United States Limited Liability Company. The United States Limited Liability Company includes three partners who share equally in all the partnership's income: two Australian partners (X Co and Y) who are residents of Australia for the purposes of the German agreement and a non-resident partner (Z Co) who is a resident of a third country.

As the United States Limited Liability Company is treated as a partnership for United States tax law purposes, it is also treated as a partnership for Australian tax law purposes under Australia's foreign hybrid rules.

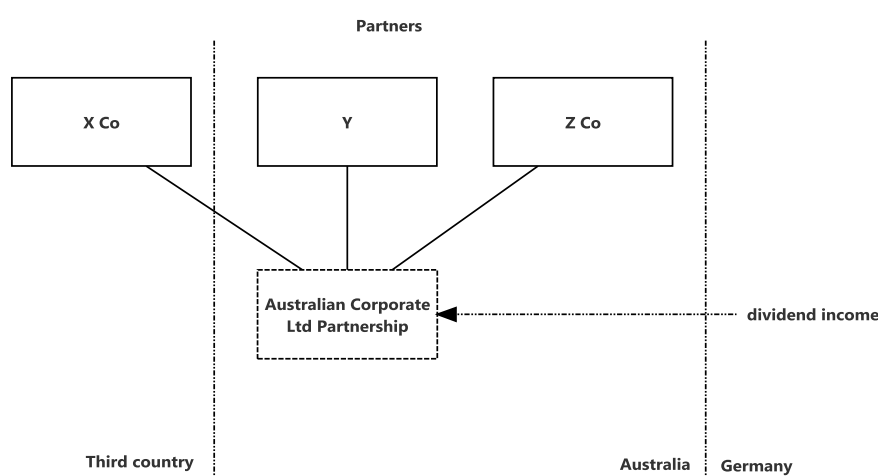
In this example, the dividend income derived through the United States Limited Liability Company on which the Australian resident partners are assessable under Australian income tax law would be eligible for the benefits of the German agreement. Subject to separately meeting the other requirements set out in Article 10 (*Dividends*) to qualify for the relevant treaty benefits, X Co may be entitled to the 5 per cent rate limit set out in subparagraph 2(a) of Article 10 and Y may be entitled to the 15 per cent rate limit set out in subparagraph 2(b) of Article 10.

Treaty relief under the German agreement will not apply to income derived by any partners that are not residents of Australia for purposes of the German agreement (in this example, Z Co).

Eligibility for the treaty benefits will also be subject to the potential application of the anti-avoidance and limitation of benefits provisions contained in the German agreement.

1.31. The following example illustrates the application of paragraph 2 of Article 1 (*Persons Covered*) where income (including profits or gains) is derived from sources in one country through an entity that is organised in the other country and is treated as a taxable entity under the taxation laws of that other country and fiscally transparent under the laws of the source country.

### Example 1.3



In the above diagram, dividend income arising in Germany is paid to an Australian Corporate Limited Partnership which is subject to Division 5A and is resident in Australia under that Division. The Australian Corporate Limited Partnership includes Australian partners (Y and Z Co) who are residents of Australia for the purposes of the German agreement, and a third country resident partner (X Co). The Australian Corporate Limited Partnership is effectively treated as a company that is a resident of Australia for Australian tax purposes.

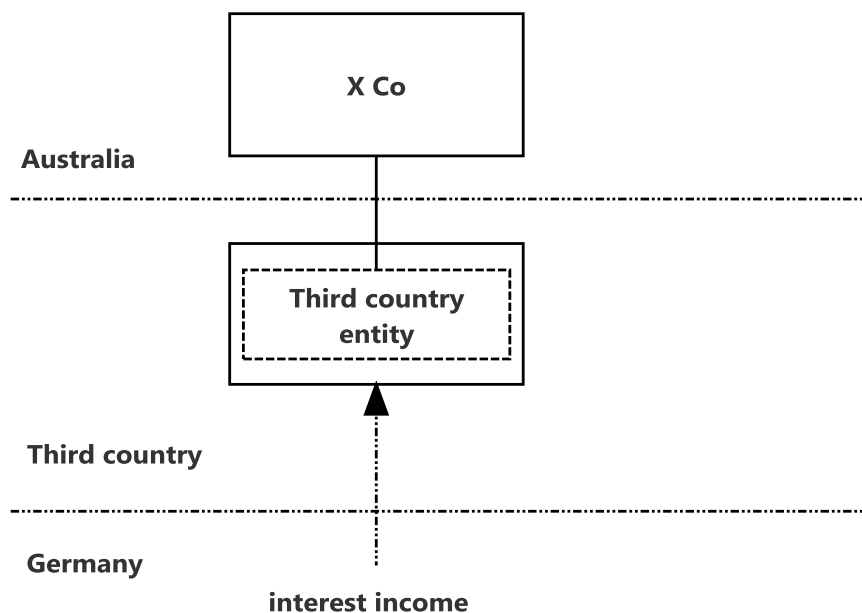
As such, in this example, the dividend income would be eligible for the benefits of the German agreement. This will be the case, notwithstanding that one or more of the participants in the corporate limited partnership is not a resident of Australia and irrespective of whether Germany, under its domestic law, would tax the income in the hands of the Australian corporate limited partnership or in the hands of the partners. Even if Germany would treat the partnership as fiscally transparent under its domestic law, the income will be considered to be derived by an Australian resident for purposes of the German agreement in accordance with paragraph 2 of Article 1 (*Persons Covered*), since the income is treated for purposes of Australian tax

law as the income of a resident (that is, the Australian corporate limited partnership).

Eligibility for the treaty benefits will also be subject to the Australian corporate limited partnership meeting the other requirements set out in Article 10 (Dividends) to qualify for the relevant treaty benefits, as well as the potential application of the anti-avoidance and limitation of benefits provisions contained in the German agreement.

1.32. The following example illustrates the situation where one country regards the income as derived by an entity which it regards as a company (and therefore not as a fiscally transparent entity), but not a resident, for tax purposes. In such a case, the income derived from the other country will not be entitled to the benefits of the German agreement, even if the shareholders of that company are residents of the first country.

**Example 1.4**

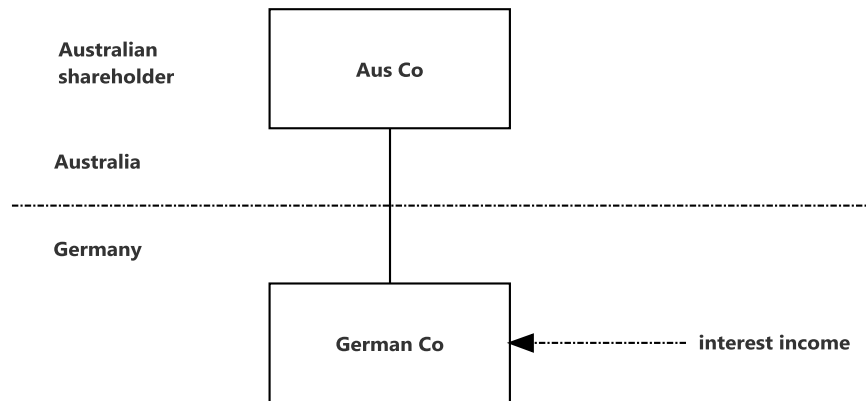


In the above diagram, a German resident pays interest income to a third country entity that is treated as a company for Australian tax purposes.

In this case, the interest income will not be eligible for the benefits of the German agreement. In this example it would not matter if under the tax law of Germany, the third country entity were treated as fiscally transparent or as a company. If Germany also treats the third country legal entity as a company for its tax purposes, paragraph 2 of Article 1 (*Persons Covered*) would not apply but the outcome would still be the same; that is, no benefits under the German agreement.

1.33. The following example illustrates the situation where income derived from a country through an entity organised in that country will not be eligible for treaty benefits if the income is treated as derived by that entity under the tax laws of the other country.

**Example 1.5**



In the above diagram, a German resident pays interest income to another German entity, German Co. Aus Co, an Australian resident shareholder holds shares in German Co. Australia treats German Co as a company for tax purposes and as the entity that derives the interest income.

In this example, the interest income would be ineligible for the benefits of the German agreement. Australia does not treat the interest income as income of an Australian resident. Accordingly, paragraph 2 of Article 1 (*Persons Covered*) will not apply to treat the income as derived by an Australian resident for purposes of the German agreement, even if Germany regards German Co as a fiscally transparent entity.

1.34. Where the two countries allocate the income to different resident persons (for example, where one country considers that the income is derived by a resident entity, while the other country considers that the same income is derived by a resident who is a participant in that entity), both countries may tax the income in accordance with paragraph 2 of this Article. Income derived from a country through an entity organised in that country will not be eligible for treaty benefits if the income is treated as derived by a resident entity under the tax laws of that country. In such case, the income would be regarded as domestic source income of a resident which, in accordance with normal treaty principles, would not be limited by the German agreement. During negotiations, the two delegations agreed that:

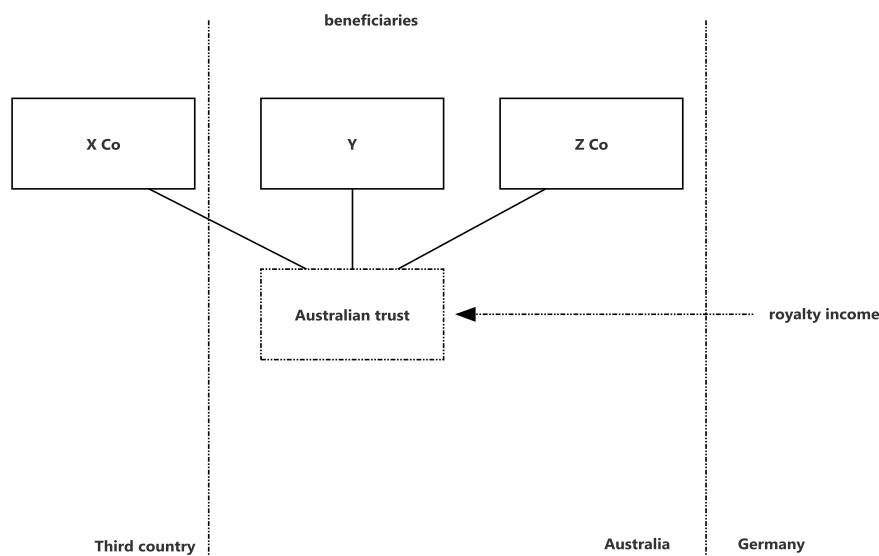
‘... paragraph 2 of Article 1 shall not affect the taxation by a Contracting State of its residents’.

**Example 1.6**

The facts are the same as Example 1.5 except that Germany regards German Co as a company and resident there, while Australia regards German Co as a fiscally transparent partnership. In this case, Germany would not be required to extend source tax reductions on the interest income under Article 11 (*Interest*) of the German agreement.

1.35. The examples above deal with entities that are wholly fiscally transparent or alternatively taxed as a taxable entity such as a company on all their income. As noted in paragraph 1.22 above, paragraph 2 of Article 1 (*Persons Covered*) applies on an item of income basis. This is illustrated by the following example.

**Example 1.7**



Royalty income arising in Germany is paid to an Australian resident trust. The Australian resident beneficiaries are presently entitled to half of the royalty income and are taxed in Australia under section 97 of the ITAA 1936. A non-resident of Australia is presently entitled to the other half of the royalty income. The trust also derives Australian source income to which no beneficiary is presently entitled and that income is taxed to the trustee under section 99A of that Act.

In this example, the royalty income paid to the trust on which the Australian resident beneficiaries are assessable under Australian income tax law would be eligible for the benefits of the German agreement. As the Australian beneficiaries are only entitled to half of

the income, only the half of that royalty income attributable to the Australian resident beneficiaries would be eligible for the benefits of the German agreement.

Treaty relief will not apply to income derived by any beneficiaries that are not residents of Australia for purposes of the German agreement.

Eligibility for the treaty benefits will also be subject to the Australian beneficiaries meeting the other requirements set out in Article 12 (*Royalties*) to qualify for the relevant treaty benefits, as well as the potential application of the anti-avoidance and limitation of benefits provisions contained in the German agreement.

The fact that the trustee is taxable in Australia on other items of income of the trust does not affect the fact that the trust is fiscally transparent with respect to the royalty income.

If the trustee is a resident of Australia, it is entitled to treaty benefits in relation to the income in respect of which the trustee is liable to tax under section 99A of the ITAA 1936 as a resident of Australia.

The same result is obtained even if Germany regarded the trust or trustee as taxable on the income rather than the beneficiaries.

Relief under the German agreement will not apply to a beneficiary who is presently entitled to the royalty income but who is not an Australian resident for purposes of the German agreement.

1.36. No treaty benefits are available under the German agreement where the income is exempt from tax in Australia or Germany on the basis that it is derived by a temporary resident individual. *[Article 23, paragraph 1]*

#### ***Article 2 – Taxes covered***

1.37. This Article specifies the taxes of each country to which the German agreement applies.

1.38. The German agreement applies to federal taxes on income imposed by Australia and Germany, and by Germany's States, political subdivisions and local authorities. The German agreement also applies to taxes on capital imposed by Germany, or Germany's States, political subdivisions and local authorities. *[Article 2, paragraph 1]*

1.39. All taxes imposed on total income, on elements of income or capital, including taxes on gains on alienation of movable or immovable property, taxes on wages and salaries paid by enterprises and taxes on appreciation of capital are regarded as taxes on income and on capital. *[Article 2, paragraph 2]*

1.40. The existing taxes to which the German agreement expressly applies are, in the case of Australia, the income tax, the fringe benefits tax and resource rent taxes. In the case of Australia, while not expressly stated, taxes on income include taxation in respect of capital gains tax assets, depreciable assets, trading stock and revenue assets. [*Article 2, subparagraph 3(a)*]

1.41. The existing German taxes that the German agreement expressly applies to are the tax on income, the corporate income tax, the trade tax and the capital tax, including supplements levied on these taxes. While the German agreement expressly refers to the capital tax, at the time of signature of the German agreement Germany was not, in fact, imposing its capital tax in practice. [*Article 2, subparagraph 3(b)*]

1.42. As with the German 1972 agreement, the German agreement does not generally cover Australia's goods and services tax, customs duties, state taxes and duties and estate tax and duties.

*Extended scope for non-discrimination, exchange of information and assistance in collection of taxes*

1.43. While the taxes specified in this Article are covered for all purposes of the German agreement, a wider range of taxes is covered for the purposes of Article 24 (*Non-discrimination*), Article 26 (*Exchange of Information*) and Article 27 (*Assistance in the Collection of Taxes*). Paragraph 5 of Article 24 provides that the *Non-discrimination* Article applies to taxes of every kind and description. Paragraph 1 of Article 26 provides that the *Exchange of Information* Article applies to taxes of every kind and description imposed on behalf of Australia or Germany or their political subdivisions or local authorities or Germany's States. Paragraph 2 of Article 27 provides that the *Assistance in the Collection of Taxes* Article applies to amounts owed in respect of taxes of every kind and description imposed on behalf of Australia or Germany, or on behalf of Germany's States, political subdivisions or local authorities.

*Identical or substantially similar taxes*

1.44. The application of the German agreement extends to any identical or substantially similar taxes to the existing taxes which are imposed by either country after the date of signing of the German agreement in addition to, or in place of, the existing taxes. [*Article 2, paragraph 4*]

1.45. The competent authorities (being the Commissioner of Taxation in the case of Australia and the Federal Ministry of Finance in the case of Germany, or their authorised representatives) are required to notify each other in the event of a significant change in the taxation laws of the respective countries. [*Article 2, paragraph 4*]

### **Article 3 – General definitions**

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

1.47. Certain other terms are defined in other articles of the German agreement. 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. These definitions are to be applied consistently throughout the German agreement.

#### *Definition of Australia*

1.48. As in Australia’s other modern tax treaties, **Australia** is defined to include certain external territories and the continental shelf. The German agreement 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 German agreement 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, certain sea installations and offshore areas are to be treated as part of Australia).  
*[Article 3, subparagraph 1(a)]*

#### *Definition of Germany*

1.49. The definition of **Germany** includes the territory of the Federal Republic of Germany as well as the area of the seabed, its subsoil and the superjacent water column adjacent to the territorial sea. *[Article 3, subparagraph 1(b)]*

#### *Definition of tax*

1.50. For the purposes of the German agreement, the term **tax** does not include any amount of penalty imposed under the respective domestic tax law of the two countries. *[Article 3, subparagraph 1(c)]*

1.51. In the case of a resident of Australia, any penalty component of a liability determined under the domestic taxation law of Germany with respect to income that Germany is entitled to tax under the German agreement would not be a creditable German 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 person*

1.52. The definition of **person** in the German agreement includes an individual, a company and any other body of persons. This includes a partnership (as a body of persons). [Article 3, subparagraph 1(d)]

*Definition of company*

1.53. The definition of **company** in the German agreement accords with but slightly extends the OECD Model, and means any body corporate or any entity which is treated as a company or a body corporate for tax purposes.

1.54. 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 German agreement. [Article 3, subparagraph 1(e)]

*Definitions of business and enterprise*

1.55. The term **enterprise** is stated to apply to the carrying on of any business. The term **business** is defined to include the performance of professional services and other activities of an independent character. Both these definitions are identical to the definitions added to the OECD Model concurrently with the deletion of the OECD Model Article 14 (*Independent Personal Services*). The inclusion of the two definitions is intended to clarify that income from the performance of professional services or other activities of an independent character is dealt with under Article 7 (*Business Profits*) and not Article 20 (*Other Income*). [Article 3, subparagraphs 1(f) and (g)]

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

1.56. 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 one country need not be carried on in that country. It may be carried on in the other country or a third country (that is, an Australian company doing all its business in Germany would still be an Australian enterprise). [Article 3, subparagraph 1(h)]

*Definition of international traffic*

1.57. In the German agreement, 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 14 (*Income from Employment*)).

1.58. 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. However, it does not include transport where a 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 journey occurs in international waters or airspace. For example, a ‘voyage to nowhere’ which begins and ends in Sydney on a ship operated by a German 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 1(i)*]

*Definition of competent authority*

1.59. The **competent authority** is the person specifically authorised to perform certain actions under the German agreement. For instance, the competent authorities 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 26 (*Exchange of Information*)).

1.60. In the case of Australia, the competent authority is the Commissioner of Taxation or an authorised representative. In the case of Germany, the competent authority is the Federal Ministry of Finance or the agency to which it has delegated its powers. [*Article 3, subparagraph 1(j)*]

*Definition of national*

1.61. In the case of Australia, the German agreement defines **national** by reference to an individual’s nationality or citizenship. In the case of Germany, the term applies to any German individual within the meaning of the meaning of the Basic Law for the Federal Republic of Germany. A partnership, association or any other legal person will be a national if it is created or organised under the laws of Australia or Germany. In the case of Australia, the term also applies to a company created or organised under the laws of Australia. For example, a company’s nationality is determined by where it is incorporated. [*Article 3, subparagraph 1(k)*]

1.62. The concept of nationality is used in paragraph 2 of Article 4 (*Resident*), paragraphs 1 and 2 of Article 18 (*Government Service*) and paragraph 1 of Article 24 (*Non-discrimination*).

*Definition of collective investment vehicle*

1.63. The German agreement defines **collective investment vehicle** to mean a vehicle that is widely-held, which holds a diversified portfolio of securities or invests directly or indirectly in immovable property for the main purpose of deriving rent, and is subject to investor-protection regulation in the country of establishment. In order to fall within the definition of collective investment vehicle, a vehicle must both satisfy these broad tests and be a type of vehicle specifically recognised by both Australia and Germany for the collective investment vehicle definition. The requirements that the vehicle be widely-held, hold a diversified portfolio of securities and be subject to investor-protection regulation in the country of establishment accord with the general description of the term collective investment vehicle found in paragraph 6.8 of the Commentary on Article 1 (*Persons Covered*) in the OECD Model. The inclusion of the words ‘or invests directly or indirectly in immovable property for the main purpose of deriving rent’ ensures that property trusts may also fall within the definition of collective investment vehicle.

1.64. In the case of Australia, a trust that is a managed investment trust for the purposes of Australian tax is specifically recognised as a collective investment vehicle. Section 12-400 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953) defines the term ‘managed investment trust’. In general terms, a trust is a managed investment trust in relation to an income year if, among other things, at the time of the first fund payment is made:

- the trustee is an Australian resident, or the central management and control of the trust is in Australia;
- the trust satisfies certain requirements under the *Corporations Act 2001* relating to the management of investments; and
- the trust is either listed on an approved stock exchange in Australia, or is widely held.

1.65. In the case of Germany, an investment vehicle within the meaning of the Investment Act (*Kapitalanlagegesetzbuch*), other than a vehicle that has been established as a partnership, is specifically recognised.

1.66. The two countries may agree, in an Exchange of Notes, to regard any other investment fund or vehicle established in either country as a collective investment vehicle. *[Article 3, subparagraph 1(l)]*

*Definition of recognised stock exchange*

1.67. The term is used in relation to entitlement to treaty benefits for collective investment vehicles contained in Article 4 (*Resident*) and the limits on source country taxation contained in Article 10 (*Dividends*). For example, subject to certain other conditions in paragraph 3 of Article 10 being met, Australia will not impose dividend withholding tax on a dividend paid by an Australian resident company to a German resident company where the principal class of shares of the German company is listed and regularly traded on a recognised stock exchange.

1.68. The term recognised stock exchange is defined as:

- the Australian Securities Exchange and any other Australian stock exchange recognised as such under Australian law;
- any German stock exchange on which registered dealings in shares take place; and
- any other stock exchange agreed upon by the competent authorities. *[Article 3, subparagraph 1(m)]*

*Terms not specifically defined*

1.69. Unless the context requires otherwise, a term not specifically defined in the German agreement will have the same meaning that it has under the law of the country applying the German agreement 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.

1.70. 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.

1.71. If a term is not defined in the Agreement, 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***

##### *Resident status*

1.72. This Article sets out the basis upon which the residence of a person is to be determined for the purposes of the German agreement. Residence in one or the other country is a necessary condition for the provision of relief under the German agreement. For Australia, ‘resident’ status is determined by reference to the person’s liability to tax as a resident of Australia. For Germany, ‘resident’ status is determined by reference to the person’s liability to tax in Germany by reason of the person’s domicile, residence, place of management or any criterion of a similar nature.

1.73. The term ‘liable to tax’ 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 even where the country does not in fact impose tax on the income of that person. 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 this Article despite being expressly exempted from tax, and are therefore ‘residents’ under the German agreement.

1.74. The third 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, or in the case of Germany, is also only liable to tax on capital situated in Germany *[Article 4, paragraph 1]*

##### *Residency of governments*

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

*Dual residents*

1.76. A set of tie-breaker rules is included for determining how residence is to be allocated for the purposes of the German agreement if a person qualifies as a dual resident; that is, as a resident of both countries in accordance with paragraph 1 of the Article.

1.77. Notwithstanding that the German agreement 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 German agreement allows.

*Individuals*

1.78. 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 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 that person in both countries, then the person's residence status takes into account the person's personal and economic relations; 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 the person's centre of vital interests cannot be determined, the individual shall be deemed to be a resident only of the country in which the person has an habitual abode;
- if the individual has an habitual abode in both countries or in neither of them, the person shall be deemed to be a resident only of the country of which the person is a national;
- if the individual is a national of both countries or is not a national of either country, the competent authorities of Australia and Germany will endeavour to resolve the question by mutual agreement.

*[Article 4, paragraph 2]*

*Other persons*

1.79. 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 solely of the country in which its place of effective management is situated.

1.80. 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.

1.81. Where the place of effective management cannot be determined or is in neither country, the competent authorities of the two countries will endeavour to determine by mutual agreement in accordance with Article 25 (*Mutual Agreement Procedure*) the country of which the person will be deemed to be resident for the purposes of the German agreement. The competent authorities will have regard to the person's places of management, the place where it is incorporated or otherwise constituted and any other relevant factors.

1.82. If the competent authorities cannot reach such an agreement, the person will not be considered to be a resident of either country for the purposes of enjoying the benefits of the German agreement. However, the person will be considered to remain a resident of both countries for purposes of the German agreement other than granting treaty benefits or exemptions to that person. For example, if the person is a company, it will be considered to be a resident of each country for the purposes of the application of Article 10 (*Dividends*) to dividends it pays. [*Article 4, paragraph 3*]

*Collective investment vehicles*

1.83. The German agreement specifically provides that, notwithstanding any other provisions of the German agreement, a collective investment vehicle established in one of the countries that receives income (including profits and gains) arising in the other country, shall be treated, for purposes of applying the German agreement to that income, as an individual resident of the country in which it is established and as the beneficial owner of the income it receives, but only to the extent that residents of that country and equivalent beneficiaries are the owners of the beneficial interests in the collective investment vehicle. This is subject to the condition that if an individual of that country had received the income in the same circumstances, that individual would have been considered to be the beneficial owner of the income.

1.84. However, if:

- the collective investment vehicle is established in Australia and has its principle class of shares, units or other comparable interests listed on the Australian Securities Exchange, or any other Australian stock exchange recognised as such under Australian law, and is regularly traded on one or more recognised stock exchanges;
- at least 75 per cent of the value of beneficial interests in the collective investment vehicle is owned by residents of the country in which it is established; or
- at least 90 per cent of the value of beneficial interests in the collective investment vehicle is owned by equivalent beneficiaries,

the collective investment vehicle shall be treated as an individual resident of the country in which it is established and as the beneficial owner of all the income it receives. Again, this is subject to the condition that if an individual of that country had received the income in the same circumstances, that individual would have been considered to be the beneficial owner of the income. *[Article 4, paragraph 4]*

1.85. The term equivalent beneficiary is defined to mean:

- a resident of the country in which the collective investment vehicle is established; or
- a resident of any other country with which the country in which the income arises has a tax agreement that provides for effective and comprehensive information exchange who would, if that resident received the particular item of income for which benefits are being claimed under the German agreement, be entitled under that other tax agreement, or under the domestic law of the country in which the income arises, to a rate of tax with respect to that item of income that is at least as low as the rate claimed under the German agreement by the collective investment vehicle with respect to that item of income. *[Article 4, paragraph 5]*

1.86. Paragraph 4 of Article 4 (*Resident*) is designed to facilitate the claiming of treaty benefits for investments held by collective investment vehicles. The definition of collective investment vehicle for this purpose is contained in subparagraph (1) of paragraph 1 of Article 3 (*General Definitions*) and is discussed in paragraphs 1.64 to 1.67 above.



1.87. It is often practically difficult for the many investors in widely held collective investment vehicles to individually claim treaty benefits in the source country. This provision is designed to overcome that practical difficulty.

1.88. The provision achieves this by treating the collective investment vehicle as an individual resident in the country in which it is established and the beneficial owner of the income for purposes of applying the German agreement to income received by the collective investment vehicle, where the collective investment vehicle meets certain specified conditions. This allows the collective investment vehicle to claim treaty benefits directly under Articles 6 to 20 of the German agreement. As it is almost invariably the investors in the collective investment vehicle rather than the collective investment vehicle who are taxed on that income on a fiscally transparent basis, in the absence of this provision it would be those investors who would normally have to claim treaty benefits under paragraph 2 of Article 1 (*Persons Covered*). This provision is thus an exception to this extent to the general operation of paragraph 2 of Article 1 (*Persons Covered*).

1.89. Paragraph 4 of Article 4 (*Resident*) is also designed to ensure that the provision does not give rise to treaty shopping by third country investors. The provision achieves this result in three different ways. If:

- the collective investment vehicle is established in Australia and listed and regularly traded on a recognised stock exchange in Australia, or
- at least 75 per cent of the value of the beneficial interests in the collective investment vehicle are owned by residents of the country in which the collective investment vehicle is established, or
- at least 90 per cent of the value of the beneficial interests in the collective investment vehicle is owned by equivalent beneficiaries,

the collective investment vehicle is treated as entitled to treaty benefits with respect to all of its income arising in the other country. If none of these tests are satisfied, the collective investment vehicle is entitled to treaty benefits only to the extent to which residents of the country where the collective investment vehicle is established and equivalent beneficiaries are the owners of the beneficial interests in the collective investment vehicle. This is subject to the additional requirement that if an individual who is a resident of the country where the collective investment vehicle is established had received the income in the same

circumstances, that individual would have been treated as the beneficial owner of the relevant income.

1.90. For these purposes, and subject to the other conditions in paragraph 4 of Article 4 (*Resident*) being met, unitholders that are residents of Australia for treaty purposes and are liable to tax in Australia on income received by a managed investment trust would be regarded as residents of Australia that are owners of the beneficial interests in the managed investment trust. Thus, Australian resident individuals and companies that own units in the managed investment trust that are not held on trust will be treated as owners of the beneficial interests in the managed investment trust where the income received by them is allocated to them for tax purposes. This will also be the case for unitholders in the managed investment trust that are life insurance companies or superannuation entities to which the managed investment trust income is allocated for tax purposes, where such entities are liable to tax in Australia on their worldwide income. Where units in one managed investment trust are held by another managed investment trust (investor managed investment trust), the investor managed investment trust will be regarded as an Australian resident that is the owner of the beneficial interests in the first managed investment trust where the investor managed investment trust satisfies the requirements of paragraph 4 to be treated as an individual resident in Australia with respect to all the income it receives.

1.91. Paragraph 4 of Article 4 (*Resident*) is not intended to prevent either country from taxing income derived by its own residents through a collective investment vehicle.

#### *Australian superannuation funds*

1.92. While there is no specific rule in Article 4 (*Resident*) addressing the residence of Australian superannuation funds, during negotiations the delegations agreed that:

‘...an Australian superannuation fund would be regarded as a resident of Australia, notwithstanding that the trustee of such a fund is responsible for the fund’s tax obligations under Australia’s domestic law.’

1.93. This accords with Australia’s understanding of how the Resident Articles in Australia’s bilateral tax treaties would generally apply to Australian superannuation funds.

#### ***Article 5 – Permanent establishment***

1.94. The application of various provisions of the German agreement (Articles 7 (*Business Profits*), 10 (*Dividends*), 11 (*Interest*),

12 (*Royalties*), 13 (*Alienation of Property*), 14 (*Income from Employment*), 20 (*Other Income*), 21 (*Capital*) and 24 (*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*

1.95. For the purposes of the German agreement, the term permanent establishment means a fixed place of business through which the business of an enterprise is wholly or partly carried on. 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 of the enterprise must be carried on through this fixed place.

*[Article 5, paragraph 1]*

1.96. This 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 relating to the exploration for or exploitation of natural resources; and
- an agricultural, pastoral or forestry property.

*[Article 5, paragraph 2]*

1.97. 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.

*Building site or construction or installation project*

1.98. A building site or construction or installation project will constitute a permanent establishment only if it lasts for longer than 9 months. [*Article 5, paragraph 3*]

1.99. 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.

*Agricultural, pastoral or forestry property*

1.100. 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*). [*Article 5, subparagraph 2(g)*]

1.101. Under the German agreement, profits from agriculture or forestry activities are dealt with under Article 6 (*Income from Immovable Property*). This is reflected in the phrase ‘including from agriculture or forestry’ in paragraph 1 of that Article.

1.102. 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 (for example, Article 20 (*Other Income*)) or determining the country in which the income arises (for example, Article 11 (*Interest*)).

*Deemed permanent establishment*

Supervisory and consultancy activities

1.103. 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 9 months, such activities will be deemed to be carried on through a permanent establishment of the enterprise located in that other country. In the course of negotiations, the two delegations agreed that this does not extend to:

‘supervisory or consultancy activities carried on outside the State where the building site or construction or installation project is being undertaken.’

*[Article 5, subparagraph 4(a)]*

Natural resource activities

1.104. 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 a period or periods exceeding in the aggregate 90 days in any 12 month period. *[Article 5, subparagraph 4(b)]*

Substantial equipment

1.105. In addition, a permanent establishment is deemed to exist where an enterprise operates substantial equipment in a country for one or more periods which exceed, in the aggregate, 183 days in any 12-month period. *[Article 5, subparagraph 4(c)]*

1.106. 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.

1.107. Subparagraphs 4(b) and 4(c) of this Article together reflect Australia’s reservation to Article 5 (*Permanent Establishment*) of 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 4(b) and 4(c) of this Article. 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.

1.108. For example, if a German enterprise itself operates a mobile crane at an Australian port for more than 12 months, the enterprise would be deemed to have a permanent establishment in Australia under subparagraph 4(c) of this Article. However, if that German 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 German enterprise would not be deemed to have a permanent establishment in Australia under subparagraph 4(c) of this Article. However, if that other person operates the crane for or on behalf of the German enterprise in Australia, the German enterprise would be considered to operate the crane in Australia.

1.109. Subject to the application of the anti-avoidance rules set out in paragraphs 5 and 7 of this Article, the deeming provisions in paragraph 4 of this Article discussed above will apply unless the activities are limited to those described in paragraph 6 of this Article and are of a preparatory or auxiliary nature in relation to the enterprise. *[Article 5, paragraph 4]*

*Anti-avoidance provision*

1.110. In order to prevent the misuse of this Article and Article 7 (*Business Profits*), particularly the practice of contract splitting in order to avoid the existence of a deemed permanent establishment, an anti-abuse rule applies to the determination of the duration of activities under paragraphs 3 and 4 of this Article.

1.111. The anti-avoidance rule provides that where an enterprise carries on activities referred to in paragraphs 3 and 4 of this Article, any connected activities carried on during different periods of time (each exceeding 30 days) by one or more enterprises closely related to that enterprise will be added to the period of time which that enterprise itself carried on the relevant activities in determining whether the period referred to in paragraphs 3 and 4 of this Article have been exceeded. *[Article 5, paragraph 5]*

1.112. Paragraph 17 of the BEPS Action 7 2015 Final Report notes that the principal purpose test rule that will be added to the OECD Model as a result of the adoption of the Action 6 2015 Final Report will address the BEPS concerns related to the abusive splitting-up of contracts and in order to make this clear, Example J illustrating a contract-splitting arrangement will be added to the Commentary on the principal purpose test rule. For countries like Australia that are specifically concerned with splitting-up of contracts issue, paragraph 17 of the BEPS Action 7 2015 Final Report includes an alternative provision that such countries may include in their bilateral treaties.

1.113. Paragraph 5 of Article 5 of the German agreement adopts the wording in that alternative provision, with modifications to take account of the time thresholds reflected in paragraph 4 of this Article.

1.114. As noted in paragraph 18.2 of the Commentary on paragraph 3 of Article 5 of the OECD Model which will be included in the next update of the OECD Model and its Commentary, the determination of whether activities are connected will depend on the facts and circumstances of each case. Factors that may especially be relevant for that purpose include:

- whether the contracts covering the different activities were concluded with the same person or related persons;
- whether the conclusion of additional contracts with a person is a logical consequence of a previous contract concluded with that person or related persons;
- whether the activities would have been covered by a single contract absent tax planning considerations;
- whether the nature of the work involved under the different contracts is the same or similar; and
- whether the same employees are performing the activities under the different contracts.

1.115. The concept of ‘closely related enterprises’ is defined in paragraph 10 of Article 5 (see explanation in paragraphs 1.134 to 1.135 below).

*Where an enterprise is deemed not to have a permanent establishment*

Preparatory and auxiliary activities

1.116. 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.

1.117. A permanent establishment is deemed not to include:

- facilities used solely for the storage, display or delivery of goods or merchandise belonging to the enterprise;
- maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, display or delivery;

- maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise;
- maintenance of a fixed place of business for the sole purpose of purchasing goods or merchandise or collecting information for the enterprise;
- maintenance of a fixed place of business solely for the purpose of carrying on any other activity for the enterprise; or
- maintenance of a fixed place of business solely for any combination of the above activities,

provided that these listed activities have a preparatory or auxiliary character.

1.118. To address situations where the list of excepted activities included in paragraph 4 of Article 5 (*Business Profits*) of the OECD Model give rise to BEPS concerns, paragraph 12 of the BEPS Action 7 2015 Final Report recommended that the OECD Model provision be modified so that each of the exceptions included in that provision is restricted to activities that are otherwise of a ‘preparatory or auxiliary’ character.

1.119. Paragraph 6 of Article 5 of the German agreement specifically adopts the wording that will be included in the new OECD Model provision as recommended in paragraph 12 of the Action 7 2015 Final Report. The Commentary on that provision set out in paragraph 13 of the Action 7 2015 Final Report, including the examples in that Commentary, is therefore relevant for the interpretation of this paragraph of the German agreement. [*Article 5, paragraph 6*]

*Anti-fragmentation rule*

1.120. An anti-fragmentation rule has been included to prevent multinational enterprises avoiding permanent establishment status by fragmenting a cohesive operating business into several small operations in order to argue that each part is merely engaged in preparatory or auxiliary activity.

1.121. Paragraph 7 of Article 5 (*Permanent Establishment*) of the German agreement specifically adopts the wording that will be included in the new OECD Model provision as recommended in paragraph 15 of the Action 7 2015 Final Report. The Commentary on that provision set out in



paragraph 15 of the Action 7 2015 Final Report, including the examples in that Commentary, is therefore relevant for the interpretation of this paragraph of the German agreement.

1.122. As explained in paragraph 30.2 of that new Commentary, the effect of paragraph 7 of this Article in the German agreement is that the exceptions provided for by paragraph 6 do not apply to a place of business that would otherwise constitute a permanent establishment where the activities carried on at that place and other activities of the same enterprise or of closely related enterprises exercised at that place or at another place in the same country constitute complementary functions that are part of a cohesive business operation. For paragraph 7 to apply, however, at least one of the places where these activities are exercised must constitute a permanent establishment or, if that is not the case, the overall activity resulting from the combination of the relevant activities must go beyond what is merely preparatory or auxiliary. *[Article 5, paragraph 7]*

#### *Dependent agents*

1.123. An enterprise of one country is deemed to have a permanent establishment in the other country if, under certain conditions, a person acts on its behalf in that other country. Such persons are referred to as dependent agents. *[Article 5, paragraph 8]*

1.124. Paragraph 9 of the Action 7 2015 Final Report recommended changes to both paragraphs 5 (which deals with dependent agents) and 6 (which deals with independent agents) of Article 5 (*Permanent Establishment*) of the OECD Model to ensure that permanent establishment status could not be avoided through the use of certain agency arrangements. Subparagraph 8(a) and paragraph 9 of Article 5 (*Permanent Establishment*) of the German agreement incorporate those recommended changes.

1.125. For subparagraph 8(a) of this Article to apply, all of the following conditions must be met:

- a person acts in a country on behalf of an enterprise;
- in doing so, that person habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and
- these contracts are either in the name of the enterprise or for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the

enterprise has the right to use, or for the provision of services by that enterprise.

1.126. Subparagraph 8(a) of this Article specifically adopts the wording that will be included in the new paragraph 5 of Article 5 (*Permanent Establishment*) of the OECD Model, as recommended in paragraph 9 of the Action 7 2015 Final Report. The Commentary on that provision set out in paragraph 9 of the Action 7 2015 Final Report, including the examples in that Commentary, is therefore relevant for the interpretation of this subparagraph of the German agreement. [*Article 5, subparagraph 8(a)*]

1.127. Consistent with Australia's reservation to Article 5 (Permanent Establishment) of the OECD Model, where a person acts on behalf of another in manufacturing or processing the other's goods or merchandise, 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.

1.128. 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 8(b) of this Article prevents an enterprise which carries on substantial manufacturing or processing activities in a country through an intermediary from avoiding tax in that country.

1.129. 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.

1.130. The deeming rules set out under paragraph 8 of this Article discussed above are subject to the provisions of paragraph 9 of this Article. In addition, the deeming rules would not apply where the activities of the person are limited to those mentioned in paragraph 6 of this Article which, if exercised through a fixed place of business, would not make this fixed place of business a permanent establishment under the provisions of that paragraph. [*Article 5, subparagraph 8(b)*]

*Independent agents*

1.131. Business conducted through a person who is an independent agent will not, of itself, give rise to a permanent establishment, provided that person is carrying on business as an independent agent and is acting in the ordinary course of that business. However, a person will not be considered to be an independent agent where the person acts exclusively or almost exclusively for one or more enterprises to which it is closely related.

1.132. Paragraph 9 of this Article specifically adopts the wording that will be included in the new subparagraph 6(a) of Article 5 (*Permanent Establishment*) of the OECD Model, as recommended in paragraph 9 of the Action 7 2015 Final Report. The Commentary on that provision set out in paragraph 9 of the Action 7 2015 Final Report, including the examples in that Commentary, is therefore relevant for the interpretation of this subparagraph of the German agreement. [*Article 5, paragraph 9*]

*Closely related person to an enterprise*

1.133. For the purposes of Article 5 (*Permanent Establishment*), a person shall be considered to be closely related to an enterprise if, based on the relevant facts and circumstances, one has control of the other or both are under common control of the same persons or enterprises. A person will be automatically considered to be closely related to an enterprise where:

- one possesses directly or indirectly more than 50 per cent of the beneficial interests in the other (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company), or
- another person possesses directly or indirectly more than 50 per cent of the beneficial interest (or, in the case of a company, more than 50 per cent of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in the person and the enterprise.

1.134. Paragraph 10 of this Article specifically adopts the wording that will be included in the new subparagraph 6(b) of Article 5 of the OECD Model, as recommended in paragraph 9 of the Action 7 2015 Final Report. The Commentary on that provision set out in paragraph 9 of the Action 7 2015 Final Report, including the examples in that Commentary, is therefore relevant for the interpretation of this paragraph of the German agreement. [*Article 5, paragraph 10*]

*Subsidiary companies*

1.135. A subsidiary company will not generally be a permanent establishment of its parent company.

1.136. A subsidiary company can be regarded as giving rise to a permanent establishment, however, 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 11]*

*Application of the meaning of permanent establishment to enterprises of other countries*

1.137. 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 Germany, when applying the source rule contained in paragraph 7 of Article 11 (*Interest*) and paragraph 5 of Article 12 (*Royalties*). *[Article 5, paragraph 12]*

***Article 6 – Income from immovable property***

1.138. Article 6 (*Income from Immovable Property*) of the German agreement adopts the term ‘immovable property’ in place of Australia’s past tax treaty practice wording ‘real property’. Subsection 3(5) of the Agreements Act 1953 confirms that the expression ‘immovable property’ for the purposes of this agreement includes ‘real property’. In this respect, no difference in meaning between the two terms is intended.

*Where income from immovable property is taxable*

1.139. This Article provides that the income of a resident of one country, from immovable property (including from agriculture or forestry) 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.

1.140. Some of 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 Australia’s tax treaties. However, under the German agreement, 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]*

1.141. 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*

1.142. **Immovable property** is primarily defined as having the meaning which it has under the domestic law of the country where the immovable property is situated. It expressly 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*

1.143. 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 this Article puts the situation of the interest or right beyond doubt by deeming the *situs* to be where the underlying immovable 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*

1.144. Paragraph 4 of this Article 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*

1.145. Paragraphs 1, 3 and 4 of Article 6 (*Income from Immovable Property*) are extended to income from immovable property of an enterprise.

1.146. This Article therefore provides that the country in which the immovable property is situated may also impose tax on the income derived from that immovable property by a resident of the other country, irrespective of whether that income is attributable to a permanent establishment of such an enterprise situated in the first-mentioned country.  
*[Article 6, paragraph 5]*

**Article 7 – Business profits**

1.147. 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.

1.148. 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]*

1.149. 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*

1.150. 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 German agreement correspond to international practice and corresponding provisions in Australia's other tax treaties. *[Article 7, paragraphs 2 and 3]*

1.151. In determining the profits of a permanent establishment, expenses which are incurred for the purposes of the permanent establishment are allowed as deductions. However, only those expenses which would be deductible if the permanent establishment were an independent entity which paid those expenses will be regarded as having been incurred for the purposes of the permanent establishment. *[Protocol, paragraph 4]*

1.152. 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. Conversely, 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]*

*Profits dealt with under other Articles*

1.153. Where income or gains included in the profits of the business are specifically dealt with under other Articles of the German agreement, the effect of those particular Articles is not overridden by this Article.

1.154. This provision lays down the general rule of interpretation that categories of income, profits or gains which are the subject of other Articles of the German agreement (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 5 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]*

*Insurance with non-residents*

1.155. Profits of an enterprise derived from carrying on any form of insurance business, other than life insurance, are excluded from the application of Article 7. 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 and reinsurance activities with non-resident insurers and reinsurers. An effect of this paragraph 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. *[Article 7, paragraph 6]*

*Trust beneficiaries*

1.156. The principles of this Article will apply to a resident of Germany who is beneficially entitled to a share of the business profits (directly or through one or more interposed trusts) of an enterprise carried on through a permanent establishment in Australia by the trustee of a trust estate, except where the trust estate is treated as a company for tax purposes.

*[Article 7, paragraph 7]*

1.157. 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 estate 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 Germany is beneficially entitled under the trust.

1.158. Paragraph 7 of this Article 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 Germany, a permanent establishment in Australia in relation to that business. This is consistent with Australia's reservation to Article 7 (*Business Profits*) of the OECD Model. This paragraph will also apply where relevant to other Articles of the German agreement, 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.

*Ten year limit for adjustments of profits*

1.159. No adjustments of profits that are attributable to a permanent establishment can be made after the expiration of ten years from the end of the taxable year in which the profits would have been attributable to the permanent establishment. This ten year limit does not apply where an audit into the profits of the enterprise has been initiated by either country within that ten year period, or in the case of fraud, wilful default, or, in the case of Australia, involves gross negligence or, in the case of Germany, negligence.

1.160. Paragraph 8 adopts the wording recommended in paragraph 39 of the BEPS Action 14 2015 Final Report as an alternative provision for inclusion in the Commentary on Article 7 (*Business Profits*) of the OECD Model. Consistent with that recommended wording and Australian tax treaty practice, paragraph 8 refers to 'gross negligence' in the case of Australia. As Germany does not have a domestic law concept of 'gross negligence', paragraph 7 instead refers to 'negligence' in the case of Germany. It is not intended that this different terminology will result in



material differences in the application of this provision by Australia and Germany in practice. [Article 7, paragraph 8]

### **Article 8 – Shipping and air transport**

#### *Profits from international traffic*

1.161. The main effect of this Article is that the right to tax profits from the operation of ships or aircraft in international traffic, including profits attributable to participation in a pool, a 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]

1.162. 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.

1.163. 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.

1.164. The OECD Model Commentary on Article 8 (*Shipping, Inland Waterways Transport and Air Transport*) also confirms that profits obtained by leasing a ship or aircraft on charter fully equipped, crewed and supplied (that is, leasing on a full basis) are covered by paragraph 1 of this Article.

1.165. Paragraph 4 of this Article provides that profits from leasing containers (as well as trailers and related equipment for the transport of containers) used for the transport of goods or merchandise, insofar as such lease is directly connected or ancillary to the operation of ships or aircraft in international traffic would constitute profits covered by this Article. [Article 8, paragraph 4]

1.166. 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 German

agreement 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 1(i)]*

*Profits from internal traffic*

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

1.168. Australia's (and Germany'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 Germany). *[Article 8, paragraph 2]*

1.169. Paragraph 2 of this Article will also apply to profits derived from leasing a ship or aircraft, on a full basis, for the purposes of such carriage.

1.170. There is no specified limit under the German agreement on the amount of tax that can be charged on profits from the operation of ships or aircraft in international traffic or internal traffic. However, for Australian tax purposes, Division 12 of Part III of the ITAA 1936 (*Overseas ships*) 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.

**Example 1.8**

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

**Example 1.9**

A German enterprise operates sightseeing flights over the Southern Ocean. Passengers board 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 this Article, 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.

### ***Article 9 – Associated enterprises***

#### *Reallocation of profits*

1.171. 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 Germany on an *arm's length* basis where the commercial or financial relations between the enterprises differ from those that might be expected to operate between unrelated enterprises dealing wholly independently with one another. *[Article 9, paragraph 1]*

1.172. 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.

1.173. 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.

#### *Correlative adjustments*

Where a reallocation of profits is made 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.

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 Germany will consult with each other to determine the appropriate adjustment. *[Article 9, paragraph 2]*

The reference to the conditions which ‘would have been made between independent enterprises’ is to be construed to mean conditions which would have been made if the enterprises had been dealing wholly independently with one another. Thus, the appropriate benchmark for determining the conditions operating between the associated enterprises should have regard to whether those dealings between the enterprises occurred on a truly independent basis. [**Protocol, paragraph 5**]

*Ten year limit for adjustments of profits*

No adjustments of profits can be made after the expiration of ten years from the end of the taxable year in which the profits would have accrued to the enterprise. This ten year limit does not apply where an audit into the profits of the enterprise has been initiated by either country within that ten year period, or in the case of fraud, wilful default, or, in the case of Australia, gross negligence and, in the case of Germany, negligence.

1.174. Paragraph 3 of this Article adopts the wording recommended in paragraph 39 of the BEPS Action 14 2015 Final Report as an alternative provision for inclusion in the Commentary on Article 9 (*Associated Enterprises*) of the OECD Model. Consistent with that recommended wording and Australia’s tax treaty practice, paragraph 3 refers to ‘gross negligence’ in the case of Australia. As Germany does not have a domestic law concept of ‘gross negligence’, paragraph 3 instead refers to ‘negligence’ in the case of Germany. It is not intended that this different terminology will result in material differences in the application of this provision by Australia and Germany in practice. [*Article 9, paragraph 3*]

***Article 10 – Dividends***

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

- certain cross-border intercorporate dividends will be either exempt from source country taxation or subject to a maximum 5 per cent rate of tax in the source country;
- a maximum 15 per cent rate of source country tax may be applied on all other dividends, including dividends paid by a German Real Estate Aktiengesellschaft with listed share capital;
- dividends paid in respect of a holding which is effectively connected with a permanent establishment are to be dealt with under Article 7 (*Business Profits*); and

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

*Permissible rate of source country taxation*

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

1.176. This Article allows both Australia and Germany 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 (other than partnership) who are the beneficial owners of the dividends. *[Article 10, paragraphs 1 and 2]*

1.177. A limit of 5 per cent will apply for dividends paid in respect of direct company shareholdings that constitute at least 10 per cent of the voting power in the company paying the dividends, provided the requisite voting power was held directly throughout a 6 month period that includes the day of the payment of the dividend.

1.178. Paragraph 36 of the BEPS Action 6 2015 Final Report recommended that the equivalent provision in subparagraph 2(a) of Article 10 (*Dividends*) of the OECD Model be amended to include a minimum holding period to address potential abuse cases where a company with a holding of less than the specified holding percentage increases its holding shortly before the dividends are paid for the purpose of securing the benefits of the provision. The new OECD Model provision will include a 365 day holding period condition. Subparagraph 2(a) of this Article in the German agreement adopts a 6 month holding period condition. *[Article 10, subparagraph 2(a)]*

Fifteen per cent rate limit for other dividends

1.179. In all other cases (other than those to which an exemption applies as explained below), the German agreement 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 2(b)]*

1.180. This includes all dividends paid by a German Real Estate Aktiengesellschaft with listed share capital. *[Article 10, paragraph 2]*

1.181. Although the provisions in this Article 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 current domestic law for franked dividends paid to non-residents will continue to apply. That is, franked dividends paid to

German residents will not be subject to Australian dividend withholding tax.

Exemption for certain cross-border intercorporate dividends

1.182. No tax will be payable in the source country on intercorporate dividends paid to a company (other than a partnership) that is the beneficial owner of those dividends and is a resident of the other country where the recipient company:

- directly holds shares representing 80 per cent or more of the voting power 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]*

1.183. 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 the Australian Securities Exchange and any other Australian stock exchange recognised as such under Australian law, or any German stock exchange on which registered dealings in shares take place; and
  - regularly traded on one or more recognised stock exchanges as defined under Article 3 (*General Definitions*) of the German agreement (that is, any of the stock exchanges set out in sub-subparagraphs 1(m)(i) to (iii) of Article 3);
- a company that is owned directly or indirectly by one or more such companies (provided that where a company is owned indirectly, each intermediate company is a resident of either Australia or Germany or is a resident of a third country that would be entitled to equivalent treaty benefits);
- a company that is owned 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), provided that where a company is owned indirectly, each intermediate company is a resident of either Australia or Germany or is a resident of a third country that would be entitled to equivalent treaty benefits;

- 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 3(a) to (c)]*

1.184. 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 German agreement. *[Article 3, sub-subparagraph 1(m)(iii)]*

#### Equivalent benefits

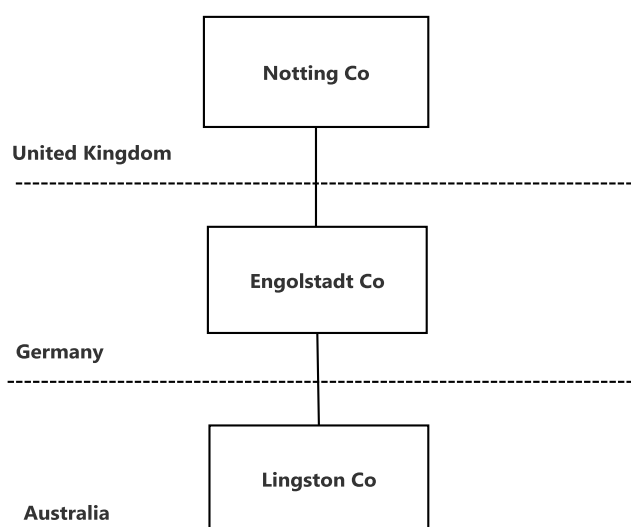
1.185. Under subparagraph 3(b) of this Article, an exemption applies to dividends:

- 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 specified in sub-subparagraphs 1(m)(i) or (ii) of Article 3 (*General Definitions*) or would be entitled to equivalent benefits under another treaty between the country of which the owning company or companies are 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.

1.186. Subparagraph 3(b) of this Article expressly clarifies that for the owing companies to satisfy the wholly-owned requirement, each intermediate company in the chain of ownership must be a resident of either Australia or Germany or be entitled to equivalent benefits under another treaty between the country of which the owning company or companies are 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. This means that the ownership chain cannot include a company resident in a third country that would not be entitled to equivalent benefits under another treaty between that third country and the country of which the paying company is a resident had the company resident in the third country owned the holding in the paying company directly.

1.187. The exemption would apply to dividends paid by an Australian company to a German 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 German 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 Germany, would also be exempt.

**Example 2.1**



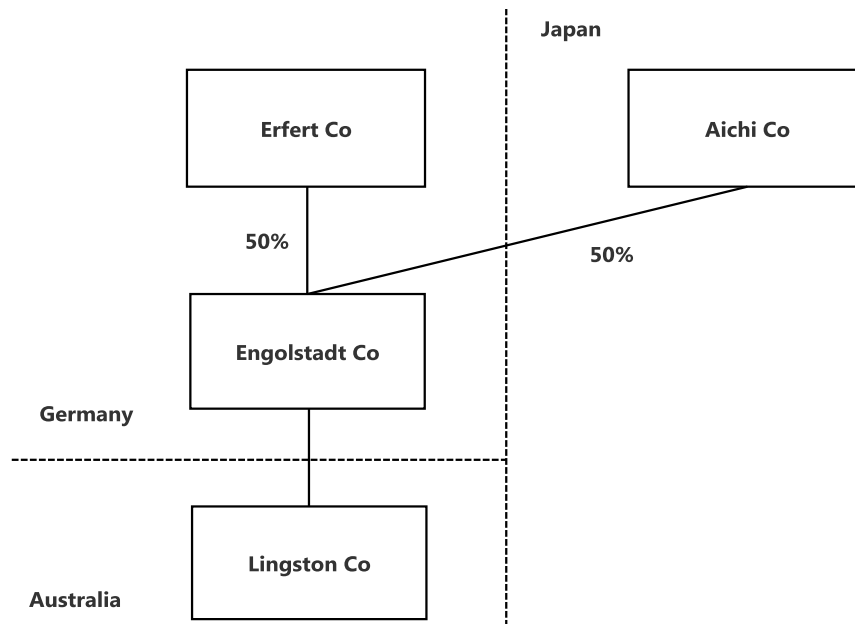
Engolstadt Co is an unlisted German company which owns all the shares in Lingston Co, an Australian company, and has done so for more than 12 months. Assume Engolstadt Co is the beneficial owner of the dividends paid by Lingston Co.

Notting 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 United Kingdom convention, and wholly owns Engolstadt Co.

If Notting Co had owned the shares held by Engolstadt Co in Lingston Co directly, then an exemption would apply to the dividends paid on those shares under subparagraph 3(a) of Article 10 of the United Kingdom convention. In such a case Notting Co is considered to be entitled to equivalent benefits to those provided under paragraph 3 of Article 10 (*Dividends*) of the German agreement. Accordingly, the Australian dividend paid to Engolstadt Co will be exempt from dividend withholding tax under sub-subparagraph 3(b)(ii) of this Article.



**Example 2.2**



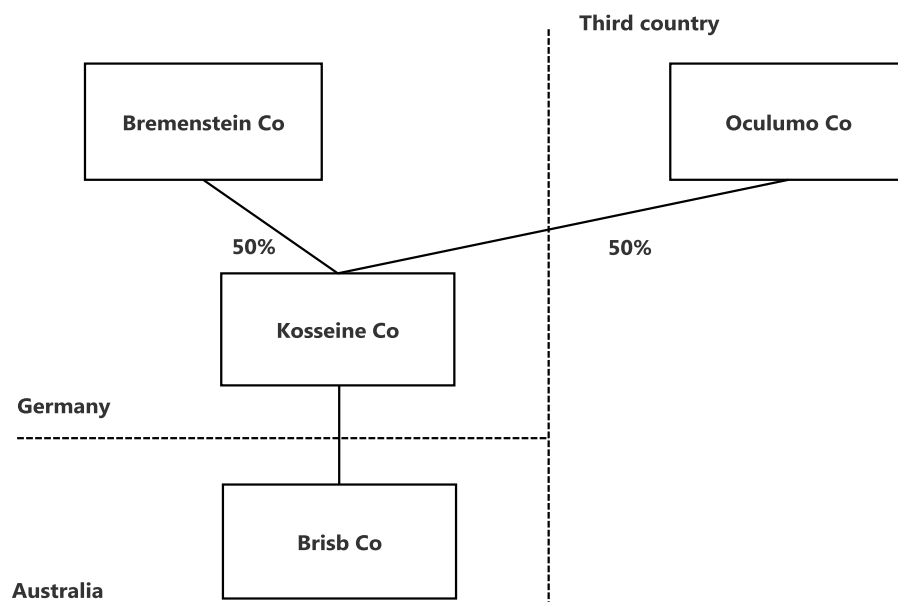
Assume Engolstadt Co is now owned by a second German resident company, Erfert Co, and a Japanese resident company, Aichi Co. Erfert Co is listed on a stock exchange that is a 'recognised stock exchange' specified in sub-paragraph 1(m)(ii) of Article 3 of the German agreement. Aichi Co is listed on a stock exchange that is a 'recognised stock exchange' within the meaning of Article 23 of the Japanese convention. Each company owns 50 per cent of the shares in Engolstadt Co.

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

If Erfert Co had owned the shares held by Engolstadt Co in Lingston Co directly, then an exemption would apply to the dividends paid on those shares under subparagraph 3(a) of Article 10 of the German agreement. If Aichi Co had owned the shares held by Engolstadt Co in Lingston Co directly, then an exemption would apply to the dividends paid on those shares under subparagraph 3(a) of Article 10 of the Japanese convention.

In both cases, Erfert Co and Aichi Co are considered to be entitled to equivalent benefits to those provided under paragraph 3 of Article 10 of the German agreement. Accordingly, the Australian dividend paid to Engolstadt Co will be exempt from dividend withholding tax under sub-paragraph 3(b)(ii) of this Article.

### Example 2.3



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

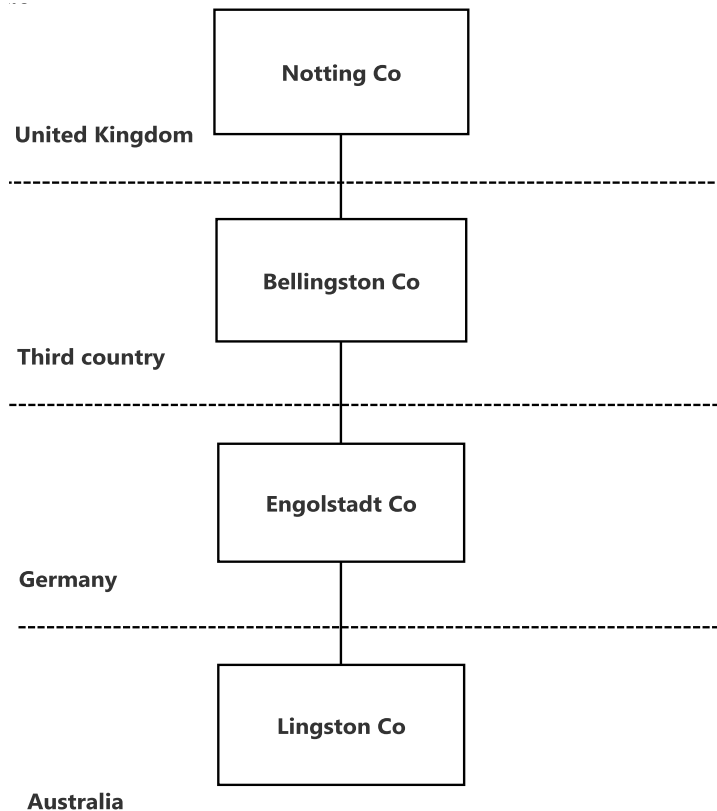
Kosseine Co is owned by a second German resident company, Bremenstein Co, and Oculumo Co, a company that is a resident of a treaty partner country of Australia's. Bremenstein Co and Oculumo Co each own 50 per cent of the shares in Kosseine Co.

Bremenstein Co is listed on a stock exchange that is a 'recognised stock exchange' specified in subparagraph 1(m)(ii) of Article 3 of the German agreement. If Bremenstein Co had owned the shares held by Kosseine Co directly, then an exemption would apply to the dividends paid on those shares under subparagraph 3(a) of Article 10 of the German agreement.

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

The requirements of sub-subparagraph 3(b)(ii) of Article 10 of the German agreement are not met because one of the companies owning Kosseine Co (that is, Oculumo Co) is not entitled to equivalent benefits. Accordingly, that provision will not apply to exempt the Australian dividends paid to Kosseine Co from dividend withholding tax.

**Example 2.4**



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

Bellingston Co, a company resident in a third country with which Australia does not have a tax treaty, wholly owns Engolstadt Co.

Notting 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 United Kingdom convention, and wholly owns Bellingston Co.

If Notting Co had owned the shares held by Engolstadt in Lingston Co directly, then an exemption would apply to the dividends paid on those shares under subparagraph 3(a) of Article 10 of the United Kingdom convention. However, the requirements of subparagraph 3(b) of this Article are not met because one of the intermediate companies (that is, Bellingston Co) is not a resident of either Australia or Germany and is not entitled to equivalent benefits. Accordingly, subparagraph 3(b) of this Article will not apply to exempt the Australian dividends paid to Engolstadt Co from dividend withholding tax.

Competent authority determination

1.188. Dividends which are beneficially owned by a company that does not meet the conditions in subparagraphs 3(a) or (b) this 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 the arrangement or transaction that would result in that dividend exemption and obtaining the exemption would not be contrary to the object and purpose of the provisions of the German agreement. Before refusing to grant benefits to a company under subparagraph 3(c) of this Article (for example, because the arrangements had a principal purpose of obtaining the exemption under paragraph 2 of Article 23 (*Limitation of Benefits*)), the competent authority is required to consult with the competent authority of that company's country of residence. [*Article 10, subparagraph 3(c)*]

Exclusion of partnerships

1.189. Consistent with Germany's tax treaty practice and the OECD Model, paragraphs 2 and 3 of this Article expressly exclude companies that are partnerships from qualifying for the 5 per cent rate or exemption for intercorporate dividends. However in the course of negotiations, the two delegations agreed:

‘... the exclusion of partnerships in subparagraph 2(a) and paragraph 3 of Article 10 does not exclude partnerships subject to the same taxation treatment as companies in Australia or the Federal Republic of Germany from the application of those provisions.’

1.190. Accordingly, a partnership that falls within the definition of *company* under subparagraph 1(e) of Article 3 (*General Definitions*) will still qualify for the benefits specified in paragraphs 2 and 3 of this Article, provided that they satisfy all other requirements in those paragraphs.

1.191. In the case of Australia, this means Australian corporate limited partnerships that are treated in the same way as companies for Australian tax purposes may qualify for those benefits.

Dividends derived by or through a fiscally transparent entity

1.192. Where dividends are derived by or through a fiscally transparent entity or arrangement and are treated, for the purposes of taxation by one of the two countries, as the income, profits or gains of a resident of that country, this Article will apply as if that resident had derived the dividends directly. As explained in 1.29, this is not intended to operate to alter the specific treaty benefit that would be available for an item of income in the absence of paragraph 2 of Article 1 (*Persons Covered*).

That resident would therefore need to satisfy the relevant requirements set out in paragraphs 2 or 3 of this Article in order for either of those paragraphs to apply. Further, if that resident is the beneficial owner of the dividends and is not a company (as defined in subparagraph 1(e) of Article 3 (*General Definitions*)), paragraph 3 of the Protocol ensures that that resident can only seek to claim the benefits of subparagraph 2(b) of Article 10 (*Dividends*). [*Protocol, paragraph 3*]

***Definition of dividends***

1.193. The term *dividends* in this Article means:

- income from shares, or other rights, not being debt-claims, participating in profits; and
- other amounts which are subject to the same taxation treatment as income from shares in the country of which the distributing company is a resident for the purposes of its tax, and shall include, in the case of Germany, distributions on certificates of a German collective investment vehicle.

1.194. The phrase ‘for the purposes of its tax’, which appears in paragraph 4 of this Article, 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 German Agreement by virtue of paragraph 3 of Article 4 (*Resident*). [*Article 10, paragraph 4*]

1.195. In the case of Australia, the definition of ‘dividends’ 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.

1.196. During negotiations, the delegations agreed that:

‘...the definition of dividends in paragraph 4 of Article 10 does not limit either country’s ability to determine the meaning of income from shares in accordance with its domestic law. In the case of Australia, subsection 3(2A) of the *International Tax Agreements Act 1953* shall apply’.

***Dividends effectively treated as business profits***

1.197. Limitations on the tax of the source country do not apply to dividends derived by a resident of the other country who has a permanent

establishment in that source country, if the holding giving rise to the dividends is effectively connected with such permanent establishment.

1.198. Where the holding is effectively connected with such permanent establishment, the dividends are to be treated as business profits, 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 Article 7 (*Business Profits*).

1.199. Franked and unfranked dividends paid by an Australian company will be included in the assessable income of a German company or individual where the dividends are attributable to a permanent establishment of that German 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 German resident. Further, a German company or individual may be entitled to tax offsets in respect of any franked dividends received under Australia's domestic law. [*Article 10, paragraph 5*]

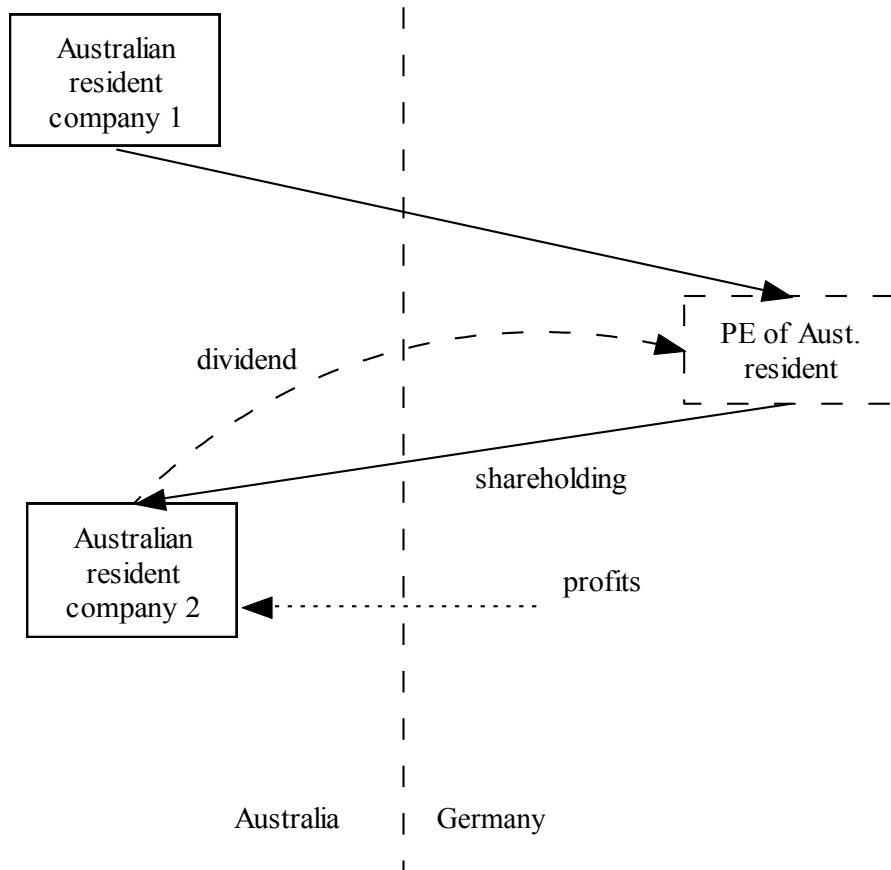
***Extra-territorial application precluded***

1.200. 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 6*]

Diagram 1.1



In the diagram above, paragraph 6 would, but for the exception, preclude Germany from taxing the dividend paid by Australian resident company 2 to Australian resident company 1 out of profits derived from German sources. However, as the dividends relate to the Australian shareholder's permanent establishment in Germany with which the holding is effectively connected, Germany may tax the dividends.

*Dividends paid by dual resident companies*

1.201. The restrictions under paragraph 6 of this Article do not apply when the company paying the dividends is a dual resident that is deemed to be a resident of Australia or Germany under paragraph 3 of Article 4 (*Resident*). 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, but only to the extent that the underlying profits arising in that country out of which the dividends are paid are not subject to tax at the corporate level. However, where the

dividends are beneficially owned by a resident of the other country, the limits provided for in paragraph 2 of this Article 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 7]*

1.202. 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. Paragraphs 2 and 3 of this Article will apply where those dividends are beneficially owned by a resident of the other country.

***Income derived from rights or debt claims carrying the right to participate in profits which are deductible to the payer***

1.203. Paragraph 6 of the Protocol to the German agreement provides that dividends and interest will remain taxable according to the domestic law of each country if they are:

- derived from rights or debt claims carrying a right to participate in profits, including income:
  - derived by a silent partner ('stiller Gesellschafter') from that partner's participation as such, or
  - from loans with an interest rate linked to the borrower's profit ('partiarische Darlehen') or
  - from profit sharing bonds ('Gewinnobligationen') within the meaning of Germany's tax law, and
- deductible in the determination of profits of the payer of the dividends or interest.

1.204. In such cases, a country's domestic law will apply instead of the 15 per cent, 10 per cent rate, 5 per cent rates or the exemptions set out in Articles 10 (*Dividends*) and 11 (*Interest*).

1.205. In Australia, the debt and equity rules in Australia's tax law determine whether a financial interest constitutes equity in a company (an *equity interest*, as defined in Subdivision 974-C of the ITAA 1997) or constitutes debt (a *debt interest*, as defined in Subdivision 974-B of the ITAA 1997). This then determines the tax treatment of a return on a financing interest issued by a company – that is, whether it is frankable or may be deductible.



1.206. Broadly, an interest in a company will be a *debt interest* if, at the time of its issue, there is a scheme that is a *financing arrangement* (as defined in section 974-130 of the ITAA 1997) under which the company is obliged to pay an amount to the holder of the interest at least equal to its issue price. Shares that give rise to *debt interests* (e.g. compulsorily redeemable preference shares that satisfy the *debt test* under subsection 974-20(1) of the ITAA 1997) are called *non-equity shares* (defined in subsection 995-1(1) of the ITAA 1997 as a share that is not an equity interest in a company).

1.207. The debt and equity concepts also apply to Division 11A of Part III of the ITAA 1936, which imposes withholding tax on Australian sourced dividends, interest and royalties paid to non-residents.

1.208. For the purposes of determining the boundary between interest and dividend withholding tax, the definition of *interest* in subparagraph 128A(1AB)(d) of the ITAA 1936 includes an amount that is a 'dividend paid in respect of a non-equity share'. For consistency, the definition of *dividend* in subparagraph 128A(1)(b) excludes 'a dividend paid in respect of a non-equity share'. This ensures that interest withholding tax applies to these amounts, rather than dividend withholding tax.

1.209. Subsection 3(2A) of the Agreements Act 1953 confirms that a payment that is treated as a return on a debt interest, under Australia's domestic law, is not treated as a dividend for the purposes of Australia's tax treaties. Subsection 3(2A) clarifies that the references to income from shares and to income from other rights participating in profits, in the dividends definition in Australia's tax treaties do not include a reference to a return on a debt interest. Such a return on a debt interest would therefore generally be treated as an interest payment for the purposes of Australia's tax treaties.

1.210. The combined effect of Australia's domestic debt and equity rules, withholding tax rules and subsection 3(2A) of the Agreements Act 1953 is that an item of income that is derived from rights or debt-claims carrying a right to participate in profits, and which is deductible to the payer, would be treated as an interest payment for the purposes of the German agreement.

1.211. As both the German agreement and Australia's domestic law provide for a 10 per cent rate of withholding tax on interest payments, paragraph 6 of the Protocol would not affect the 10 per cent maximum rate of interest withholding tax in practice. However, there is no equivalent exemption in Australia's domestic interest withholding tax rules to that contained in subparagraph 3(b) of Article 11 (*Interest*) for interest derived by a financial institution. As paragraph 6 of the Protocol

applies ‘notwithstanding the provisions of Article ... 11’ of the German agreement, the exemption in subparagraph 3(b) of Article 11 (*Interest*) will therefore not apply for a dividend paid in respect of a non-equity share (such as a dividend paid on certain redeemable preference shares) to a German financial institution. In such a case, the 10 per cent rate limit would apply instead, subject to that German financial institution satisfying any other relevant conditions in the German agreement. [**Protocol, paragraph 6**]

#### ***Article 11 – Interest***

1.212. This Article allocates taxing rights in respect of interest flows between Australia and Germany. Article 11 (*Interest*) provides that:

- an exemption from source country tax applies to certain cross-border interest flows to:
- certain bodies exercising governmental functions or central banks; and
  - financial institutions in certain circumstances.
- 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 shall be subject to Article 7 (*Business Profits*); 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.

#### *Permissible rate of source country taxation*

##### Ten percent rate limit

1.213. 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

1.214. The exemption for interest paid to the government of a country will apply to interest derived by the Australian or German governments, or by any political or administrative subdivision or local authority, or any

other body exercising governmental functions, in either Australia or Germany.

1.215. During negotiations, the delegations agreed that:

‘... subparagraph 3(a) of Article 11 will apply to Australian government investment funds (such as the Future Fund) established for the main purpose of funding future Australian government financial liabilities, where the investment funds’ monies are and remain government monies’.

1.216. The exemption also applies to interest derived by banks performing central banking functions in Australia and Germany.

**[Article 11, subparagraph 3(a)]**

Exemptions for interest paid to financial institutions

1.217. 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.

1.218. 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 the cost of their funds.

1.219. For the purposes of this Article, 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 3(b)]**

1.220. The exemption provided under subparagraph 3(b) of this Article 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 4]**

1.221. 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 German 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.

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

*Definition of interest*

1.223. 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 and whether or not carrying a right to participate in the debtor's profits);
- interest from government securities;
- income 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.

1.224. However, the term interest does not include income dealt with in Article 10 (*Dividends*).

***[Article 11, paragraph 5]***

*Interest effectively treated as business profits*

1.225. 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 of that person in the other country, will form part of the profits of that permanent establishment and be subject to the provisions of Article 7 (*Business Profits*). Accordingly, the rate limitations on source taxation provided in paragraphs 2 and subparagraph 3(b) of this Article do not apply to such interest in the country in which the interest arises.

***[Article 11, paragraph 6]***

*Deemed source rules*

1.226. The source rules which determine where interest arises for the purposes of this Article are set out in paragraph 7. The phrase ‘for the purposes of its tax’, which appears in paragraph 7 of this Article, 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 German agreement by virtue of paragraph 2 or 3 of Article 4 (*Resident*).

1.227. Paragraph 7 of this Article operates to allow Australia to tax interest paid by a resident of Australia to a resident of Germany 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 Germany, if it is an expense incurred by the payer of the interest in connection with a permanent establishment situated in Australia.

1.228. 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 outside both Australia and Germany (that is, the permanent establishment is in a third country). In that case, the interest is deemed to arise in the country in which the permanent establishment is situated. [**Article 11, paragraph 7**]

1.229. In determining whether a permanent establishment exists in a third country, the principles set out in Article 5 (*Permanent Establishment*) apply. [**Article 5, paragraph 12**]

*Related persons*

1.230. 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 German Agreement. [**Article 11, paragraph 8**]

1.231. 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.

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

*Income derived from rights or debt claims carrying the right to participate in profits which is deductible to the payer*

1.233. As explained in paragraphs 1.204 to 1.213, paragraph 6 of the Protocol to the German agreement provides that dividends and interest will remain taxable according to the domestic law of each country if they are:

- derived from rights or debt claims carrying a right to participate in profits, including income:
  - derived by a silent partner ('stiller Gesellschafter') from that partner's participation as such, or
  - from loans with an interest rate linked to the borrower's profit ('partiarische Darlehen') or
  - from profit sharing bonds ('Gewinnobligationen') within the meaning of Germany's tax law, and
- deductible in the determination of profits of the payer of the dividends or interest.

1.234. The combined effect of Australia's domestic debt and equity rules, withholding tax rules and subsection 3(2A) of the Agreements Act 1953 is that an item of income that is derived from rights or debt-claims carrying a right to participate in profits, and which is deductible to the payer, would be treated as an interest payment for the purposes of the German agreement.

1.235. As both the German agreement and Australia's domestic law provide for a 10 per cent rate of withholding tax on interest payments, paragraph 6 of the Protocol would not affect the 10 per cent maximum rate of interest withholding tax in practice. However, there is no equivalent exemption in Australia's domestic interest withholding tax rules to that contained in subparagraph 3(b) of Article 11 (*Interest*) for interest derived by a financial institution. As paragraph 6 of the Protocol applies 'notwithstanding the provisions of Article ... 11' of the German agreement, the exemption in subparagraph 3(b) of this Article will therefore not apply for a dividend paid in respect of a non-equity share (such as a dividend paid on certain redeemable preference shares) to a

German financial institution. In such a case, the 10 per cent rate limit would apply instead, subject to that German financial institution satisfying any other relevant conditions in the German agreement. [*Protocol, paragraph 6*]

**Article 12 – Royalties**

1.236. This Article allocates taxing rights in respect of royalties paid or credited between Australia and Germany. 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 are subject to Article 7 (*Business Profits*);
- royalties are deemed to have an Australian source (and may therefore be taxed in Australia) where:
- the royalties are paid to a German 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 the Australian resident's permanent establishment situated in Germany or a third country; or
- the royalties are paid by a non-resident to a German resident and are an expense of the payer in connection with a permanent establishment 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.

1.237. The phrase 'for the purposes of its tax', which appears in paragraph 5 of this Article, 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 German agreement by virtue of paragraph 2 or 3 of Article 4 (*Resident*).

*Permissible rate of source country taxation*

1.238. 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*]

*Definition of royalties*

1.239. 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 to the extent to which they are made as consideration for the use of, or the right to use, any copyright, patent, design or model, plan, secret formula or process, trademark or other like property or right. It also encompasses the supply of any related ancillary and subsidiary assistance aimed at facilitating the enjoyment of the foregoing.

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

1.241. Payments for the use of, or the right to use, industrial, commercial or scientific equipment are not included in the definition of royalties under the German agreement. Such payments will instead be treated as business profits under Articles 7 (*Business Profits*) and as profits from transport operations (for certain leases of ships, aircraft and containers) under Article 8 (*Shipping and Air Transport*).

Image or sound reproduction or transmission

1.242. 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 3(d)**]

Spectrum licences

1.243. Under the German agreement, payments (or credits) made for the use of, or right to use, the radio frequency spectrum specified in a spectrum licence are treated as royalties. This provision preserves Australia's ability to tax payments (or credits) that arise in Australia for the use in Australia of any part of the radio frequency spectrum specified in an Australian spectrum licence. [**Article 12, subparagraph 3(e)**]

Forbearance

1.244. 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 this Article. **[Article 12, subparagraph 3(f)]**

*Other royalties effectively treated as business profits*

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

*Deemed source rules*

1.246. The source rules which determine where royalties arise for the purposes of this Article are set out in paragraph 5. This provision broadly mirrors the source rule for interest income in Article 11 (*Interest*).

1.247. The Article allows Australia to tax royalties paid by a resident of Australia to a resident of Germany 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 German resident if the royalties are an expense incurred by the payer in carrying on a business in Australia through a permanent establishment.

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

1.249. Royalty payments that are an expense incurred by an Australian resident carrying on a business through a permanent establishment 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 is situated. **[Article 12, paragraph 5]**

*Related Persons*

1.250. 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 German agreement. **[Article 12, paragraph 6]**

1.251. 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*

1.252. This Article allocates taxing rights between the respective countries in relation to income, profits or gains arising from the alienation of immovable property and movable property (such as shares or comparable rights in an entity).

1.253. 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. Article 7 deals with the allocation of taxes in regard to business profits. Paragraph 5 of Article 7 confirms that Article 7 does not affect the effect of Article 13 (*Alienation of Property*) where an item of income or gain is dealt with by Article 13. **[Article 7, paragraph 5]**

#### *Immovable property*

1.254. 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]**

1.255. For the purpose of this Article, the term ***immovable property*** has the same meaning as it has under paragraph 2 of Article 6 (*Income from Immovable Property*) and therefore has a broad meaning for the purposes of this Article. For example, it includes livestock and equipment used in agriculture and forestry. Immovable property also includes interests in or rights in respect of immovable property. **[Article 6, paragraph 2].**

1.256. Where the property is situated is clarified under paragraph 3 of Article 6 **[Article 6, paragraph 3]**

#### *Permanent establishment*

1.257. Paragraph 2 of this Article 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. It also applies where the permanent establishment is itself (alone or with the whole enterprise) alienated. Such income, profits or gains may be taxed in the country in which the permanent establishment is situated. This corresponds to the rules for the taxation of business profits contained in Article 7 (*Business Profits*). [**Article 13, paragraph 2**]

1.258. 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 described in paragraph 2 of Article 6 and dealt with in paragraph 1 of this Article.

*Disposal of ships or aircraft*

1.259. Income, profits or gains of an enterprise carried on by a resident of a country from the disposal of ships or aircraft operated by that enterprise 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 operation of ships or aircraft in international traffic. [**Article 13, paragraph 3**]

1.260. The term **international traffic** excludes transportation which commences at a place in the other country and terminates at the same or another place in that country, even if it travels through international airspace or waters (for example, so-called ‘voyages to nowhere’ by cruise ships). [**Article 3, subparagraph 1(i)**]

*Shares and other interests in land-rich entities*

1.261. Income, profits or gains from the alienation of shares or comparable interests derived by a resident of a country may be taxed in the other country if at any time during the 365 days prior to the alienation, those shares or interests derive more than 50 per cent of their value directly or indirectly from immovable property situated in the other country. This rule is designed to deal with arrangements involving the effective alienation of incorporated immovable property, or like arrangements.

1.262. 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.

1.263. Paragraph 44 of the BEPS Action 6 2015 Final Report recommended that the equivalent provision in paragraph 4 of Article 13 (*Capital Gains*) of the OECD Model be amended to address cases where assets are contributed to an entity shortly before the sale of the shares or other interests in that entity in order to dilute the proportion of the value of these shares or interests that is derived from immovable property situated in one country. The new OECD Model provision will refer to situations where shares or comparable interests derive their value primarily from immovable property at any time during a 365 day period preceding the alienation as opposed to at the time of the alienation only. Paragraph 4 of this Article in the German agreement adopts this 365 day condition. **[Article 13, paragraph 4]**

*Resident country sweep-up provision*

1.264. Paragraph 5 of this Article contains a sweep-up provision which reserves the sole right to tax any gains of a capital nature from the alienation of property that is not otherwise covered by this Article to the country of which the person alienating the property 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 Germany. 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]**

*Former German resident individuals*

1.265. Germany's right to treat an individual that was a resident of Germany, for at least five years just before the time the individual became a resident of Australia, as having alienated shares or comparable interests at the time of the change of residence is unaffected by paragraph 5 of this Article.

1.266. During negotiations, the delegations agreed that:

‘...the reference to “a period of at least 5 years” refers to a period of at least 5 years in the aggregate’.

1.267. If the individual is taxed in Germany and the shares or comparable interests are subsequently alienated after the change of residence, Australia is generally required to calculate the capital gain on the shares or comparable interest on the basis of the value applied by Germany at the time of the change of residency from Germany to Australia.

1.268. During negotiations, the delegations agreed that:

‘... the value of the alienated shares will be, if they are shares in a public company, the listed value of the shares at the time of alienation, and if they are shares in a private company, the fair value of the shares at that time’.

1.269. For shares or comparable interests deriving directly or indirectly more than 50 per cent of their value from immovable property located in Australia at any time in the preceding 365 days, the German tax shall be reduced by the amount of Australian tax that would have been payable under Australian law if the shares or comparable interests were actually sold for the value which Germany applied at the time of change of residence. **[Article 13, paragraph 6]**

1.270. The following examples illustrate how paragraph 6 would apply to calculate both the Australian and German tax on the capital gain.

1.271. A former German resident individual had acquired 1000 shares in a company for \$100 each. The individual had been a resident of Germany for 8 years on changing residency status from being a German resident to an Australian resident on 4 December 2017. On 1 July 2017, prior to changing residency status, 75 per cent of the shares’ value was derived from immovable property located in Australia. The value of each share on change of residency was \$120.

1.272. Germany treats the individual as having alienated the shares at the time of the change of residence and computes the capital gain as \$20,000 (based on a \$20 gain for each of the 1000 shares). Assuming Australia and Germany had the same tax rate of 30 per cent on the gain (and ignoring any currency exchange difference), Germany would in the first instance calculate German tax on the capital gain as \$6,000. Australia, applying the hypothetical test at the time of change of residency, also calculates Australian tax on the capital gain as \$6,000. As a result, the German tax would be reduced by the \$6,000 Australian tax hypothetically due, leaving the resident with a nil German tax liability. The individual then sells the 1000 shares for \$135 each on 20 December 2017 while being an Australian resident. Australia is entitled to tax the full capital gain of \$10,500 (based on a \$35 gain for each of the 1000 shares).

1.273. If instead the shares did not derive at least 50 per cent of their value directly or indirectly from immovable property located in Australia within the prior 365 days of selling the shares, the result would be that Germany would treat the shares as having been sold for \$120 each at the time of residency change leaving a German tax liability of \$6,000 on the \$20,000 gain. The deemed acquisition cost for Australian taxation purposes will be \$120 per share, being the value applied by Germany at the time of the change of residence. If the individual subsequently sold the

shares for \$135 each on 20 December 2017 while being an Australian resident, the Australian tax on the capital gain would be calculated on the basis of the individual having acquired each share for \$120 each.

*Former Australian resident individuals*

1.274. Australia's right to tax, in accordance with Australian law, gains of a capital nature from the alienation of any movable property derived by an individual who is a resident of Australia at any time during the year of income in which the alienation occurred, or at any time during the five years preceding the alienation, is not affected by paragraph 5 of this Article.

1.275. If that individual is a resident of Germany at the time of alienating the movable property, the amount of gain that can be taxed by Australia is generally limited to the amount that would have been calculated on the assumption that the alienation took place at the time the individual ceased to be an Australian resident. If, however, the movable property consists of shares or comparable interests deriving more than 50 per cent of their value directly or indirectly from immovable property situated in Australia at any time during the preceding 365 days before alienation, the amount of the gain that Australia can tax is not limited (consistent with the rule in paragraph 4 of this Article).

1.276. If the individual is taxed in Australia and the movable property is alienated after the change of residence, Germany will generally calculate the capital gain on the basis of the value which Australia applied at the time of the change of residency. If, however, the movable property consists of shares or comparable interests deriving more than 50 per cent of their value directly or indirectly from immovable property located in Germany at any time during the preceding 365 days of the alienation, the amount of the gain that Germany can tax is not limited (consistent with the rule in paragraph 4 of this Article). [**Article 13, paragraph 7**]

***Article 14 – Income from employment***

*Basis of taxation*

1.277. 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 15 (*Directors' Fees*);
- Article 16 (*Entertainers and Sportspersons*);
- Article 17 (*Pensions, Annuities and Similar Payments*); and

- Article 18 (*Government Service*).

1.278. 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 that such remuneration derived in respect of short-term visits will be taxable only in the country of residence of the individual. **[Article 14, paragraphs 1 and 2]**

*Short term visit*

1.279. The Article provides that the remuneration will be taxable only in the employee's country of residence if the employee performed that employment in the other country and:

- the period of the visit or visits does not exceed, in the aggregate, 183 days in any twelve month period commencing or ending 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 which the employer has in the country being visited.

**[Article 14, paragraph 2]**

*Employment on a ship or aircraft*

1.280. 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 German resident airline would be taxable in Germany 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 German tax paid under Article 22 (*Methods of Elimination of Double Taxation*).

**[Article 14, paragraph 3]**

*Fringe benefits*

1.281. Both Australia and Germany 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.

Germany taxes fringe benefits as part of the employee's employment income.

1.282. Paragraph 4 of this Article deals with fringe benefits. In the absence of this paragraph, such benefits may be taxable in both Australia and Germany 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 as if the benefit was ordinary employment income. 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.

*Primary taxing right*

1.283. This Article operates on the basis 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 (*Methods of Elimination of Double Taxation*). [**Article 14, paragraph 4**]

**Example 1.9**

Petra, a German resident employee of a German 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 that relate to her employment in Australia. Under paragraph 2 of Article 14 (Income from Employment), Australia has the right to tax the employment income. Germany may also tax the employment income but, under Article 22 (Methods of Elimination of Double Taxation), would be obliged to give credit for the Australian tax paid. For the purposes of paragraph 4 of Article 14 (Income from Employment), Australia therefore has the primary right to tax the employment income in these circumstances. Consequently, the fringe benefits which relate to that employment income will only be taxable in Australia.

*Definition of fringe benefit*

1.284. The term 'fringe benefit' is not defined in the German agreement and therefore, in accordance with paragraph 2 of Article 3 (*General Definitions*), that term would take its ordinary domestic law meaning'.

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

**Article 15 – Directors' fees**

1.286. This Article relates to fees and similar payments 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. The Article provides that directors' fees may be taxed in the country of residence of the company receiving the directorship services. **[Article 15]**

### ***Article 16 – Entertainers and sportspersons***

#### *Personal activities*

1.287. 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.

1.288. 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.

1.289. 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 16, paragraph 1]**

#### *Safeguard*

1.290. 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 in that country. **[Article 16, paragraph 2]**

#### *Exception for visit wholly or mainly supported by public funds*

1.291. 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 visit is wholly or mainly supported by public funds of the country of residence. This would apply, for example, to cultural activities performed by visiting entertainers where the visit is funded by, in the case of visits to Germany,

the Australian Federal Government (or by an Australian state or territory government or local council) or, in the case of visits to Australia, by the German federal government (or by Germany's States, political subdivisions or local authorities). **[Article 16, paragraph 3]**

***Article 17 – Pensions, annuities and similar payments***

*General scope*

1.292. Pensions, payments made under the social security legislation and annuities generally will be taxable only in the country of residence of the recipient. However, pensions relating to government service that are covered under paragraph 2 of Article 18 (*Government Service*) are not dealt with under this Article.

1.293. 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, social security payment or annuity where, upon that person's death, such entitlement has passed to that person's dependants. **[Article 17, paragraph 1]**

*Contributory pensions and annuities*

1.294. Pensions or annuities first paid after 31 December 2016 (other than social security payments first paid on or after 1 January 2017 to which paragraph 3 of this Article applies) may also be taxed in the country in which they arise (that is, the source country). This rule applies to such pensions or annuities that are attributable (in whole or in part) to contributions which, for more than 15 years in that source country, received concessional tax treatment by:

- not forming part of the taxable income of the recipient from their employment,
- were tax deductible, or
- in the case of pensions or annuities arising in Germany, were afforded some other form of beneficial treatment by Germany.

1.295. However, the payment will be taxable only in the country of residence of the recipient if the tax relief or other beneficial treatment was clawed back for any reason, the 15 year conditions was fulfilled in both countries, or the tax relief or beneficial treatment was for 15 years or less.

1.296. In the case of Australia, contributions which an employee has 'salary-sacrificed' into an Australian complying superannuation fund would be contributions which did not form part of the taxable income

from employment for the purposes of subparagraph 2(a) of this Article. In addition, contributions to an Australian superannuation fund for which an employer or a self-employed individual has claimed an Australian income tax deduction would be contributions which were tax deductible for the purposes of subparagraph 2(a) of this Article.

1.297. The reference to 15 years in paragraph 2 of this Article refers to where the contributions satisfied the requirements set out in subparagraphs (a) to (c) of paragraph 2 for more than 15 years in total. Therefore, even if there were gaps in the periods of contribution where a person was, for instance, not working or was living in third country, if the total period during which qualifying contributions were made exceeds 15 year in the aggregate, the 15 year period will be met. **[Article 17, paragraph 2]**

*Social security payments*

1.298. Benefits paid under the social security legislation of one of the two countries may also be taxed in that country of source where the benefits were first paid on or after 1 January 2017. However, the tax charged must not exceed 15 per cent of the gross amount of the benefit. Such benefits first paid prior to 1 January 2017 are instead subject to the rule in paragraph 1 of this Article and therefore are taxable only in the recipient's country of residence. **[Article 17, paragraph 3]**

*Certain compensation payments*

1.299. Recurrent or non-recurrent payments for:

- political persecution,
- injustice or damage sustained as a result of war,
- damage as a result of military or civil alternative service or of a crime, a vaccination, or
- similar reasons,

which are exempt from tax in the source country are also exempt from tax in the country of residence of the recipient. This applies to such payments by either country, their political subdivisions and local authorities, and, in the case of Germany, its States. **[Article 17, paragraph 4]**

*Alimony and other maintenance payments*

1.300. Alimony and other maintenance payments are taxable only in the country where those payments arise. **[Article 17, paragraph 5]**

*Definition of annuity*

1.301. The term **annuity** means a stated sum payable periodically at stated times during the life or 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 17, paragraph 6]**

**Article 18 – Government service**

*Salary and wage income*

1.302. Salary, wages and other remuneration income, other than government service pensions, paid to an individual for services rendered to a government of one of the two countries, or to one of the two countries' political subdivisions or local authorities or Germany's States, will be taxable 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 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 18, paragraph 1]**

*Pensions*

1.303. Pensions paid by or out of funds created by one of the two countries, , or by one of the two countries' political subdivisions or local authorities, to an individual in respect of government services rendered to that country, or its political subdivision or local authority, will be taxable only in that country, unless the recipient is a resident and a national of the other country. If the recipient is a resident and a national of the other country (the residence country), the pension is taxable only in the residence country. **[Article 18, paragraph 2]**

Extension of scope of government services

1.304. The application of this Article extends to salaries, wages and pensions paid in respect of services rendered to the Deutsche Bundesbank and the Association of Chamber of Industry and Commerce for the promotion of Foreign Economic Relations through the Network of Foreign Chambers of Commerce. It can also be extended to other

comparable institutions mutually agreed between Australia and Germany. **[Article 18, paragraph 3]**

*Business income*

1.305. The Article provides that Article 14 (*Income from Employment*); Article 15 (*Directors' Fees*); Article 16 (*Entertainers and Sportspersons*); and Article 17 (*Pensions, Annuities and Similar Payments*) shall apply to salaries, wages and other similar remuneration or to pensions in respect of services rendered in relation to any business carried on by the government of one of the countries. This also applies to services rendered in connection with any business carried on by a political subdivision or a local authority of either country, or by Germany's States. **[Article 18, paragraph 4]**

**Article 19 – Professors, teachers and students**

*Exemption from tax*

1.306. This Article applies to exempt remuneration received by a visiting professor or teacher (who is a resident of one of the two countries), for visits to the other country for a period not exceeding two years, for carrying out advanced study or research, or for teaching at a university, college, school or other educational institution, in the other country, provided that the remuneration is wholly or mainly supported by public funds of the individual's country of residence, or by a tax exempt charitable or benevolent organisation, and the remuneration is exempt from tax in that country of residence. **[Article 19, paragraph 1]**

1.307. This Article also applies to students or business apprentices who are temporarily present in one of the two 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 visited country during the period of their visit.

1.308. The exemption from tax provided by the visited country extends to maintenance payments received by the student or apprentice that are made for the maintenance of dependent family members who have accompanied the student or apprentice to the visited country. **[Article 19, paragraph 2]**

*Employment income*

1.309. Paragraph 1 of this Article only applies to the remuneration received by a visiting professor or teacher that is wholly or mainly supported by public funds or by a tax exempt charitable or benevolent organisation as prescribed in paragraph 1. Any other employment income derived by that professor or teacher may be subject to tax in the visited country as provided for in Article 14 (*Income from Employment*).

1.310. Where a German 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,

1.311. the income earned by that student as a consequence of that employment may be subject to tax in Australia as provided for in Article 14 (*Income from Employment*).

1.312. For business apprentices, the exemption provided under Article 19 (*Professors, Teachers and Students*) only applies where the payment received by the apprentice consists solely of subsistence payments to cover training or maintenance. Remuneration for service, that is, salary equivalents, fall for consideration under Article 14 (*Income from Employment*), as will any income derived from employment with a local employer.

1.313. In the case of a German 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.

1.314. A payment for maintenance, education or training would not be expected to exceed the level of expenses likely to be incurred to cover the student or business apprentice's maintenance, education or training (that is, a subsistence payment). On the other hand, if the payment 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 14 (*Income from Employment*).

1.315. Where the payments received from abroad are for the student or business apprentice's maintenance, education or training they will not be

taken into account in determining the tax payable on any employment income that may be 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 20 – Other Income**

#### *Allocation of taxing rights*

1.316. This Article provides rules for the allocation between the two countries of taxing rights with respect to items of income not dealt with in the preceding Articles of the German agreement. The scope of the Article is not confined to such items of income arising in one of the two countries — it extends also to income from sources in a third country.

1.317. Broadly, such income derived by a resident of one country is to be taxed only in the country of residence unless it is from sources in the other country, in which case the income may also be taxed in the other country. This is consistent with Australia’s reservation to Article 21 (*Other Income*) of the OECD Model. [**Article 20, paragraphs 1 and 3**]

1.318. Where the income may be taxed in both countries in accordance with this Article, the country of residence of the recipient of the income is obliged by Article 22 (*Methods of Elimination of Double Taxation*) to provide double taxation relief.

1.319. Paragraph 2 provides that the rule in paragraph 1 of this Article does not apply to other income (other than income from immovable property as defined in paragraph 2 of Article 6 (*Income from Immovable Property*)) where the right or property in respect of which the other income is paid is effectively connected with a permanent establishment which a resident of one country has in the other country. In such a case, Article 7 (*Business Profits*) will apply to allocate the taxing right of that other income to the country in which the permanent establishment is situated. [**Article 20, paragraph 2**]

1.320. In the case where the right or property in respect of which the other income is paid is effectively connected with such a permanent establishment, this Article includes a special rule for certain dividends, interest and royalties. Under this rule, where that other income comprises dividends paid by a company which is a resident of the same country as the resident who carries on business through that permanent establishment, or the interest or royalties arise in that country, then those dividends, interest and royalties may be taxed in that country at the rates

provided in paragraphs 2 of Articles 10 (*Dividends*), 11 (*Interest*) and 12 (*Royalties*) respectively.

1.321. In the absence of this rule, the source country, which is also the residence country, would be prevented from applying the rate limits prescribed in paragraphs 2 of Articles 10 (*Dividends*), 11 (*Interest*) and 12 (*Royalties*) because the income is attributable to a permanent establishment of its resident in the other country. Whereas, that source country could apply the rate limits prescribed in paragraphs 2 of Articles 10, 11 and 12 if the income was instead paid to a resident of the other country. Paragraph 5 of the Commentary on Article 21 (*Other Income*) of the OECD Model recognises that some countries may wish to include such a rule to address this concern and this rule in the German agreement accords with Germany's tax treaty practice.

1.322. If the country where the permanent establishment is situated taxes the dividends, interest or royalties attributable to that permanent establishment, that country will be required to give relief under Article 22 (*Methods of Elimination of Double Taxation*) for the tax imposed by the other country in accordance with paragraphs 2 of Articles 10, 11 and 12.

#### **Example 2.1**

Hanover Co, a German resident company, carries on a business through a permanent establishment situated in Australia and receives a dividend from another German resident company, Dresden Co. That dividend income is paid in respect of shares in Dresden Co that are effectively connected with Hanover Co's permanent establishment in Australia. In this case, Germany may tax that dividend paid from Dresden Co at a rate of either 5 per cent or 15 per cent of the gross dividend, subject to Hanover Co also meeting the other requirements in paragraph 2 of Article 10. If Australia includes the dividends received from Dresden Co in the taxable income of Hanover Co's Australian permanent establishment, Australia would be obliged to provide relief for the German tax withheld on those dividends.

1.323. During negotiations, the delegations agreed with respect to paragraph 2 of Article 20 (*Other Income*) that:

‘... while the final sentence permits source taxation at treaty rates of dividend, interest and royalties attributable to a permanent establishment situated in the other state, the paragraph in no way limits either country's taxing rights over its own resident enterprises.’

**[Article 20, paragraph 2]**



1.324. This Article does not apply in the situation where business profits are not taxed in the country of source because of the absence of a permanent establishment. That is, in the absence of a permanent establishment, paragraph 1 of Article 7 (*Business Profits*) provides that the profits of an enterprise of a country shall be taxable only in that country.

### **Example 2.2**

Orange Co, an Australia resident company, derives business profits from the sale of merchandise through an independent agent located in Germany. As Orange Co does not have a permanent establishment in Germany, the business profits will be taxable in Australia pursuant to Article 7 (*Business Profits*) and not under Article 20 (*Other Income*).

### **Article 21 - Capital**

1.325. This Article deals only with taxes on capital. Recognising that Australia does not impose capital taxes, this Article applies unilaterally for German capital taxes only - unlike Article 21 in the German 1972 agreement.

1.326. The German tax on capital to which this Article applies is that referred to in Article 2 (*Taxes Covered*). As explained in paragraph 1.42, while sub-subparagraph 3(b)(iv) of Article 2 expressly refers to Germany's capital tax, at the time of signature of the German agreement Germany was not, in fact, imposing its capital tax in practice.

1.327. This Article confirms Germany's right to impose its capital tax on certain elements of capital situated in Germany which are owned by residents of Australia.

1.328. The Article provides that Germany may tax capital represented by immovable property (referred to in Article 6 (*Income from Immovable Property*)) owned by a resident of Australia and situated in Germany, as well as movable property which forms part of the business property of a permanent establishment that an Australian enterprise has in Germany.

**[Article 21, paragraphs 1 and 2]**

1.329. All other elements of capital of a resident of Australia are not taxable in Germany, including capital represented by ships or aircraft operated by an Australian enterprise in international traffic and capital represented by movable property pertaining to the operation of such ships and aircraft. **[Article 21, paragraphs 3 and 4]**

1.330. Consistent with the interpretation contained in paragraph 24 of the Commentary on Article 13 (*Capital Gains*) of the OECD Model, the

term *movable property* means all property other than immovable property described in paragraph 2 of Article 6 (*Income from Immovable Property*) of the German agreement.

***Article 22 – Elimination of double taxation***

1.331. Double taxation does not arise in respect of income flowing between Australia and Germany:

- Where the terms of the German agreement 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.

1.332. 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 German agreement, 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*

1.333. This Article requires Australia to provide Australian residents with a credit, subject to Australian laws in relation to the allowance of a credit for foreign tax paid, against their Australian tax liability for German tax paid under German laws and in accordance with the German agreement, 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]***

1.334. Australia's general foreign income tax offset rules, together with the terms of this Article and of the German agreement 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 Germany.

1.335. 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).

1.336. Foreign equity distributions paid from and branch profits derived in Germany by an Australian resident company that are exempt from Australian tax under the foreign source income measures (for example, section 23AH of the ITAA 1936 or Subdivision 768-A of the ITAA 1997) 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.

*German method of relief*

1.337. In order to maintain consistency with Germany's domestic relief provisions, paragraph 2 of this Article is divided into different forms of relief (exemption and credit).

1.338. Generally, where a resident of Germany derives income, profits or gains which under the German agreement may be taxed in Australia, or is exempt from Australian tax under paragraph 3 of Article 10 (*Dividends*), Germany will exempt the income, profits or gains from German tax (subject to the provisions of subparagraph 2(c) of this Article). However, in the case of dividend, this exemption applies only to those paid to a German resident company (not including partnership) which directly own at least 10 per cent of the voting power of the Australian resident company paying the dividend. **[Article 22, subparagraph 2(a)]**

1.339. The exemption provided under subparagraph 2(a) of this Article discussed above does not apply to dividends paid by a tax exempt company or to dividends that the distributing company may deduct for Australian tax purposes or for dividends that are attributed under the German law to a person that is not a German resident company. **[Article 22, subparagraph 2(a)]**

1.340. Germany retains the right to take into account in the determination of its rate of tax the items of income, profits or gains which are exempted from German tax under the provisions of the German agreement. **[Article 22, subparagraph 2(b)]**

1.341. In relation to certain items of income, Germany will provide a credit against German tax, subject to German tax law regarding credit for foreign tax, the Australian tax paid in accordance with Australian law and with the provisions of the German agreement. These items of income are:

- dividends within the meaning of Article 10 (*Dividends*) to which subparagraph 2(a) of this Article does not apply;
- interest;

- royalties;
- income, profits or gains to which paragraph 4 of Article 13 (*Alienation of Property*) applies;
- income to which Article 15 (*Directors' Fees*) and Article 16 (*Entertainers and Sportspersons*) apply;
- income to which paragraphs 2 and 3 of Article 17 (*Pensions, Annuities and Similar Payments*) apply;
- income to which paragraph 3 of Article 20 (*Other Income*) applies.

***[Article 22, subparagraph 2(c)]***

1.342. For the purposes of subparagraph 2(c) of this Article, items of income of a resident of Germany that under the German agreement may be taxed in Australia shall be deemed to be income from sources within Australia. ***[Article 22, subparagraph 2(c)]***

1.343. The exemption from German tax provided under subparagraph 2(a) of this Article applies to profits within the meaning of Article 7 (*Business Profits*), dividends within the meaning of Article 10 (*Dividends*), and to income, profits or gains from the alienation of movable property within the meaning of paragraph 2 of Article 13 (*Alienation of Property*) only to the extent that the income, profits or gains were derived from the following activities:

- the production, processing, working or assembling of goods and merchandise;
- the exploration and extraction of natural resources;
- banking and insurance;
- trade or the rendering of services; or
- if the items of income, profits or gains are economically attributable to the abovementioned activities.

Additionally, the exemption applies only if a business undertaking that is adequately equipped for its business purpose exists, except where profits may be taxed in Australia by a German resident carrying on an insurance business of any form (other than life insurance) pursuant to paragraph 6 of Article 7 (*Business Profits*). ***[Article 22, subparagraph 2(d)]***

1.344. Where, according to subparagraph 2(d), subparagraph 2(a) of this Article does not apply, any double taxation is to be eliminated by means of a tax credit as provided under subparagraph 2(c) of this Article. **[Article 22, subparagraph 2(d)]**

1.345. Notwithstanding the exemption rule provided under subparagraph 2(a) of this Article, there are specific circumstances under which double taxation is instead to be eliminated by a tax credit under subparagraph 2(c) of this Article. Subparagraph 2(c) would apply where:

- under the provisions of the German agreement, Australia may tax items of income, profits or gains, or elements thereof, but does not actually do so; and
- after consultation Germany notifies Australia through diplomatic channels of items of income, profits or gains, or elements thereof, to which it intends to apply the provisions on tax credit under subparagraph 2(c) of this Article.

1.346. Double taxation would then be eliminated for the notified items of income, profits or gains, or elements thereof, by allowing a tax credit from the first day of the calendar year following that in which the notification was made. **[Article 22, subparagraph 2(e)]**

1.347. Where due to differences in the domestic laws of the two countries, items of income, profits or gains, or elements thereof, are placed under different provisions of the German agreement, and if, as a consequence of this different placement such income, profits or gains would be subject to double taxation and this conflict cannot be resolved by a procedure under paragraphs 2 or 3 of Article 25 (*Mutual Agreement Procedure*), the country of which the person is a resident must avoid double taxation by allowing a tax credit following the procedures set out in this Article. **[Article 22, subparagraph 3(a)]**

1.348. In addition, where in the two countries items of income, profits or gains, or elements thereof, are placed under different provisions of the German agreement, and if, as a consequence of this different placement such income, profits or gains would be subject to non-taxation or lower taxation than without this conflict, the country of which the person is a resident is not obliged to exempt such income, profits or gains. Alternatively, in the case of lower taxation only, that country of residence must allow a tax credit, following the procedures set out in this Article in respect of such income, profits or gains. **[Article 22, subparagraph 3(b)]**

1.349. Subparagraphs 2(e) and 3(b) of this Article both guard against cases where the German agreement would otherwise result in non-taxation and therefore take account of the guidance in paragraph 56.1 of the

Commentary on Article 23A of the OECD Model and the recommendation in paragraph 444 of the BEPS Action 2 2015 Final Report.

***Article 23 – Limitation of Benefits***

1.350. Article 23 outlines three situations where benefits under the German agreement are limited.

*Temporary residents*

1.351. Relief will not be available under the German agreement for income, profits or gains derived by an individual who is a temporary resident of the a country if that country exempts from tax that income, or those profits or gains, by reason only of that individual's status as a temporary resident of that other country.

1.352. This means that in the case of a person who is a temporary resident of Australia (as defined in section 995-1 of the ITAA 1997), Germany is not required to provide any relief from German tax under the German agreement in respect of income, profits or gains that are not taxed in Australia because the person is a temporary resident. 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.

***[Article 23, paragraph 1]***

*Principal purpose test*

1.353. The BEPS treaty shopping minimum standard requires that countries include in their bilateral treaties either:

- a combined approach of a specific anti-abuse rule, the limitation-on-benefits (LOB) rule, that limits the availability of treaty benefit to entities that meet certain conditions and a more general anti-abuse rule based on the principal purposed of transactions or arrangements, the principal purpose test (PPT) rule,
- a PPT rule alone, or
- a LOB rule supplemented by a mechanism that would deal with conduit financing arrangements.

1.354. Consistent with the BEPS treaty shopping minimum standard and the commitments of both Australia and Germany to implement that minimum standard, the PPT rule has been included as paragraph 2 of Article 23 of the German agreement.

1.355. Paragraph 2 specifically adopts the wording of the PPT rule recommended in paragraph 26 of the Action 6 2015 Final Report. The Commentary on the PPT rule set out in paragraph 26 of the Action 6 2015 Final Report, including the examples in that Commentary, is therefore relevant for the interpretation of the German agreement PPT rule. For ease of understanding, key guidance from that Commentary is set out in paragraphs 1.359 to 1.361 below. The OECD intends that the BEPS Project's recommended changes to the OECD Model and its Commentary will be included in the next update to the OECD Model.

1.356. Paragraph 2 provides that treaty benefits under the German agreement will not be granted in respect of an item of income, or in respect of an item of capital in the case of Germany, if it can be reasonably concluded that the obtaining of the benefit was one of the primary purposes of an arrangement or transaction that resulted in that benefit, unless it is established that the granting of that benefit is in accordance with the object and purpose of the relevant provisions of the German agreement.

1.357. Paragraph 2 therefore gives effect to the principle already recognised in paragraphs 9.5, 22, 22.1 and 22.2 of the Commentary on Article 1 of the OECD Model that the benefits of a tax agreement should not be available where one of the principal purposes of certain transactions or arrangements is to secure a benefit under a tax treaty and obtaining that benefit in these circumstances would be contrary to the object and purpose of the relevant provisions of the tax agreement.

1.358. Paragraph 2 has the effect of denying a benefit under the German agreement where one of the principal purposes of an arrangement or transaction that has been entered into is to obtain a benefit under the German agreement. However, the person to whom the benefit would otherwise be denied may nevertheless be granted a benefit under the German agreement if it is established that obtaining the benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the German agreement.

1.359. Paragraph 2 must be read in the context of the other provisions of the German agreement, including the German agreement's preamble. This is important for the purposes of determining the object and purpose of the relevant provisions of the German agreement.

1.360. Under paragraph 2, a country may deny the benefits of the German agreement where it is reasonable to conclude, having considered all the relevant facts and circumstances, that one of the principal purposes of an arrangement or transaction was for a benefit under the German agreement to be obtained. The provision is intended to ensure that the German agreement will apply for the purposes for which it was entered

into, as opposed to arrangements whose principal objective is to secure a more favourable tax treatment.

1.361. The term ‘benefit’ includes all limitations (for example, a tax reduction or exemption) on taxation imposed on the country of source under Articles 6 through 21 of the German agreement, the relief from double taxation provided by Article 22, and the protection afforded to residents and nationals of either country under Article 24. This includes, for example, limitations on the taxing rights of one country in respect of dividends, interest or royalties arising in that country, and paid to a resident of the other country (who is the beneficial owner) under Article 10, 11 or 12. It also includes limitations on the taxing rights of one country over a capital gain derived from the alienation of movable property located in that country by a resident of the other country under Article 13.

1.362. The phrase ‘that resulted directly or indirectly in that benefit’ is deliberately broad and is intended to include situations where the person who claims the application of the benefits under the German agreement is doing so with respect to a transaction that is not the one that was undertaken for one of the principal purposes of obtaining that treaty benefit.

1.363. The terms ‘arrangement or transaction’ are intended to be interpreted broadly and include any agreement, understanding, scheme, transaction or series of transactions, whether or not they are legally enforceable. In particular, they include the creation, assignment, acquisition or transfer of the income itself, or of the property or right in respect of which the income accrues. These terms also encompass arrangements concerning the establishment, acquisition or maintenance of a person who derives the income, including the qualification of that person as a resident of one of the two countries, and include steps that persons may take themselves in order to establish residence. One transaction alone may result in a benefit, or it may operate in conjunction with a more elaborate series of transactions that together result in the benefit. In both cases, the provisions of paragraph 2 may apply.

1.364. To determine whether or not one of the principal purposes of any person concerned with an arrangement or transaction is to obtain benefits under the German agreement, an objective analysis of the aims and objects of all persons involved in putting that arrangement or transaction in place or being a party to it must be undertaken.

1.365. Determining the purposes of an arrangement or transaction is a question of fact requiring consideration of all circumstances surrounding the arrangement or event on a case by case basis. It is not necessary to find conclusive proof of the intent of a person concerned with an



arrangement or transaction, but it must be reasonable to conclude, after an objective analysis of the relevant facts and circumstances, that one of the principal purposes of the arrangement or transaction was to obtain the benefits of the German agreement.

1.366. It is not to be lightly assumed, however, that obtaining a benefit under the German agreement was one of the principal purposes of an arrangement or transaction, and merely reviewing the effects of an arrangement will not usually enable a determination about its purposes. Where, however, an arrangement can only be reasonably explained by a benefit that arises under the German agreement, it may be concluded that one of the principal purposes of that arrangement was to obtain the benefit.

1.367. A person cannot avoid the application of paragraph 2 by merely asserting that the arrangement or transaction was not undertaken or arranged to obtain the benefits of the German agreement. All of the evidence must be weighed to determine whether it is reasonable to conclude that an arrangement or transaction was undertaken or arranged for such purpose. As the determination requires reasonableness, the possibility of different interpretations of the events must be objectively considered.

1.368. The reference to ‘one of the principal purposes’ in paragraph 2 means that obtaining the benefit under the German agreement need not be the sole or dominant purpose of a particular arrangement or transaction. It is sufficient that at least one of the principal purposes was to obtain the benefit.

1.369. A purpose will not be a principal purpose when it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining the benefit was not a principal consideration and would not have justified entering into any arrangement or transaction that has, alone or together with other transactions, resulted in the benefit. In particular, where an arrangement is inextricably linked to a core commercial activity, and its form has not been driven by considerations of obtaining a benefit, it is unlikely that its principal purpose will be considered to be to obtain that benefit. Where, however, an arrangement is entered into for the purpose of obtaining similar benefits under a number of treaties, it should not be considered that obtaining benefits under other treaties will prevent obtaining one benefit under the German agreement from being considered a principal purpose for that arrangement. If the facts and circumstances reveal that the arrangement has been entered into for the principal purpose of obtaining the benefits of several tax treaties, it should not be considered that obtaining a benefit under the German agreement was not one of the principal purposes for that arrangement. Similarly, purposes related to the avoidance of the domestic law of a country should not be used to argue

that obtaining a treaty benefit was merely accessory to such purposes.  
**[Article 23, paragraph 2]**

*German agreement does not take precedence over domestic provisions designed to prevent the evasion or avoidance of taxes*

1.370. Tax treaty provisions generally prevail where there are inconsistencies between those provisions and provisions in the domestic law of a country. In Australia, this principle is recognised in subsections 4(2) and 4AA(2) of the Agreements Act 1953. However,

- subsection 4(2) of the Agreements Act 1953 preserves the operation of Part IVA (Schemes to reduce income tax) of the ITAA 1936; and
- subsection 4AA(2) of the Agreements Act 1953 preserves the operation of section 67 (Arrangements to reduce or avoid FBT) of the FBTA 1986.

1.371. Paragraph 3 of Article 23 ensures that nothing in the German agreement will prevent the application of a domestic law of either Australia or Germany which is designed to prevent tax evasion or avoidance.

1.372. Such domestic provisions include:

- measures designed to prevent improper use of the provisions of tax agreements (such as the multinational anti-avoidance law in section 177DA of the ITAA 1936);
- measures designed to address thin capitalisation, dividend stripping and transfer pricing;
- in the case of Australia, controlled foreign company, transferor trusts and foreign investment fund rules; and
- measures designed to ensure that taxes can be effectively collected and recovered, including conservancy measures.

**[Protocol, subparagraph 7(1)]**

1.373. If the application of such a domestic law would result in double taxation, the competent authorities shall seek to resolve by mutual agreement the elimination of such double taxation. **[Article 23, paragraph 3]**

**Protocol – application of parts 4, 5 and 7 of German External Tax Relations Act**

1.374. The German agreement will not prevent Germany from imposing German tax on amounts included in a German resident's income under parts 4, 5 and 7 of the German External Tax Relations Act.

1.375. Part 4 of the German External Tax Relations Act contains Germany's controlled foreign company rules.

1.376. Part 5 of the German External Tax Relations Act contains rules pursuant to which income of a foreign family foundation or of a similar family related entity or trust is attributed to the founder or to the beneficiaries if they are German residents.

1.377. Part 6 of the German External Tax Relations Act contains the final rules for that Act, including a section that provides that the rules of the Act regarding controlled foreign companies and foreign family foundations apply notwithstanding the provisions of Germany's tax agreements. [*Protocol, subparagraph 1(b)*]

***Article 24 – Non-discrimination***

1.378. The German agreement includes rules to prevent tax discrimination.

*Discrimination based on nationality*

1.379. This Article ensures that nationals of one country are not treated less favourably than nationals of the other country in the same circumstances. That is, the treatment in respect of taxation or any connected requirement cannot be other or more burdensome than for a national of the other country. This principle applies to both the taxation itself and any requirement connected with such taxation. Accordingly, discrimination in the administration of the tax law of a country is also generally precluded. [*Article 24, paragraph 1*]

1.380. The term ***national*** is defined in Article 3 (*General Definitions*) of the German agreement and in relation to Australia covers an individual who is a citizen of Australia, and any legal person, company, partnership or association deriving its status as such from the laws in force in Australia. In relation to Germany, the term national covers any German within the meaning of the Basic Law for the Federal Republic of Germany and any legal person, partnership or association deriving its status as such from the laws in force in the Federal Republic of Germany. Accordingly, a company incorporated in Australia would be a national of Australia while a company incorporated in Germany would be a national of

Germany for the purposes of this paragraph. [**Article 3, subparagraph 1(k)**]

*The meaning of ‘in the same circumstances’ and ‘in particular with respect to residence’*

1.381. 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.

1.382. 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.

1.383. 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 the same circumstances. This means, different treatment accorded to a German 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 Germany, or vice versa.

*The meaning of ‘other or more burdensome’*

1.384. ‘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*).

1.385. 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 Germany*

1.386. 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 Germany. Consequently, residents of third countries who are nationals of either Australia or Germany 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 1(k) of Article 3 (*General Definitions*)) of either country.

*Non-discrimination and permanent establishments*

1.387. 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. This applies to all residents of a treaty country, irrespective of their nationality, who have a permanent establishment in the other country. **[Article 24, paragraph 2]**

1.388. A country may treat permanent establishments of enterprises of the other country differently from its own 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-residents, to take account of the fact that they often operate in different conditions to residents. 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.

1.389. 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*

1.390. 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. **[Article 24, paragraph 2]**

1.391. For example, Australia can grant certain tax offsets only to resident individuals. It also extends to the tax-free threshold which may be considered not to be based either on civil status or family responsibilities.

*Deductions for payments to foreign residents*

1.392. 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 in accordance with paragraph 1 of Article 9 (*Associated Enterprises*), and to limit deductions in accordance with paragraph 8 of Article 11 (*Interest*) and paragraph 6 of Article 12 (*Royalties*). Similarly, for the purpose of determining the taxable capital for the application of Germany's capital taxes, debts owed by a German enterprise to an Australian resident must be deductible under the same conditions as if they were owed to a German resident [**Article 24, paragraph 3**]

*Enterprises owned or controlled abroad*

1.393. A country cannot give less favourable treatment to an enterprise, 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 German residents may not be given other or more burdensome treatment than similar locally owned or controlled Australian companies. [**Article 24, paragraph 4**]

1.394. 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 a company as resident shareholders. Accordingly, there is no obligation under this Article to allow imputation credits to non-resident shareholders.

1.395. Paragraph 8 of the Protocol to the German agreement clarifies that paragraph 4 of this Article shall not be construed as obliging a country to permit cross-border consolidation of income between enterprises. This further confirms the guidance reflected in paragraph 77 of the Commentary on Article 24 (*Non-discrimination*) of the OECD Model that paragraph 4 cannot be interpreted to extend the benefits of rules that take account of the relationship between a resident enterprise and other resident enterprises, such as consolidation rules.

*Taxes to which this Article applies*

1.396. This Article applies to taxes of every kind and description imposed in either country. 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. **[Article 24, paragraph 5]**

#### *Exclusions*

1.397. Australia's tax treaties generally exclude certain provisions of the laws of both countries from the application of the *Non-discrimination* Articles so that those provisions can continue to operate for their intended purpose. In the German agreement, the combined operation of paragraph 3 of Article 23 (*Limitation of Benefits*) and paragraph 7 of the Protocol to the German agreement means that laws of either Australia or Germany which are designed to prevent evasion or avoidance of taxes are not restricted by the application of this Article. These include:

- measures designed to prevent improper use of the provisions of tax agreements (such as the multinational anti-avoidance law in section 177DA of the ITAA 1936);
- measures designed to address thin capitalisation, dividend stripping and transfer pricing;
- in the case of Australia, controlled foreign company, transferor trusts and foreign investment rules; and
- measures designed to ensure that taxes can be effectively collected and recovered, including conservancy measures.

**[Article 23, paragraph 3 and Protocol, subparagraph 7(1)]**

1.398. In the case of Australia, the reference to 'laws ... designed to prevent evasion or avoidance of taxes' includes thin capitalisation, dividend stripping, transfer pricing, controlled foreign company and transferor trust provisions, and collection measures including conservancy. 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 German agreement.

1.399. Also in the case of Australia, the reference to 'measures designed to ensure that taxes can be effectively collected and recovered' preserves 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 broadly provides that if an entity fails to withhold tax in respect of interest or royalties paid to a person or address overseas, the interest or royalty expense cannot be

claimed as a deduction by that entity. No similar measure exists in relation to payments from a resident to another resident.

1.400. If the application of a law designed to prevent evasion or avoidance of taxes results in double taxation, the competent authorities of the two countries will consult each other pursuant to Article 25 (*Mutual Agreement Procedure*) to find an appropriate solution. [**Protocol, subparagraph 7(2)**]

1.401. Subparagraph 1(b) of the Protocol to the German agreement also operates so that parts 4, 5 and 7 of the German External Tax Relations Act are not restricted by the application of this Article. [**Protocol, subparagraph 1(b)**]

*More favourable treatment*

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

**Article 25 – Mutual agreement procedure**

1.403. This Article provides for a procedure for resolving difficulties and disputes arising from the application of the German agreement.

*Consultation on specific cases*

1.404. 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 German agreement.

1.405. In the case of Australia, the competent authority is the Commissioner of Taxation or an authorised representative of the Commissioner. [**Article 3, sub-subparagraph 1(j)(i)**]

1.406. Where a person considers that the actions of one or both of the countries result in taxation not in accordance with the provisions of the German agreement, the person may, irrespective of the remedies provided by the domestic law of the two countries, present a case to the competent authority of either country.

1.407. By allowing the person to present a case to the competent authority of either country, paragraph 1 of this Article adopts one of the approaches recommended in minimum standard 3.1 of the BEPS Action 14 2015 Final Report to ensure that both competent authorities are aware of Mutual Agreement Procedure requests that are submitted and therefore able to give their views on whether the request is accepted or rejected and whether the person's objection is considered to be justified.



1.408. 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 German agreement. 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 25, paragraph 1]**

1.409. If the competent authority receiving the case considers the person's claim 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 German agreement.

1.410. If, after consideration by the competent authorities, a solution is reached, it must be implemented notwithstanding any time limits in the domestic law of the two countries. The inclusion of the second sentence of paragraph 2 of this Article adopts one of the approaches recommended in minimum standard 3.3 of the BEPS Action 14 2015 Final Report to ensure that domestic time limits do not prevent the implementation of competent authority mutual agreements and thereby frustrate the objective of resolving cases of taxation not in accordance with the relevant tax treaty. **[Article 25, paragraph 2]**

*Consultation on general problems*

1.411. This Article also authorises consultation between the competent authorities of the two countries for the purpose of resolving any difficulties or doubts that arise regarding the interpretation or application of the German agreement. The competent authorities may also consult together for the elimination of double taxation in cases not provided for in the Agreement.

1.412. 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 25, paragraph 3]**

*Methods of communication between competent authorities*

1.413. 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, e-mail or web conferencing), letter, telephone, direct meetings or any other convenient means. **[Article 25, paragraph 4]**

*Arbitration*

1.414. 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.

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

1.416. Cases arising under paragraph 1 of this Article can only access the arbitration mechanism if the competent authorities are unable to reach agreement within two 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.

1.417. It is not intended that the arbitration mechanism be used as 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 German agreement remains, the competent authorities cannot consider (either alone or together) the case resolved and refuse the person access to the arbitration mechanism.

1.418. Unlike the mutual agreement procedure, which may be invoked where a taxpayer considers that taxation not in accordance with the treaty has resulted or will result, the arbitration mechanism is only available in respect of actual taxation contrary to the German agreement which has resulted from the actions of Australia or Germany 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 Germany that they will be taxed on an item of income and has resulted for the person in taxation not in accordance with the provisions of the German agreement.

1.419. Further, unresolved issues cannot be submitted for arbitration if a decision on those issues has already been rendered by a court or administrative tribunal of either Australia or Germany. This means where

a court or administrative tribunal of one of the two countries has already rendered a decision that deals with those issues and applies to that person. 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.

1.420. Paragraph 5 of this Article provides that unless a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision that decision is binding on both Australia and Germany. Further, the two countries are obliged to implement the decision notwithstanding any time limits contained in their respective domestic laws. **[Article 25, paragraph 5]**

1.421. A person cannot, however, access arbitration to the extent that the unresolved issues relate to the application of the principle purpose test rule in paragraph 2 of Article 23 (*Limitation of Benefits*) or a provision designed to prevent the evasion or avoidance of taxes referred to in subparagraph 7(1) of the Protocol to the German agreement. If the application of a law designed to prevent evasion or avoidance of taxes results in double taxation, the competent authorities of the two countries will consult each other pursuant to this Article to find an appropriate solution. **[Article 25, paragraph 5 and Protocol, subparagraphs 7(1) and (2)]**

1.422. The operational rules and procedures of the arbitration mechanism will be mutually agreed by the competent authorities of Australia and Germany. **[Article 25, paragraph 5]**

1.423. The inclusion of paragraph 5 of this Article accords with the commitments by both Australia and Germany to provide for mandatory binding mutual agreement procedure arbitration in each country's bilateral tax treaties as a mechanism to guarantee that treaty-related disputes will be resolved within a specified timeframe, as recognised in the Executive Summary of the BEPS Action 14 2015 Final Report.

*General Agreement on Trade in Services dispute resolution process*

1.424. 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). **[Article 25, paragraph 6]**

1.425. Australia and Germany 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.

1.426. Articles XXII (*Consultation*) and XXIII (*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 XVIII (*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 – subject to the exception that if the dispute relates to a tax treaty which existed at the time the GATS entered into force, the matter may not be brought to the Council on Trade in Services unless both parties agree.

1.427. Paragraph 6 of this Article provides for the purposes of paragraph 3 of Article XXII (*Consultation*) of the GATS, that notwithstanding that paragraph 3, any dispute between them as to whether a measure falls within the scope of the German agreement may only be brought before the Council on Trade in Services with the consent of both Australia and Germany. Paragraph 6 is based, in all essential respects, on the recommendation in paragraph 93 of the Commentary on Article 25 (*Mutual Agreement Procedure*) of the OECD Model, and is common in recent international tax treaty practice.

1.428. Any doubt as to the interpretation of paragraph 6 of this Article shall be resolved under paragraph 3 of this Article or, failing agreement under that procedure, pursuant to any other procedure agreed to by the two countries.

### ***Article 26 – Exchange of information***

#### *General scope*

1.429. The German agreement obliges the competent authorities to exchange information on a wide range of taxes provided the taxation is not contrary to the German agreement. The information is not restricted to persons or taxes covered by the German agreement and may therefore cover persons who are not residents of either Australia or Germany. This includes information that can be foreseen to be relevant for applying those taxes or the provisions of the Agreement [***Article 26, paragraph 1***]

#### *Foreseeably relevant information*

1.430. This Article authorises and limits the exchange of information by the two competent authorities to information foreseeably relevant for carrying out the provisions of the German agreement or to the administration or enforcement of the relevant taxes.

1.431. 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 to the administration and enforcement of tax laws.

**[Article 26, paragraph 1]**

*Taxes to which this Article applies*

1.432. Under this Article, the competent authorities can request and obtain information concerning taxes of every kind and description imposed on behalf of Australia or Germany or their political subdivisions or local authorities or Germany's States. This means, for example, that information concerning Australian indirect taxes (for example, the GST) may be requested and obtained from Germany. **[Article 26, paragraph 1]**

1.433. 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. **[Article 2, paragraph 4]**

*Use of exchanged information*

1.434. 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 non-tax purposes when such use is permitted under both countries' domestic law and is authorised by the competent authority of the supplying country.

1.435. Any information received by a country must be treated as 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 that are concerned with or have the oversight of the assessment, collection, the enforcement or prosecution, or in determination of appeals in relation to the taxes covered by this Article.

**[Article 26, paragraph 2]**

*Limitations on exchange of information*

1.436. Despite the breadth of scope of information that is required to be exchanged on request, there are three specific circumstances where a country is not obliged to provide the requested information.

1.437. The first instance is where the carrying out of the request would be at variance with the laws and administrative practices of either country.

**[Article 26, subparagraph 3(a)]**

1.438. The second instance is where the information is not obtainable under the laws or normal course of the administration of either country.

***[Article 26, subparagraph 3(b)]***

1.439. The third instance is where the information would disclose any trade, business, industrial, commercial or professional secret or trade process, or the disclosure would be contrary to the public policy of the country that is to supply the information. ***[Article 26, subparagraph 3(c)]***

*No domestic tax interest required*

1.440. When requested, a country is required to obtain and supply information using its domestic information gathering powers even though the country may not require the information for its own tax purposes. Australia would recognise this obligation to obtain relevant information for treaty partner countries, even in the absence of an explicit provision to this effect. ***[Article 26, paragraph 4]***

*Information held by third parties such as banks, other financial institutions or nominees*

1.441. 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 or 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]***

*Information that exists prior to the entry into force of the German agreement*

1.442. Under this Article, the competent authorities can exchange information that relates to transactions or events occurring prior to entry into force of the German agreement. This approach conforms with the international practice contained in paragraph 10.3 of the Commentary on Article 26 (*Exchange of Information*) of the OECD Model.

#### ***Article 27 – Assistance in the collection of taxes***

1.443. Australia and Germany are authorised and required to provide assistance to each other in the collection of revenue claims. This assistance is not to be restricted by the terms of Article 1 (*Persons Covered*) or Article 2 (*Taxes Covered*) of the German agreement. Assistance must therefore be provided as regards a revenue claim owed to either country by any person, whether or not a resident of Australia or Germany. The competent authorities may mutually agree on the mode of application of this Article.

1.444. The form of the assistance is set out in paragraphs 3 and 4 of this Article. **[Article 27, paragraph 1]**

Definition of revenue claim

1.445. The term **revenue claim** is defined for the purposes of this Article to mean an amount owed in respect of taxes of every kind and description imposed by Australia or Germany, or by Germany's States, political subdivisions or local authorities, but only insofar as the imposition of such taxes is not contrary to the German agreement or any other instrument in force between Australia and Germany. It also applies to interest, administrative penalties and costs of collection or conservancy related to such amount. **[Article 27, paragraph 2]**

1.446. 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. **[Article 2, paragraph 4]**

Enforceable revenue claims

1.447. Assistance in collection will only be provided by Australia in relation to a revenue claim that is enforceable in Germany. Similarly, Germany is not required to provide assistance in collection in respect of an Australian revenue claim that is not enforceable in Australia. A revenue claim will be enforceable where the requesting country has the right, under its domestic law, to collect the revenue claim. Further, the revenue claim must be owed by a person who, at that time, under the law of that country, has no administrative or judicial rights to prevent its collection.

1.448. Paragraph 3 of this Article regulates the way in which the revenue claim of the requesting country is to be collected by the requested country. Other than in relation to time limits and priority (see paragraphs 1.455 to 1.458 below), the requested country is required to collect the revenue claim in accordance with its own laws as though it were its own revenue claim. This obligation applies even if, at that time, the requested country has no need to undertake collection actions related to that taxpayer for its own tax purposes. **[Article 27, paragraph 3]**

1.449. Where Germany makes a revenue claim, the Australian Commissioner of Taxation will apply the provisions of Division 263 (*Mutual assistance in collection of foreign tax debts*) in Schedule 1 to the *Taxation Administration Act 1953* for the administration and collection of that claim.

Measures of conservancy

1.450. Australia or Germany may request the other country to take measures of conservancy even where it cannot yet ask for assistance in collection, such as where the revenue claim is not yet enforceable or when the debtor still has the right to prevent its collection. Measures of conservancy are aimed at preventing a person from disposing of the person's assets in a way that is harmful to the person's creditors' interests. An example of a conservancy measure is the seizure or the freezing of assets before final judgment to guarantee that the assets will still be available when collection can subsequently take place.

1.451. If requested to do so by Germany, Australia is required to take measures of conservancy in respect of the revenue claim in accordance with the provisions of Australian law as if the revenue claim were an Australian revenue claim. Although Australia does not have specific conservancy measures, the Commissioner of Taxation may apply for a Mareva injunction, which would prevent the taxpayer and the taxpayer's associates from dealing with certain assets. **[Article 27, paragraph 4]**

Time limits

1.452. The requested country's domestic law time limitations beyond which a revenue claim cannot be enforced or collected do not apply to a revenue claim in respect of which the other country has made a request for assistance in collection. Rather, the time limits of the requesting country apply. **[Article 27, paragraph 5]**

1.453. This paragraph follows paragraph 5 of Article 27 (*Assistance in the Collection of Taxes*) of the OECD Model but has no practical effect in Australia as there is currently no time limit imposed in Australia on the collection of a revenue claim.

Priority of claims

1.454. Any rules of Australia and Germany which give priority to tax debts over the claims of other creditors do not apply to a revenue claim of the other country. This restriction applies regardless of the fact that the requested country must generally treat the claim as its own revenue claim.

1.455. The words 'by reason of its nature as such' in paragraph 5 of this Article indicate that any time limits and priority rules to which the paragraph applies are only those that are specific to unpaid taxes. Consequently, paragraph 5 of this Article does not prevent the application of general rules concerning time limits or priority which would apply to all debts, such as rules giving priority to a claim by reason of that claim having arisen or having been registered before another one. **[Article 27, paragraph 5]**



Restriction on judicial and administrative proceedings

1.456. Any legal or administrative objection concerning the existence, validity or the amount of a revenue claim of the requesting country is to be exclusively dealt with in that country. For example, no legal or administrative proceedings, such as a request for judicial review, may be initiated in Australia with respect to the existence, validity or amount of a German revenue claim. **[Article 27, paragraph 6]**

Change in circumstances

1.457. Where the relevant conditions in paragraph 3 or 4 of this Article are no longer satisfied after a request for assistance has been made, but before the revenue claim has been collected and remitted by the requested country, the competent authority of the requesting country is required to promptly notify the competent authority of the other country of that fact.

1.458. An example is where a request for assistance in collection has been made by Germany, but the revenue claim ceases to be enforceable in Germany prior to its collection by Australia.

1.459. Following such notification, the requested country has the option to ask the requesting country to either suspend or withdraw its request for assistance. If the request is suspended, the suspension applies until such time as the requesting country informs the other country that the conditions necessary for making a request as regards the revenue claim are again satisfied or that it withdraws its request. **[Article 27, paragraph 7]**

Limitations

1.460. The requested country is permitted to refuse the request for assistance in certain circumstances.

1.461. The first limitation on the obligations of the country receiving the request is that it is not required to exceed the bounds of its own domestic laws and administrative practice or those of the other country in fulfilling its obligations under this Article. **[Article 27, subparagraph 8(a)]**

1.462. However, this does not prevent Australia from applying administrative measures to collect a German revenue claim, even though invoked solely to provide assistance in the collection of German taxes.

1.463. The second limitation provides that the requested country is not required to satisfy a request where it would require the carrying out of measures that are contrary to public policy, such as where providing

assistance may affect the vital interests of the requested country itself. **[Article 27, subparagraph 8(b)]**

1.464. The third limitation provides that the requested country is not obliged to satisfy a request for assistance if the other country has not pursued all reasonable measures of collection or conservancy that are available under its own laws or administrative practice. **[Article 27, subparagraph 8(c)]**

1.465. Additionally, the requested country may reject a request for assistance on the basis of practical administrative considerations such as when the costs of recovering a revenue claim would exceed the amount of the revenue claim itself. **[Article 27, subparagraph 8(d)]**

1.466. The final limitation allows the requested country to refuse to provide assistance if it considers that the taxes with respect to which assistance is requested are imposed contrary to generally accepted taxation principles. **[Article 27, subparagraph 8(e)]**

#### ***Article 28 – Procedural Rules for Taxation at Source***

1.467. Where a country levies withholding tax on dividends, interest, royalties or other items of income arising in that country, this Article expressly permits that source country to initially apply its domestic withholding tax rate which may be at a higher rate than provided for under the German agreement. **[Article 28, paragraph 1]**

1.468. On the taxpayer's application, the tax withheld at source shall be refunded by the country imposing those withholding taxes to the extent the taxes exceed the withholding rate provided for in the German agreement or where they are eliminated by the German agreement. An application for a refund can be made up to four years from the end of calendar year in which the income is received. **[Article 28, paragraph 2]**

1.469. The source country may seek from the taxpayer an administrative certification from the other country of which they are a resident confirming the taxpayer is a resident of the other country for tax purposes. **[Article 28, paragraph 3]**

1.470. The competent authorities of the two countries may by mutual agreement implement the procedures necessary to give effect to the provisions in this Article, and if necessary, implement alternative procedures to give effect to other tax reductions or exemptions under other provisions of the German agreement. **[Article 28, paragraph 4]**

**Article 29 - Members of diplomatic missions and consular posts**

1.471. The purpose of this Article is to ensure that the provisions of the German agreement 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 the general rules of international law or under the provisions of special international agreements. 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 29]**

**Article 30 – Protection of Personal Information**

1.472. This Article provides rules on how to handle, use, record and delete personal information supplied or obtained by an agency. The rules are consistent with Germany's tax treaty practice and strict domestic laws governing the protection of personal information.

1.473. The agency receiving the information may use that information in accordance with paragraph 2 of Article 26 (Exchange of Information). That paragraph provides that the disclosure and use of the information is to be in accordance with the domestic laws of the country receiving the information. The use is restricted to assessment, collection and enforcement of tax purposes. Paragraph 2 of Article 26 (Exchange of Information) also provides for the information to be used for other purposes if under the laws of both countries such information may be used for such other purposes and the competent authority of the supplying country authorises that use. **[Article 30, paragraph (a)]**

1.474. The supplying agency is obliged to be vigilant as to the accuracy of the information and its foreseeable relevance and proportionality to the purpose for which it is supplied. Further, if it emerges that inaccurate has been supplied or information that should not have been supplied is supplied then the supplying agency must inform the receiving agency without delay. The receiving agency is obliged to correct or erase the information as relevant without delay. **[Article 30, paragraph (b)]**

1.475. The supplying agency can request the receiving agency to inform the supplying agency on a case-by-case basis how the information was used and any results achieved by that use. During negotiations, the delegations agreed that:

‘... the expression “results achieved” in paragraph (c) of Article 30 refers to the usefulness of the information and not to specific results of an audit’. **[Article 30, paragraph (c)]**

1.476. While an individual may request, on application, to be informed of the personal information relating to that individual that was supplied and its use, there is no obligation to provide these details if, on balance, the public interest in withholding these details outweighs the interest of the individual concerned. In all other respects, the rights of the individual are to be governed by the domestic law of the country in whose sovereign territory the application for the information is made. **[Article 30, paragraph (d)]**

1.477. If a liability to damages arises as a result of any person suffering unlawful damage in connection with the supply of the information, the receiving agency shall bear that liability in accordance with its domestic laws. The receiving agency cannot plead that the damage had been caused by the supplying agency. **[Article 30, paragraph (e)]**

1.478. If the supplying agency's domestic laws require information to be deleted within particular deadlines, then that agency is obliged to inform the receiving agency. Information is to be deleted in accordance with the domestic laws or administrative practices of the receiving agency once the information is no longer required for the purpose it was obtained. **[Article 30, paragraph (f)]**

1.479. Further, the supplying and receiving agencies are obliged to keep official records of personal information supplied and received. **[Article 30, paragraph (g)]**

1.480. Both the supplying and receiving agency are obliged to effectively safeguard the personal information from unauthorised access, alteration or disclosure. **[Article 30, paragraph (h)]**

#### ***Article 31 – Protocol as integral part of the German agreement***

1.481. This Article expressly confirms that the Protocol to the German agreement is an integral part of the German agreement. **[Article 31]**

#### ***Article 32 – Entry into force***

1.482. This Article provides for the entry into force of the German agreement. The German agreement is subject to ratification and will enter into force on the day of the exchange of the instruments of ratification. **[Article 32, paragraphs 1 and 2]**

1.483. In Australia, enactment of the legislation giving the force of law in Australia to the German agreement, along with tabling the agreement in Parliament, are prerequisites to the exchange of the instruments of ratification.

*Date of application for Australian taxes*

Withholding tax

1.484. The provisions of the German agreement will apply in Australia in respect of withholding tax on income that is derived by a resident of Germany, in relation to income derived on or after 1 January next following the date on which the German agreement enters into force.

***[Article 32, sub-subparagraph 2(a)(i)]***

Fringe benefits tax

1.485. The German agreement will apply in Australia in respect of fringe benefits tax in relation to fringe benefits provided on or after 1 April next following the date on which the German agreement enters into force. ***[Article 32, sub-subparagraph 2(a)(ii)]***

Other Australian taxes

1.486. The German agreement will apply to other Australian taxes in relation to income, profits or gains of any year of income beginning on or after 1 July next following the date on which the German agreement enters into force. ***[Article 32, sub-subparagraph 2(a)(iii)]***

*Date of Application for German taxes*

Withholding tax

1.487. The German agreement will apply in Germany to tax withheld at source in relation to amounts paid or credited on or after 1 January next following the date on which the German agreement enters into force.

***[Article 32, sub-subparagraph 2(b)(i)]***

Other German taxes

1.488. The German agreement will apply to German taxes levied on income derived during the periods of time beginning on or after 1 January next following the date on which the German agreement enters into force.

***[Article 32, sub-subparagraph 2(b)(ii)]***

1.489. The German agreement will apply to German taxes on capital that are levied for periods beginning on or after 1 January next following the year in which the German agreement enters into force. ***[Article 32, sub-subparagraph 2(b)(iii)]***

*Termination of the German 1972 agreement*

1.490. The existing tax treaty between Australia and Germany and its Protocol, the German 1972 agreement, will terminate upon the new

German agreement entering into force. The provisions of the German 1972 agreement will, however, continue to have effect for taxable years and periods which expired prior to the provisions of the new German agreement having effect. This ensures that the provisions of the German 1972 agreement continue to have their intended effect up to the time the provisions of the new German agreement become effective. **[Article 32, paragraph 3]**

#### ***Article 33 – Termination***

1.491. The German agreement will continue in effect until terminated. Either country may terminate the German agreement by giving notice of termination at least six months before the end of any calendar year beginning after the expiration of five years from the date of the German agreement's entry into force. Termination is by notice through the diplomatic channels. **[Article 33]**

#### *Cessation date for Australian taxes*

##### Withholding tax

1.492. In the event of termination, the German agreement will cease to apply in Australia in respect of withholding tax in relation to income that is derived by a resident of Germany on or after 1 January in the calendar year next following that in which the notice of termination is given. **[Article 33, subparagraph (a)(i)]**

##### Fringe benefits tax

1.493. In the event of termination, the German agreement will cease to apply in Australia in respect of fringe benefits tax in relation to fringe benefits provided on or after 1 April next following the date on which the notice of termination is given. **[Article 33, subparagraph (a)(ii)]**

##### Other Australian taxes

1.494. In the event of termination, the German agreement will cease to apply to other Australian taxes in relation to income, profits or gains of any year of income beginning on or after 1 July in the calendar year next following that in which the notice of termination is given. **[Article 33, subparagraph (a)(iii)]**

#### *Cessation date for German Taxes*

##### Withholding tax

1.495. In the event of termination, the German agreement will cease to apply to tax withheld at source in relation to amounts paid or credited on

or after 1 January of the calendar year following the year in which the notice of termination is given. *[Article 33, subparagraph (b)(i)]*

#### Other German taxes

1.496. In the event of termination, the German agreement will cease to apply to German taxes on income levied on income derived during the periods of time beginning on or after 1 January of the calendar year following the year in which the notice of termination is given. *[Article 33, subparagraph (b)(ii)]*

1.497. In the event of termination, the German agreement will cease to apply to German taxes on capital that are levied for periods beginning on or after 1 January of the calendar year following the year in which the notice of termination is given. *[Article 33, subparagraph (b)(iii)]*

1.498. Notice of termination is considered to be given by a country on the date of receipt of the notice by the other country. *[Article 33]*

#### *Source of income*

1.499. Consistent with Australia's treaty practice, income, profits or gains derived by a resident of Germany which, in accordance with Articles 6 to 8 and 10 to 18 of the German agreement, may be taxed in Australia, are deemed to have a source in Australia for the purposes of the law of Australia relating to its tax. This 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 German agreement over income derived by residents of Germany. *[Protocol, paragraph 1(a)]*

### **Amendments made to the Agreements Act 1953**

1.500. This Bill amends the Agreements Act 1953 to give the German Agreement the force of law according to its tenor. This applies on or after the date on which the German Agreement enters into force. *[Schedule 1, item 3, subsection 5(1) of the Agreements Act 1953]*

1.501. This Bill also preserves the force of law for the existing German 1972 agreement, so far as the provisions of that agreement continue to affect Australian tax. *[Schedule 1, items 4 to 6, section 11 of the Agreements Act 1953]*

## **Consequential amendments**

### **Consequential amendments relating to the German agreement**

1.1. This Bill inserts new definitions of German agreement and German 1972 agreement into the Agreements Act 1953. ***[Schedule 1, items 1 and 2, subsections 3AAA(1) and 3AAB(1) of the Agreements Act 1953]***

### **Other technical amendments**

1.2. The Convention between Australia and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, and Protocol, signed at Sydney on 30 July 2013, was given the force of law under the Agreement Act 1953 in 2014. This Bill inserts a note containing the Australian Treaty Series citation for that Convention. ***[Schedule 1, item 7, subsection 3AAA(1)(note at the end of the definition of Swiss Convention) of the Agreements Act 1953]***

1.3. This Bill removes a reference to fringe benefits under the *Agreement between Australia and Switzerland for the Avoidance of Double Taxation with Respect to Taxes on Income and Protocol*, signed at Canberra on 28 February 1980. This reference has been removed to avoid confusion, because that Agreement did not deal with Australian fringe benefits tax. ***[Schedule 1, item 8, subsection 3AAB(1)(note 2 at the end of the definition of Swiss 1980 Agreement) of the Agreements Act 1953]***

1.4. This Bill amends a reference to the content of Article 9 of the *Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains*, signed at Canberra on 21 August 2003 (the United Kingdom convention). This amendment is intended to improve the usefulness of that reference by clarifying that Article 9 deals with profits of associated enterprises. ***[Schedule 1, item 9, subsection 24(1) (note) of the Agreements Act 1953]***

1.5. This Bill corrects a reference to the United Kingdom convention in the *Taxation (Interest on Overpayments and Early Payments) Act 1983*. It also updates a reference to Article 9 of that convention, similarly to the amendment described at paragraph 1.4. ***[Schedule 1, item 10, subsection 3A(1A) of the Taxation (Interest on Overpayments and Early Payments) Act 1983]***



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## **Chapter 2. Statement of Compatibility with Human Rights**

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**Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011***

### ***International Tax Agreements Amendment Bill 2016***

2.1 This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview**

2.2 Schedule 1 to this Bill amends the *International Tax Agreements Act 1953* (Agreements Act 1953) to give the force of law in Australia to the *Agreement between Australia and the Federal Republic of Germany for the Elimination of Double Taxation with respect to Taxes on Income and on Capital and the Prevention of Fiscal Evasion and Avoidance* and its *Protocol* (the German agreement), which were signed in Berlin on 12 November 2015.

#### **Human rights implications**

2.3 This Bill engages the following human rights:

- the right to protection from arbitrary or unlawful interference with privacy under Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR); and
- the right to protection from discrimination under Articles 2(1) and 26 of the ICCPR and Article 2(1) of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD).

#### ***Protection from arbitrary or unlawful interferences with privacy***

2.4 The Bill engages the right to protection from arbitrary or unlawful interferences with privacy in Article 17 of the ICCPR because the German agreement obliges the taxation authorities of Australia and Germany to provide personal taxpayer information to each other in certain

circumstances. This requirement is contained in Article 26 (*Exchange of Information*) of the German agreement, with further requirements governing the protection of personal information contained in Article 30 (*Protection of Personal Information*) of the German agreement. The scope of personal information to be exchanged also extends to persons who are not residents of either country.

2.5 The provision of information under the German agreement is not arbitrary, as it must be ‘foreseeably relevant’ to the administration of taxation (Article 26). It is also lawful, under the treaty, the Agreements Act 1953 (which gives force of law to the treaty in Australia) and existing privacy laws.

2.6 The sharing of this information is also a reasonable, necessary and proportionate approach aimed at achieving a legitimate objective.

*Legitimate aim*

2.7 One objective of the German agreement is to provide a framework for the exchange of information and cooperation between Australia and Germany’s taxation authorities as a means of combating international tax avoidance and evasion.

*How the German agreement facilitates prevention of fiscal evasion*

2.8 Australia is a long-standing supporter of international cooperation to prevent tax evasion. This Bill reinforces Australia’s support for international tax transparency and cooperation between taxation authorities to help prevent tax evasion and improve global tax compliance. This is consistent with ongoing international efforts, supported by the G20, to improve tax system integrity.

*Reasonable, necessary and proportionate approach*

2.9 Given that many taxpayers (both individuals and entities) operate internationally, effective cooperation between the two countries is the best way to combat international tax avoidance and evasion. The exchange of personal taxpayer information is necessary to facilitate this cooperation.

2.10 Both the German agreement and Australian domestic law have safeguards in place to ensure that exchanging information under the agreement is a reasonable and proportionate way to combat international tax avoidance.

2.11 Further, information exchanges envisaged in the German agreement are subject to strict confidentiality rules. That is, any information provided by Australia’s taxation authority, the Australian

Taxation Office, can only be used by German taxation authorities for the purposes permitted by the German agreement. In general, this means that the information can only be used for tax administration purposes and may only be disclosed to persons (including courts and administrative bodies) concerned with or have the oversight of the assessment, collection, administration or enforcement of, or with litigation with respect to, the taxes covered by the treaty.

2.12 Taxation officers are generally prohibited from disclosing taxpayer information by section 355-25 of Schedule 1 to the *Taxation Administration Act 1953*. There are limited exceptions to this prohibition that allow disclosure in some circumstances, including disclosure in the course of performing duties as a taxation officer.

2.13 The right to privacy in Australia is protected by the *Privacy Act 1988*. The Privacy Act enables an individual to make a complaint about the handling of their information, including tax information, by specified Australian government agencies and private sector organisations.

2.14 The Office of the Australian Information Commissioner is also available to investigate and enforce Australia's privacy law where a person alleges that an agency or organisation is non-compliant. Depending on the particular complaint, some possible resolutions could include compensation for financial or non-financial loss, or change to the respondent's practices.

### ***Protection from discrimination***

2.15 The Bill engages the right to equal protection of the law and non-discrimination contained in the ICCPR and ICERD. Discrimination under the ICCPR and ICERD comprises differential treatment (a distinction, exclusion or restriction) on the basis of a prohibited ground, which nullifies or impairs the enjoyment of human rights.

2.16 The German agreement contains a number of provisions affecting the tax liability of individuals. Article 24 (*Non-discrimination*) of the German agreement also contains rules to protect nationals and businesses from one of the two countries from tax discrimination in the other country, while ensuring that laws intended to maintain tax system integrity continue to apply. Thus, in relation to this Bill, the relevant issue is whether differentiation on the basis of residency or nationality constitutes discrimination on prohibited grounds.

2.17 Article 1(2) of the ICERD provides that it does not 'apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens'. On its face, it

would appear that a distinction between citizens and non-citizens would not amount to discrimination for the purposes of the ICERD.

2.18 However, the Committee on the Elimination of Racial Discrimination stated in General Recommendation No. 30 that ‘differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in light of the objectives and purposes of the [ICERD], are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.

2.19 In other words, differential treatment would not amount to discrimination under international human rights law if the different treatment is proportionate to the achievement of a legitimate aim.

*Legitimate aim*

2.20 The express purpose of the German agreement is to eliminate double taxation with respect to taxes on income and on capital without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the German agreement for the indirect benefit of residents of a third country).

*How the agreement facilitates avoidance of double taxation*

2.21 Under the German agreement, Australia and Germany agree to restrict their respective taxing rights to avoid double taxation. Taxing rights are ‘allocated’ over different categories of income including business profits, dividends, interest, royalties and pensions.

2.22 Further, the German agreement provides for relief from double taxation where both countries have a right to tax the income. It also establishes arrangements for the exchange of information between taxation authorities (as mentioned in paragraph 2.4 above) as well as mutual assistance in the collection of tax debts, and provides for resolution of disputes where the two countries attempt to tax the same income. In addition, it requires both countries to refrain from treating the other country’s nationals and businesses any less favourably, for tax purposes, than they would treat their own nationals or businesses in the same circumstances.

2.23 In doing so, the German agreement establishes greater legal and fiscal certainty within which cross-border trade and investment (between Australia and Germany) can be carried on and promoted.

*Proportionality*

2.24 Differential treatment of residents and non-residents is permitted under the German agreement, as well as by both countries' domestic law.

2.25 Article 24 of the German agreement enhances the non-discrimination principle by ensuring that Australia is not able to treat nationals or businesses of Germany differently in similar situations except where legitimate and objective justifications exist, and vice versa. However, the rule preventing discriminatory tax treatment of nationals is subject to the condition that the German national must be in the same circumstances with respect to residence as an Australian national, and vice versa.

2.26 Differential treatment on the basis of a person's residence is a proportionate means of achieving the Bill's legitimate objective, as this approach follows the Organisation for Economic Cooperation and Development (OECD) *Model Tax Convention on Income and on Capital*, which has been largely adopted by most countries, with some variations.

**Conclusion**

2.27 This Bill is consistent with the right to privacy, as the exchange of information under the German agreement is neither arbitrary nor unlawful. Various safeguards are in place to protect the information that is exchanged.

2.28 This Bill is also consistent with the right to protection from discrimination, as any differential treatment of nationals is proportionate to the pursuit of a legitimate aim.