



# **International Tax Agreements Amendment Act (No. 1) 2002**

**No. 59, 2002**

**An Act to amend the *International Tax Agreements Act 1953*, and for related purposes**

Note: An electronic version of this Act is available in SCALEplus  
(<http://scaleplus.law.gov.au/html/comact/browse/TOCN.htm>)



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## **An Act to amend the *International Tax Agreements Act 1953*, and for related purposes**

[Assented to 3 July 2002]

The Parliament of Australia enacts:

### **1 Short title**

This Act may be cited as the *International Tax Agreements Amendment Act (No. 1) 2002*.

### **2 Commencement**

This Act commences on the day on which it receives the Royal Assent.

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### **3 Schedule(s)**

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

## **Schedule 1—Agreement with Russia**

### ***International Tax Agreements Act 1953***

#### **1 Subsection 3(1)**

Insert:

*the Russian agreement* means the Agreement between the Government of Australia and the Government of the Russian Federation for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and the protocol to that agreement, being the agreement and protocol a copy of each of which in the English language is set out in Schedule 46.

#### **2 After section 11ZJ**

Insert:

##### **11ZK Agreement with Russia**

Subject to this Act, on or after the date of entry into force of the Russian agreement, the provisions of the agreement, so far as those provisions affect Australian tax, have the force of law according to their tenor.

#### **3 At the end of the Act**

Add:

### **Schedule 46—Russian agreement**

Note: See section 3

**AGREEMENT BETWEEN  
THE GOVERNMENT OF AUSTRALIA  
AND  
THE GOVERNMENT OF THE RUSSIAN FEDERATION  
FOR THE AVOIDANCE OF DOUBLE TAXATION  
AND THE PREVENTION OF FISCAL EVASION  
WITH RESPECT TO TAXES ON INCOME**

THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF  
THE RUSSIAN FEDERATION,

DESIRING to conclude an Agreement for the avoidance of double taxation and  
the prevention of fiscal evasion with respect to taxes on income,

HAVE AGREED as follows:

Article 1  
Personal scope

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

Article 2  
Taxes covered

1 The existing taxes to which this Agreement shall apply are:

(a) in Australia:

the income tax, and the resource rent tax in respect of offshore  
projects relating to exploration for or exploitation of petroleum  
resources, imposed under the federal law of Australia;

(b) in Russia:

(i) tax on profits (income) of enterprises and organisations; and

(ii) tax on the income of individuals.

2 This Agreement shall apply also to any identical or substantially similar  
taxes which are imposed under the federal law of Australia or the federal law of  
Russia after the date of signature of this Agreement in addition to, or in place  
of, the existing taxes.

Article 3  
General definitions

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

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- (a) the terms “Contracting State” and “other Contracting State” mean Australia or Russia, as the context requires;
- (b) — the term “Australia” means the territory of Australia including only 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 the exclusive economic zone and continental shelf of Australia (including the territories specified) 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 natural resources of the seabed and subsoil of the continental shelf;
- the term “Russia” means the territory of the Russian Federation and includes its exclusive economic zone and continental shelf, defined in accordance with international law;
- (c) the term “Australian tax” means tax imposed by Australia, being tax to which this Agreement applies by virtue of Article 2;
- (d) the term “Russian tax” means tax imposed by Russia, being tax to which this Agreement applies by virtue of Article 2;
- (e) the term “person” includes an individual, an enterprise, a company and any other body of persons;

- (f) the term “company” means any body corporate or any entity which is treated as a company or body corporate for tax purposes;
- (g) the terms “enterprise of a Contracting State” and “enterprise of the other Contracting State” mean an enterprise carried on by a resident of Australia or an enterprise carried on by a resident of Russia, as the context requires;
- (h) the term “international traffic” means any transportation 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;
- (i) the term “competent authority” means:
  - in the case of Australia, the Commissioner of Taxation or an authorised representative of the Commissioner; and
  - in the case of Russia, the Ministry of Finance of the Russian Federation or its authorised representative;
- (j) the term “tax” means Australian tax or Russian tax, as the context requires, but does not include any penalty or interest imposed under the law of either Contracting State relating to its tax.

2 As regards the application of this Agreement at any time by a Contracting State, any term not defined in this Agreement shall, unless the context otherwise requires, have the meaning which it has at that time under the law of that State. In case of divergence between the law of that State concerning the taxes to which this Agreement applies and any other law of that State the law concerning the taxes to which this Agreement applies shall prevail.

#### Article 4 Residence

1 For the purposes of this Agreement, a person is a resident of a Contracting State if the person is a resident of that State under the law of that State relating to its tax.

2 A person is not a resident of a Contracting State for the purposes of this Agreement if the person is liable to tax in that State in respect only of income from sources in that State.

3 Where by reason of the preceding provisions of this Article a person, being an individual, is a resident of both Contracting States, then the person shall be deemed to be a resident solely of the Contracting State in which a permanent home is available to the person, or if a permanent home is available to the person in both Contracting States, or in neither of them, the person shall be deemed to be a resident solely of the Contracting State with which the person's personal and economic relations are closer. For the purpose of this paragraph, an individual's citizenship of one of the Contracting States shall be a factor in determining the degree of the individual's personal and economic relations with that Contracting State.

4 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.

Article 5  
Permanent establishment

1 For the purposes of this Agreement, the term "permanent establishment" means a fixed place of business through which an enterprise of a Contracting State wholly or partly carries out business activities in the other State.

2 The term "permanent establishment" includes:

- (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;
- (g) an agricultural, pastoral or forestry property; and

- (h) a building site or construction, installation or assembly project or supervisory activities in connection with them, but only if such site, project or activities continue for a period of more than 12 months.

3 An enterprise shall not be deemed to have a permanent establishment merely by reason of:

- (a) the use of facilities solely for the purpose of storage or display of goods or merchandise belonging to the enterprise; or
- (b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage or display; or
- (c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise; or
- (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; or
- (e) the maintenance of a fixed place of business solely for the purpose of activities which have a preparatory or auxiliary character for the enterprise, such as advertising or scientific research.

4 Notwithstanding the provisions of the preceding paragraphs, an enterprise shall be deemed to have a permanent establishment in a Contracting State and to carry on business through that permanent establishment if:

- (a) a person acting in a Contracting State on behalf of an enterprise of the other Contracting State manufactures or processes in the firstmentioned State for the enterprise goods or merchandise belonging to the enterprise; or
- (b) heavy industrial equipment including, for example, but not limited to, a platform, installation, drilling rig, or heavy machinery is being used in the firstmentioned State by, for or under contract with the enterprise.

5 A person acting in a Contracting State on behalf of an enterprise of the other Contracting State — other than an agent of an independent status to whom

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paragraph 6 applies — shall be deemed to be a permanent establishment of that enterprise in the firstmentioned State if the person:

- (a) has, and habitually exercises in that State, an authority to conclude contracts on behalf of the enterprise, unless the person's activities are limited to the purchase of goods or merchandise for the enterprise; or
- (b) has no such authority but maintains in the firstmentioned State a stock of goods or merchandise from which delivery is made within that State on behalf of the enterprise.

6 An enterprise of a Contracting State shall not be deemed to have a permanent establishment in the other Contracting State merely because it carries on business in that other State through a person who is a broker, general commission agent or any other agent of an independent status and is acting in the ordinary course of the person's business.

7 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.

Article 6  
Income from real property

1 Income from real property may be taxed in the Contracting State where such property is situated.

2 In this Article, the term "real property":

- (a) for Australia, has the meaning which it has under the law of Australia, and includes:
  - (i) land and any other interest in or over land, whether improved or not, including a right to explore for mineral, oil or gas deposits or other natural resources, and a right to mine those deposits or resources; and
  - (ii) a right to receive variable or fixed payments either as consideration for or in respect of the exploitation of, or the

right to explore for or exploit, mineral, oil or gas deposits, quarries or other places of extraction or exploitation of natural resources;

- (b) for Russia, means immovable property according to the law of Russia, and includes:
  - (i) property accessory to immovable property; and
  - (ii) rights known as usufruct of immovable property; and
  - (iii) rights to which the provisions of the law respecting landed property apply; and
  - (iv) a right to receive variable or fixed payments either as consideration for or in respect of the exploitation of, or the right to explore for or exploit, mineral, oil or gas deposits, quarries or other places of extraction or exploitation of natural resources; and
- (c) for both Contracting States does not include ships, boats and aircraft.

3 Any interest or right referred to in paragraph 2 shall be regarded as situated where the land, mineral, oil or gas deposits, quarries 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 real property.

5 The provisions of paragraphs 1, 3 and 4 shall also apply to income from real property of an enterprise and to income from real property used for the performance of independent personal services.

#### 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 in that other State. If the enterprise carries on business in that manner, the profits of the enterprise may be taxed in

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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 in that other State, there shall in each Contracting State be attributed to that permanent establishment the profits which it might reasonably 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 with which it deals.

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) and which would be deductible if the permanent establishment were an independent entity which paid those expenses, whether incurred in the Contracting 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 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.

#### Article 8 Profits from the operation of ships and aircraft

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

2 Notwithstanding the provisions of paragraph 1, such profits may be taxed in the other Contracting State to the extent that they are profits derived from ship or aircraft operations confined solely to places in that other State.

3 The profits to which the provisions of paragraphs 1 and 2 apply include profits from the operation of ships or aircraft derived through participation in a pool service or other profit sharing arrangement.

Article 9  
Adjustments to profits of 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 reasonably be expected to operate between independent enterprises dealing wholly independently with one another, then any profits which, but for those conditions, might reasonably 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 Nothing in this Article shall affect the application of any law of a Contracting State relating to the determination of the tax liability of a person, including where the information available to the competent authority of that State is inadequate to determine the profits accruing to an enterprise, provided that that law shall be applied, so far as it is practicable to do so, consistently with the principles of this Article.

3 Where profits on which an enterprise of a Contracting State has been charged to tax in that State are also included, by virtue of the provisions of paragraph 1 or 2, in the profits of an enterprise of the other Contracting State and charged to tax in that other State, and the profits so included are profits which might reasonably have been expected to have accrued to that enterprise of the other State if the conditions operative between the enterprises had been those which might reasonably have been expected to have operated between independent enterprises dealing wholly independently with one another, then the firstmentioned State shall make an appropriate adjustment to the amount of tax charged on those profits in the firstmentioned State. In determining such an 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.



Article 10  
Dividends

1 Dividends paid by a company which is a resident of a Contracting State for the purposes of its tax, being dividends to which a resident of the other Contracting State is beneficially entitled, 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 for the purposes of its tax, and according to the law of that State, but the tax so charged shall not exceed:

- (a) 5 per cent of the gross amount of the dividends:
  - (i) to the extent to which those dividends are paid out of profits that have borne the normal rate of tax, where those dividends are paid to a company (other than a partnership) which holds directly at least 10 per cent of the capital of the company paying the dividends; and
  - (ii) provided that the resident of the other Contracting State has invested a minimum of 700,000 Australian Dollars or an equivalent amount in Russian Roubles in the capital of that company; and
  - (iii) where, if the dividends are paid by a company that is resident in Russia, the dividends are exempt from Australian tax; and
- (b) 15 per cent of the gross amount of the dividends in all other cases.

3 For the purposes of subparagraph (a) of paragraph 2 of this Article, profits have borne the normal rate of tax:

- (a) in Australia, to the extent to which the dividends have credits attached for tax paid on their profits by Australian companies in accordance with its law relating to tax; and
- (b) in Russia, to the extent that they are assessable to tax.

4 The term “dividends” as used in this Article means income from shares, as well as other amounts which are subjected to the same taxation treatment as income from shares by the law of the State of which the company making the distribution is a resident for the purposes of its tax.

5 The provisions of paragraphs 1 and 2 shall not apply if the person beneficially entitled to 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 in that other State, or performs in that other State independent personal services from a fixed base situated in that other State, and the holding in respect of which the dividends are paid is effectively connected with that permanent establishment or fixed base. In that case the provisions of Article 7 or Article 14, as the case may be, 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 to which a person who is not a resident of the other Contracting State is beneficially entitled — except insofar as the holding in respect of which such dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other State, even if the dividends paid consist wholly or partly of profits or income arising in such other State. This paragraph shall not apply in relation to dividends paid by any company which is a resident of a Contracting State for the purposes of its tax and which is also a resident of the other Contracting State for the purposes of the other Contracting State’s tax.

#### Article 11 Interest

1 Interest arising in a Contracting State, being interest to which a resident of the other Contracting State is beneficially entitled, 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 law of that State, but the tax so charged shall not exceed 10 per cent of the gross amount of the interest.

3 The term “interest” in this Article includes interest from Government securities or from bonds or debentures, including premiums and prizes attaching to such securities, bonds and debentures, whether or not secured by mortgage

and whether or not carrying a right to participate in profits, interest from any other form of indebtedness and all other income assimilated to income from money lent by the law, relating to tax, of the Contracting State in which the income arises.

4 The provisions of paragraphs 1 and 2 shall not apply if the person beneficially entitled to 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 in that other State, or performs in that other State independent personal services from a fixed base situated in that other State, and the indebtedness in respect of which the interest is paid is effectively connected with that permanent establishment or fixed base. In that case the provisions of Article 7 or Article 14, as the case may be, shall apply.

5 Interest shall be deemed to arise in a Contracting State when the payer is that State itself, a political subdivision or a local authority of that State, or a person who 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 or fixed base in connection with which the indebtedness on which the interest is paid was incurred, and that interest is borne by that permanent establishment or fixed base, then the interest shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

6 Where, by reason of a special relationship between the payer and the person beneficially entitled to the interest, or between both of them and some other person, the amount of the interest paid, having regard to the indebtedness for which it is paid, exceeds the amount which might reasonably have been expected to have been agreed upon by the payer and the person so entitled in the absence of that relationship, the provisions of this Article shall apply only to the lastmentioned amount. In that case the excess part of the amount of the interest paid shall remain taxable according to the law 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, being royalties to which a resident of the other Contracting State is beneficially entitled, 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 law of that State, but the tax so charged shall not exceed 10 per cent of the gross amount of the royalties.

3 The term “royalties” in this Article means amounts paid or credited as due and payable, 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; or
- (b) the use of, or the right to use, any industrial, commercial or scientific equipment; or
- (c) the supply of scientific, technical, industrial or commercial knowledge or information; or
- (d) the supply of any assistance that is incidental, 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), any such equipment as is mentioned in subparagraph (b) or any such knowledge or information as is mentioned in subparagraph (c); or
- (e) the use of, or the right to use:
  - (i) motion picture films; or
  - (ii) films or video tapes for use in connection with television; or
  - (iii) tapes for use in connection with radio broadcasting; or
- (f) the reception of, or the right to receive, visual images or sounds, or both, transmitted to the public by:
  - (i) satellite; or
  - (ii) cable, optic fibre or similar technology; or
- (g) the use in connection with television broadcasting or radio broadcasting, or the right to use in connection with television

broadcasting or radio broadcasting, visual images or sounds, or both, transmitted by:

- (i) satellite; or
- (ii) cable, optic fibre or similar technology; or
- (h) the use of, or the right to use, some or all of the part of the radiofrequency spectrum specified in a relevant licence; or
- (i) 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 person beneficially entitled to 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 in that other State, or performs in that other State independent personal services from a fixed base situated in that other State, and the property or right in respect of which the royalties are paid or credited is effectively connected with that permanent establishment or fixed base. In that case the provisions of Article 7 or Article 14, as the case may be, shall apply.

5 Royalties shall be deemed to arise in a Contracting State when the payer is that State itself, a political subdivision or a local authority of that State, or a person who 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 or fixed base in connection with which the liability to pay the royalties was incurred, and the royalties are borne by the permanent establishment or fixed base, then the royalties shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

6 Where, owing to a special relationship between the payer and the person beneficially entitled to 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 person so entitled in the absence of such relationship, the provisions of this Article shall apply only to the lastmentioned amount. In that case, the excess part of the amount of the royalties paid or credited shall remain taxable according to the law of each

Contracting State, due regard being had to the other provisions of this Agreement.

Article 13  
Income from alienation of property

1 Income or profits derived by a resident of a Contracting State from the alienation of real property situated in the other Contracting State may be taxed in that other State. The meaning of the term “real property”, and its situation, shall be determined in accordance with Article 6.

2 Income or profits from the alienation of property, other than real property, that forms part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or pertains to a fixed base available in that other State to a resident of the firstmentioned State for the purpose of performing independent personal services, including income or profits from the alienation of that permanent establishment (alone or with the whole enterprise) or of that fixed base, may be taxed in that other State.

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

4 Income or profits derived by a resident of a Contracting State from the alienation of any shares or other interests in a company, or of an interest of any kind in a partnership, trust or other entity, where the value of the assets of such entity, whether they are held directly or indirectly (including through one or more interposed entities, such as, for example, through a chain of companies), is principally attributable to real property, situated in the other Contracting State, may be taxed in that other State.

5 Nothing in this Agreement affects the application of a law of a Contracting State relating to the taxation of capital gains derived from the alienation of any property other than that to which any of the preceding paragraphs of this Article apply.

Article 14  
Income from independent personal services

1 Income derived by an individual who is a resident of a Contracting State in respect of professional services or other activities of an independent character shall be taxable only in that State unless a fixed base is regularly available to the individual in the other Contracting State for the purpose of performing the individual's activities. If such a fixed base is available to the individual, the income may be taxed in the other State but only so much of it as is attributable to that fixed base.

2 The term "professional services" includes services performed in the exercise of independent scientific, literary, artistic, educational or teaching activities as well as in the exercise of the independent activities of physicians, lawyers, engineers, architects, dentists and accountants.

Article 15  
Income from employment

1 Subject to the provisions of Articles 16, 18 and 19, 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 firstmentioned 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 year of income of that other State; 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 or a fixed base which the employer has in the other State.

3 Notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated

by an enterprise of a Contracting State in international traffic may be taxed in that State.

Article 16  
Directors' fees

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 17  
Income of entertainers and sportspersons

1 Notwithstanding the provisions of Articles 14 and 15, income derived by entertainers (such as theatrical, motion picture, radio or television artistes and musicians) and sportspersons from their personal activities as such may be taxed in the Contracting State in which these activities are exercised.

2 Where income in respect of the personal activities of an entertainer or sportsperson as such accrues not to that person but to another person, that income may, notwithstanding the provisions of Articles 7, 14 and 15, be taxed in the Contracting State in which the activities of the entertainer or sportsperson are exercised.

Article 18  
Pensions and annuities

1 Subject to the provisions of paragraph 2 of Article 19, pensions and annuities paid to a resident of a Contracting State shall be taxable only in that State.

2 The term "annuity" means a stated sum payable periodically at stated times during life or during a specified or ascertainable period of time under an obligation to make the payments in return for adequate and full consideration in money or money's worth.

Article 19  
Income from government service



1 Salaries, wages and other similar remuneration, other than a pension or annuity, paid by a Contracting State, a political subdivision or local authority of that State to an individual in respect of services rendered in the discharge of governmental functions shall be taxable only in that State. However, such salaries, wages and other similar remuneration shall be taxable only in the other Contracting State if the services are rendered in that other State and the recipient is a resident of that other State who:

- (a) is a citizen of that State; or
- (b) 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 the funds created by, a Contracting State, a political subdivision or a local authority of that State, to an individual in respect of services rendered in the discharge of governmental functions shall be taxable only in that State.

(b) However, that pension shall be taxable only in the other Contracting State if the individual:

- (i) is a resident of, and a citizen of that State; and
- (ii) the services in respect of which that pension is paid were rendered in that State.

3 The provisions of paragraphs 1 and 2 shall not apply to salaries, wages and other similar remuneration or to pensions in respect of services rendered in connection with any trade or business carried on by a Contracting State or a political subdivision or local authority of that State. In that case, the provisions of Articles 15, 16 or 18, as the case may be, shall apply.

#### Article 20 Payments to students

Where a student, who is a resident of a Contracting State or who was a resident of that State immediately before visiting the other Contracting State and who is temporarily present in that other State solely for the purpose of the student's education, receives payments from sources outside that other State for the purpose of the student's maintenance or education, those payments shall be exempt from tax in that other State.

Article 21  
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 real property as defined in paragraph 2 of Article 6, derived by a resident of a Contracting State where that income is effectively connected with a permanent establishment or fixed base situated in the other Contracting State. In that case the provisions of Article 7 or Article 14, as the case may be, shall apply.

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 derived from sources in the other Contracting State may also be taxed in that other State.

Article 22  
Methods of elimination of double taxation

1 Subject to the law of Australia as it may be amended from time to time (without changing the general principle of this Article), Russian tax paid under the law of Russia, and in accordance with this Agreement, whether directly or by deduction in respect of income derived from sources in Russia by a resident of Australia, shall be allowed as a credit against Australian tax payable in respect of that income.

2 Subject to the law of Russia as it may be amended from time to time (without changing the general principle of this Article), Australian tax paid under the law of Australia, and in accordance with this Agreement, whether directly or by deduction in respect of income derived from sources in Australia by a resident of Russia, shall be allowed as a credit against Russian tax payable in respect of that income.

Article 23  
Limitation of benefits

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1 The benefits of this Agreement shall not apply to income or profits arising from:

- (a) activities such as banking, shipping, financing or insurance, and Internet activities; or
- (b) activities such as headquarter or coordination centre or similar arrangements providing company or group administration, financing or other support; or
- (c) activities which give rise to passive income, such as dividends, interest and royalties; or
- (d) other activities the performance of which do not require substantial presence in the State of source,

where, under the laws or administrative practices of a Contracting State, such income or profits are preferentially taxed and, in relation thereto, information is accorded confidential treatment beyond the usual or general protection of information accorded for tax purposes under the laws or administrative practices of that State.

2 For the purposes of paragraph 1, income or profits are preferentially taxed in a Contracting State if, other than by reason of the preceding Articles of this Agreement, an amount of income or profits:

- (a) is exempt from tax; or
- (b) is included in taxable income of a taxpayer but that amount is subject to a rate of tax that is lower than the rate applicable to an equivalent amount that is included in the tax base of similar taxpayers who are residents of that State; or
- (c) a credit, rebate or other concession or benefit is provided directly or indirectly in relation to that income or profits, other than a credit for foreign tax paid.

Article 24  
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

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accordance with this Agreement, the person may, irrespective of the remedies provided by the domestic law of those States concerning taxes to which this Agreement applies, present a case to the competent authority of the Contracting State of which the person is a resident. The case must be presented within 3 years from the first notification of the action resulting in taxation not in accordance with this Agreement.

2 The competent authority shall endeavour, if the claim appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with this Agreement. The solution so 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 jointly endeavour to resolve any difficulties or doubts arising as to the interpretation or application of this Agreement. They may also consult together for the avoidance of double taxation in cases not provided for in this Agreement.

4 The competent authorities of the Contracting States may communicate with each other directly for the purpose of giving effect to the provisions of this Agreement.

#### Article 25 Exchange of information

1 The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Agreement or of the domestic law of the Contracting States concerning taxes to which this Agreement applies insofar as the taxation under that law is not contrary to this Agreement. The exchange of information is not restricted by Article 1. Any information received by a Contracting State shall be treated as confidential in the same manner as information obtained under the domestic law 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 to which this Agreement applies. 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.

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

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

Article 26

Members of diplomatic missions and consular posts

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

Article 27

Entry into force

Both Contracting States shall notify each other in writing through the diplomatic channel of the completion of their respective procedures required for the entry into force of this Agreement. This Agreement shall enter into force on the date of the last notification, and thereupon the provisions of this Agreement shall have effect:

- (a) in Australia:
  - (i) in respect of withholding tax on income that is derived by a nonresident, in relation to income derived on or after 1 July in the calendar year next following that in which the Agreement enters into force;
  - (ii) in respect of other Australian tax, in relation to income or profits of any year of income beginning on or after 1 July in the calendar year next following that in which the Agreement enters into force;
- (b) in Russia:

for taxable years and periods beginning on or after 1 January in the calendar year next following that in which the Agreement enters into force.

Article 28  
Termination

This Agreement shall continue in effect indefinitely, but either of the Contracting States may, on or before 30 June in any calendar year beginning after the expiration of 5 years from the date of its entry into force, give to the other Contracting State through the diplomatic channel written notice of termination and, in that event, the provisions of the Agreement shall cease to be effective:

(a) in Australia:

- (i) in respect of withholding tax on income that is derived by a nonresident, in relation to income derived on or after 1 July in the calendar year next following that in which the notice of termination is given;
- (ii) in respect of other Australian tax, in relation to income or profits 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 Russia:

for taxable years and periods beginning on or after 1 January in the calendar year next following that in which the notice of termination is given.

IN WITNESS WHEREOF the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

DONE at Canberra, on 7 September 2000, in duplicate, each in the English and Russian languages, both texts being equally authentic.

FOR THE GOVERNMENT OF  
AUSTRALIA:

ROD KEMP

[Signatures omitted]

FOR THE GOVERNMENT OF  
THE RUSSIAN FEDERATION:

SERGEI SHATALOV

PROTOCOL TO THE AGREEMENT BETWEEN THE GOVERNMENT OF  
AUSTRALIA AND THE GOVERNMENT OF THE RUSSIAN  
FEDERATION FOR THE AVOIDANCE OF DOUBLE TAXATION AND  
THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES  
ON INCOME

THE GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF  
THE RUSSIAN FEDERATION,

HAVING REGARD to the Agreement between the Government of Australia  
and the Government of Russian Federation for the avoidance of double taxation  
and the prevention of fiscal evasion with respect to taxes on income signed  
today at Canberra (in this Protocol called “the Agreement”),

HAVE AGREED on the following, which shall form an integral part of the  
Agreement:

- 1 With respect to the Agreement as a whole (including this Protocol):
  - (a) income or profits derived by a resident of a Contracting State which, under at least one of Articles 6 to 8, 10 to 17 and 19, may be taxed in the other Contracting State shall, for the purposes of Article 22 and of the income tax laws of the respective Contracting States, be deemed to be income from sources in that other State; and
  - (b) the terms “income” and “profits” shall, in the case of Australia, include capital gains.
- 2 With respect to Articles 13 and 15:

the term “international traffic” shall not include any transportation which commences at a place in a Contracting State and returns to that place, after travelling through international waters, but not visiting another State (including, but not limited to, the other Contracting State) or Territory (other than a Territory of the firstmentioned Contracting State).
- 3 With respect to Article 3:



nothing in subparagraph (b) of paragraph 1 of Article 3 is intended to vary the effect as between the Contracting States of paragraph 2 of Article IV of the Antarctic Treaty done at Washington on 1 December 1959.

4 With respect to Article 5:

the principles set forth in Article 5 shall be applied in determining for the purposes of paragraph 5 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.

5 With respect to Article 7:

- (a) nothing in Article 7 shall affect the application of any law of a Contracting State relating to the determination of the tax liability of a person, including where the information available to the competent authority of that State is inadequate to determine the profits to be attributed to a permanent establishment, provided that that law shall be applied, so far as it is practicable to do so, consistently with the principles of this Article. For the purposes of this paragraph, “competent authority” for Russia includes the Ministry of Taxes and Duties;
- (b) nothing in Article 7 shall affect the application of any law of a Contracting State relating to tax imposed on profits from insurance contracts entered into with nonresidents provided that if the relevant law in force in either Contracting State at the date of signature of this Agreement is varied (otherwise than in minor respects so as not to affect its general character) the Contracting States shall consult each other with a view to agreeing to any amendment of this paragraph that may be appropriate; and
- (c) where:
  - (i) a resident of a Contracting State 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 the other Contracting State by the trustee of a trust estate other than a trust estate which is treated as a company for tax purposes; and

- (ii) in relation to that enterprise, that trustee would, in accordance with the principles of Article 5, have a permanent establishment in that other State,

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

6 With respect to Article 8:

*the expression “profits derived from ship or aircraft operations confined solely to places in that other State” includes profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise which are shipped in a Contracting State and are discharged at a place in that State.*

7 With respect to Article 9:

- (a) it is understood that a Contracting State that is being asked to grant relief in respect of an adjustment made by the other Contracting State is not compelled to make an adjustment simply because the other State has increased the amount of profits subject to tax but is entitled to satisfy itself that the adjustment made by that other State really produces an outcome in conformity with internationally accepted principles for transfer pricing adjustments before granting any relief; and
- (b) for the purposes of paragraph 2 of this Article, “competent authority” for Russia includes the Ministry of Taxes and Duties.

8 With respect to Article 10:

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without limiting any other provision of this Agreement regarding notification and consultation on changes to the taxation systems of the Contracting States, if the relevant law in either Contracting State at the date of signature of this Agreement is varied, otherwise than in minor respects so as not to affect its general character, the Contracting States shall consult each other with a view to agreeing to any amendment of paragraph 2 that may be appropriate.

IN WITNESS WHEREOF the undersigned, duly authorised thereto, have signed this Protocol.

DONE at Canberra, on 7 September 2000, in duplicate, each in the English and Russian languages, both texts being equally authentic.

FOR THE GOVERNMENT OF  
AUSTRALIA:

ROD KEMP

FOR THE GOVERNMENT OF  
THE RUSSIAN FEDERATION:

SERGEI SHATALOV

[Signatures omitted]

## Schedule 2—Protocol to the Convention with the United States

### *International Tax Agreements Act 1953*

#### **1 Subsection 3(1) (at the end of the definition of *the United States convention*)**

Add “, as amended by the United States protocol”.

#### **2 Subsection 3(1)**

Insert:

*the United States protocol* means the Protocol amending the Convention between the Government of Australia and the Government of the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, being the protocol a copy of which is set out in Schedule 2A.

#### **3 After section 6**

Insert:

#### **6AA Protocol with the United States of America**

Subject to this Act, on and after the date of entry into force of the United States protocol, the provisions of the protocol, so far as those provisions affect Australian tax, have the force of law according to their tenor.

#### **4 At the end of section 17A**

Add:

- (5) Section 128B of the Assessment Act (which deals with liability for withholding tax) does not apply to the payment of a royalty as defined in subsection 6(1) of that Act if:
  - (a) the royalty is paid to a person who is a resident of a Contracting State or territory (other than Australia) for the purposes of an agreement; and
  - (b) the agreement does not treat the amount paid as a royalty.

**5 Application of item 4**

The amendment made by item 4 applies to the payment of a royalty made after the commencement of that item.

**6 After Schedule 2**

Insert:

**Schedule 2A—United States protocol**

Note: See section 3.

**PROTOCOL AMENDING THE CONVENTION BETWEEN THE  
GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT OF THE  
UNITED STATES OF AMERICA FOR THE AVOIDANCE OF DOUBLE  
TAXATION AND THE PREVENTION OF FISCAL  
EVASION WITH RESPECT TO TAXES ON INCOME**

The Government of Australia and the Government of the United States of America,

Desiring to amend the Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income signed at Sydney on the sixth day of August 1982 (in this Protocol referred to as “the Convention”),

Have agreed as follows:

**ARTICLE 1**

Article 1 of the Convention is amended by:

- (a) inserting in the last sentence of paragraph (3) “or long-term resident” after “include a former citizen”; and
- (b) by omitting in the last sentence of paragraph (3) “citizenship” and substituting “such status”.

## **ARTICLE 2**

Article 2 of the Convention is amended by omitting paragraph (1) and substituting:

- “(1) The existing taxes to which this Convention shall apply are:
- (a) in the United States: the Federal income taxes imposed by the Internal Revenue Code; and
  - (b) in Australia:
    - (i) the Australian income tax, including tax on capital gains; and
    - (ii) the resource rent tax in respect of offshore projects relating to exploration for or exploitation of petroleum resources,
- imposed under the federal law of Australia.”.

## **ARTICLE 3**

Article 4 of the Convention is amended by:

- (a) deleting “or” at the end of sub-paragraph (1)(b)(i) and inserting after that sub-paragraph the following:
- “(ii) a United States citizen, other than a United States citizen who is a resident of a State other than Australia for the purposes of a double tax agreement between that State and Australia; or”;
- and
- (b) renumbering sub-paragraph (1)(b)(ii) as sub-paragraph (1)(b)(iii).

#### **ARTICLE 4**

Article 7 of the Convention is amended by inserting:

“(9) Where:

- (a) a resident of one of the Contracting States is beneficially entitled, whether directly or through one or more interposed fiscally transparent entities, to a share of the business profits of an enterprise carried on in the other Contracting State by the fiscally transparent entity (or, in the case of a trust, by the trustee of the trust estate); and
- (b) in relation to that enterprise, that fiscally transparent entity (or trustee) would, in accordance with the principles of Article 5 (Permanent Establishment), have a permanent establishment in that other State, that enterprise carried on by that fiscally transparent entity (or trustee) shall be deemed to be a business carried on in the other State by that resident

through a permanent establishment situated in that other State and that share of business profits shall be attributed to that permanent establishment.”.

## **ARTICLE 5**

Article 8 of the Convention is amended by:

(a) omitting sub-paragraph (1)(b) and substituting:

“(b) profits from the lease of ships or aircraft on a bare boat basis, provided that such lease is merely incidental to the operation in international traffic of ships or aircraft by the lessor.”; and

(b) omitting paragraphs (2) and (3) and substituting:

“(2) Profits of an enterprise of one of the Contracting States from the use, maintenance, or rental of containers (including trailers, barges, and related equipment for the transport of containers) used in international traffic shall be taxable only in that State.

(3) The profits to which the provisions of paragraphs (1) and (2) apply include profits from the participation in a pool service or other profit sharing arrangement.



(4) For the purposes of this Article, profits derived from the carriage by ships or aircraft of passengers, livestock, mail, goods or merchandise taken on board in a Contracting State for discharge in that State shall not be treated as profits from the operation in international traffic of ships or aircraft and may be taxed in that State.”.

## **ARTICLE 6**

Article 10 of the Convention is omitted and the following Article is substituted:

### “ARTICLE 10

#### Dividends

- (1) Dividends paid by a company which is a resident of one of the Contracting States for the purposes of its tax, being dividends to which a resident of the other Contracting State is beneficially entitled, may be taxed in that other State.
- (2) However, those dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident for the purposes of its tax, and according to the law of that State, but:
- (a) the tax charged shall not exceed 5 percent of the gross amount of the dividends, if the person beneficially entitled to those dividends is a

company which holds directly at least 10 percent of the voting power in the company paying the dividends; and

(b) the tax charged shall not exceed 15 percent of the gross amount of the dividends to the extent to which those dividends are not within sub-paragraph (a),

provided that if the relevant law in either Contracting State is varied after the effective date of this provision otherwise than in minor respects so as not to affect its general character, the Contracting States shall consult each other with a view to agreeing to any amendment of this paragraph that may be appropriate.

(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 person who is beneficially entitled to the dividends is a company that is a resident of the other Contracting State that has owned shares representing 80 percent 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:

(a) is a qualified person by reason of sub-paragraph (c) of paragraph (2) of Article 16 (Limitation on Benefits); or

(b) is entitled to benefits with respect to the dividends under paragraph (5) of that Article.

- (4) (a) Sub-paragraph (a) of paragraph (2) and paragraph (3) shall not apply in the case of dividends paid by a Regulated Investment Company (RIC) or a Real Estate Investment Trust (REIT).
- (b) In the case of dividends paid by a RIC, sub-paragraph (b) of paragraph (2) shall apply.
- (c) In the case of dividends paid by a REIT, sub-paragraph (b) of paragraph (2) shall apply only if:
- (i) the person beneficially entitled to the dividends is an individual holding an interest of not more than 10 percent in the REIT;
  - (ii) the dividends are paid with respect to a class of stock that is publicly traded and the person beneficially entitled to the dividends holds an interest of not more than 5 percent of any class of the REIT's stock; or
  - (iii) the person beneficially entitled to the dividends holds an interest of not more than 10 percent in the REIT and the gross value of no single interest in real property held by the REIT exceeds 10 percent of the gross value of the REIT's total interest in real property.
- (d) Notwithstanding sub-paragraph (c), sub-paragraph (b) of paragraph (2) shall apply with respect to dividends paid by a REIT to a

listed Australian property trust (“LAPT”). However, if the responsible entity for the LAPT knows or has reason to know that one or more unitholders each owns 5 percent or more of the beneficial interests in the LAPT, each of such 5 percent or more unitholders shall, for purposes of this paragraph, be deemed to hold such proportion of the LAPT’s direct interest in the REIT as equals that person’s proportionate interest in the LAPT and shall be deemed to be beneficially entitled to the REIT dividends paid with respect thereto, and the provisions of sub-paragraph (c) shall apply to that person. For purposes of this paragraph, dividends paid with respect to REIT shares held by an LAPT shall be deemed to be paid with respect to a class of stock that is publicly traded. For these purposes, a “listed Australian property trust” means an Australian unit trust registered as a “Managed Investment Scheme” under the Australian Corporations Act in which the principal class of units is listed on a recognized stock exchange in Australia and regularly traded on one or more recognized stock exchanges (as defined in Article 16 (Limitation on Benefits)).

- (5) The above provisions of this Article shall not apply if the person beneficially entitled to the dividends, being a resident of one of the Contracting States, carries on business in the other Contracting State of which the company paying the dividends is a resident, through a permanent establishment situated

in that other State, or performs in that other State independent personal services from a fixed base situated in that other State, and the holding in respect of which the dividends are paid is effectively connected with that permanent establishment or fixed base. In that case the provisions of Article 7 (Business Profits) or Article 14 (Independent Personal Services), as the case may be, shall apply.

(6) The term “dividends” as used in this Article means income from shares, as well as other amounts which are subjected to the same taxation treatment as income from shares by the law of the State of which the company making the distribution is a resident for the purposes of its tax.

(7) 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 to which a person who is not a resident of the other Contracting State is beneficially entitled—except insofar as the holding in respect of which such dividends are paid is effectively connected with a permanent establishment or a fixed base situated in that other State, nor may it impose tax on a company’s undistributed profits, except as provided in paragraph (8), even if the dividends paid consist wholly or partly of profits or income arising in such other State.

(8) A company which is a resident of one of the Contracting States and that has a permanent establishment in the other State or that is subject

to tax in the other State on a net basis on its income or gains that may be taxed in the other State under Article 6 (Income from Real Property) or under paragraph (1) or (3) of Article 13 (Alienation of Property) may be subject in that other State to a tax in addition to the tax allowable under the other provisions of this Convention. Such tax, however, may be imposed on only the portion of the business profits of the company attributable to the permanent establishment and the portion of the income or gains referred to in the preceding sentence that is subject to tax under Article 6 (Income from Real Property) or under paragraph (1) or (3) of Article 13 (Alienation of Property) that, in the case of the United States, represents the dividend equivalent amount of such profits, income or gains and, in the case of Australia, is an amount that is analogous to the dividend equivalent amount. This paragraph shall not apply in the case of a company which:

- (a) is a qualified person by reason of sub-paragraph (c) of paragraph (2) of Article 16 (Limitation on Benefits) of this Convention;
- or
- (b) is entitled to benefits with respect to the dividends under paragraph (5) of that Article.

(9) The tax referred to in paragraph (8) may not be imposed at a rate in excess of the rate specified in sub-paragraph (a) of paragraph (2).”

**ARTICLE 7**

Article 11 of the Convention is omitted and the following Article is substituted:

“ARTICLE 11

Interest

(1) Interest arising in one of the Contracting States, being interest to which a resident of the other Contracting State is beneficially entitled, 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 law of that State, but the tax so charged shall not exceed 10 percent of the gross amount of the interest.

(3) Notwithstanding paragraph (2), interest arising in one of the Contracting States to which a resident of the other Contracting State is beneficially entitled may not be taxed in the first-mentioned State if:

(a) the interest is derived by one of the Contracting States or by a political or administrative sub-division 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;

(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) (a) Notwithstanding paragraph (3), interest referred to in sub-paragraph (b) of that paragraph may be taxed in the State in which it arises at a rate not exceeding 10 percent 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.
- (b) Nothing in this Article shall be construed as restricting, in any manner, the right of a Contracting State to apply any anti-avoidance provisions of its taxation law.
- (5) The term “interest” in this Article means interest from government securities or from bonds or debentures (including premiums attaching to such securities, bonds or debentures), whether or not secured by mortgage and whether or not carrying a right to participate in profits, interest from any other form of indebtedness, 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. Income dealt with in Article 10 (Dividends) and penalty charges for late payment shall not be regarded as interest for the purposes of this Article.



(6) The provisions of paragraphs (1), (2), (3) and (4) shall not apply if the person beneficially entitled to the interest, being a resident of one of the Contracting States, carries on business in the other Contracting State, in which the interest arises, through a permanent establishment situated in that other State, or performs in that other State independent personal services from a fixed base situated in that other State, and the indebtedness in respect of which the interest is paid is effectively connected with that permanent establishment or fixed base. In that case the provisions of Article 7 (Business Profits) or Article 14 (Independent Personal Services), as the case may be, 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 a permanent establishment or fixed base in connection with which the indebtedness on which the interest is paid was incurred, and that interest is borne by that permanent establishment or fixed base, then the interest shall be deemed to arise in the State in which the permanent establishment or fixed base is situated.

(8) Where, by reason of a special relationship between the payer and the person beneficially entitled to the interest, or between both of them and some other person, the amount of the interest paid, having regard to the indebtedness for which it is paid, exceeds the amount which might reasonably have been

expected to have been agreed upon by the payer and the person so entitled in the absence of that relationship, the provisions of this Article shall apply only to the last-mentioned amount. In that case the excess part of the amount of the interest paid shall remain taxable according to the law of each Contracting State, due regard being had to the other provisions of this Convention.

- (9) Notwithstanding the provisions of paragraphs (1), (2), (3) and (4):
- (a) interest that is paid by a resident of one of the Contracting States and that is determined with reference to the profits of the issuer or of one of its associated enterprises, as defined in sub-paragraph (a) or (b) of paragraph (1) of Article 9 (Associated Enterprises), being interest to which a resident of the other State is beneficially entitled, also may be taxed in the Contracting State in which it arises, and according to the laws of that State, at a rate not exceeding 15 percent of the gross amount of the interest; and
  - (b) interest that is paid with respect to the ownership interests in a person used for the securitization of real estate mortgages or other assets, to the extent that the amount of interest paid exceeds the normal rate of return on publicly-traded debt instruments with a similar risk profile, may be taxed by each State in accordance with its domestic law.

(10) Where interest expense is deductible in determining the profits, income or gains of a company resident in one of the Contracting States, being profits, income or gains which:

- (a) are attributable to a permanent establishment of that company in the other Contracting State; or
- (b) may be taxed in the other Contracting State under Article 6 (Income from Real Property) or paragraph (1) or (3) of Article 13 (Alienation of Property),

and that interest expense exceeds the interest paid by that permanent establishment or paid with respect to the debt secured by real property located in the other Contracting State, the amount of that excess shall be deemed to be interest arising in that other Contracting State to which a resident of the first-mentioned Contracting State is beneficially entitled.”.

## **ARTICLE 8**

Article 12 of the Convention is amended by:

- (a) omitting “10” and substituting “5” in paragraph (2); and
- (b) omitting sub-paragraph (a) of paragraph (4) and substituting:
  - “(a) payments or credits of any kind to the extent to which they are consideration for the use of or the right to use any:

- (i) copyright, patent, design or model, plan, secret formula or process, trademark or other like property or right;
- (ii) motion picture films; or
- (iii) 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;”.

#### ARTICLE 9

Article 13 of the Convention is amended by:

- (a) omitting paragraph (3) and substituting:

“(3) Income or gains from the alienation of property, other than real property, that forms part of the business property of a permanent establishment which an enterprise of one of the Contracting States has in the other Contracting State or pertains to a fixed base available in that other State to a resident of the first-mentioned State for the purpose of performing independent personal services, including income or gains from the alienation of that permanent establishment (alone or with the whole enterprise) or of that fixed base, may be taxed in that other State.

(4) Income or gains derived by an enterprise of one of the Contracting States from the alienation of ships, aircraft or containers operated or used in international traffic or property, other than real

property, pertaining to the operation or use of such ships, aircraft, or containers shall be taxable only in that State.

(5) Where an individual who, upon ceasing to be a resident of one of the Contracting States, is treated under the taxation law of that State as having alienated any property and is taxed in that State by reason thereof, the individual may elect to be treated for the purposes of taxation in the other Contracting State as if the individual had, immediately before ceasing to be a resident of the first-mentioned State, alienated and re-acquired the property for an amount equal to its fair market value at that time.

(6) An individual who elects, under the taxation law of a Contracting State, to defer taxation on income or gains relating to property which would otherwise be taxed in that State upon the individual ceasing to be a resident of that State for the purposes of its tax, shall, if the individual is a resident of the other State, be taxable on income or gains from the subsequent alienation of that property only in that other State.

(7) Except as provided in the preceding paragraphs of this Article, each Contracting State may tax capital gains in accordance with the provisions of its domestic law.”; and

(b) renumbering paragraph (4) as paragraph (8).

**ARTICLE 10**

Article 16 of the Convention is omitted and the following Article is substituted:

“ARTICLE 16

Limitation on Benefits

(1) Except as otherwise provided in this Article, a resident of one of the Contracting States that derives income from the other Contracting State shall not be entitled to the benefits of this Convention otherwise accorded to residents of one of the Contracting States unless such resident is a “qualified person” as defined in paragraph (2).

(2) A resident of one of the Contracting States shall be a qualified person for a taxable year if the resident is:

- (a) an individual;
- (b) that State, any political subdivision or local authority thereof or any agency or instrumentality of such State;
- (c) a company, if:
  - (i) the principal class of its shares is listed on a recognized stock exchange specified in sub-paragraph (a) or (b) of paragraph (6) of this Article and is regularly traded on one or more recognized stock exchanges; or

- (ii) at least 50 percent of the aggregate vote and value of the shares in the company is owned directly or indirectly by five or fewer companies entitled to benefits under clause (i) of this sub-paragraph, provided that, in the case of indirect ownership, each intermediate owner is a resident of either Contracting State;
- (d) a person other than an individual or a company, if:
  - (i) the principal class of units in that person is listed or admitted to dealings on a recognized stock exchange specified in sub-paragraph (a) or (b) of paragraph (6) of this Article and is regularly traded on one or more of the recognized stock exchanges; or
  - (ii) the direct or indirect owners of at least 50 percent of the beneficial interests in that person are qualified persons by reason of clause (i) of sub-paragraph (c) or clause (i) of this sub-paragraph;
- (e) an entity organized under the laws of one of the Contracting States and established and maintained in that State exclusively for a religious, charitable, educational, scientific, or other similar purpose, even if the entity is generally exempt from tax in that State;
- (f) an entity organized under the laws of one of the Contracting States and established and maintained in that State to provide, pursuant

to a plan, pensions or other similar benefits to employed and self-employed persons, even if the entity is generally exempt from tax in that State, provided that more than 50 percent of the entity's beneficiaries, members or participants are individuals resident in either Contracting State;

- (g) a person other than an individual, if:
  - (i) on at least half the days of the taxable year persons that are qualified persons by reason of sub-paragraph (a), (b), (c)(i), or (d)(i) of this paragraph own, directly or indirectly, at least 50 percent of the aggregate vote and value of the shares or other beneficial interests in the person; and
  - (ii) less than 50 percent of the person's gross income for the taxable year is paid or accrued, directly or indirectly, to persons who are not residents of either Contracting State in the form of payments that are deductible for purposes of the taxes covered by this Convention in the person's State of residence (but not including arm's length payments in the ordinary course of business for services or tangible property and payments in respect of financial obligations to a bank, provided that where such a bank is not a resident of one of the Contracting States such



payment is attributable to a permanent establishment of that bank located in one of the Contracting States); or

(h) a recognized headquarters company for a multinational corporate group. For purposes of this paragraph, a person shall be considered a recognized headquarters company if:

(i) it provides in its State of residence a substantial portion of the overall supervision and administration of a group of companies (which may be part of a larger group of companies), which may include, but cannot be principally, group financing;

(ii) the group of companies consists of corporations resident in, and engaged in an active business in, at least five countries (or groupings of countries), and the business activities carried on in each of the five countries (or groupings of countries) generate at least 10 percent of the gross income of the group;

(iii) the business activities carried on in any one country other than the Contracting State of residence of the headquarters company generate less than 50 percent of the gross income of the group;

(iv) no more than 25 percent of its gross income is derived from the other Contracting State;

- (v) it has, and exercises, independent discretionary authority to carry out the functions referred to in sub-paragraph (i);
- (vi) it is subject to generally applicable rules of taxation in its country of residence; and
- (vii) the income derived in the other Contracting State either is derived in connection with, or is incidental to, the active business referred to in sub-paragraph (ii).

If the income requirements for being considered a recognized headquarters company (sub-paragraphs (ii), (iii), or (iv)) are not fulfilled, they will be deemed to be fulfilled if the required percentages are met when averaging the gross income of the preceding four years.

- (3) (a) A resident of one of the Contracting States will be entitled to the benefits of the Convention with respect to an item of income derived from the other State, regardless of whether the resident is a qualified person, if the resident is engaged in the active conduct of a trade or business in the first-mentioned State (other than the business of making or managing investments for the resident's own account, unless these activities are banking, insurance or securities activities carried on by a bank, insurance company or a registered, licensed or authorized securities dealer), and the income derived from the other Contracting

State is derived in connection with, or is incidental to, that trade or business.

(b) If the resident or any of its associated enterprises carries on a trade or business activity in the other Contracting State which gives rise to an item of income, sub-paragraph (a) of this paragraph shall apply to such item only if the trade or business activity in the first-mentioned State is substantial in relation to the trade or business activity in the other State. Whether a trade or business activity is substantial for purposes of this paragraph will be determined based on all the facts and circumstances.

(c) In determining whether a person is “engaged in the active conduct of a trade or business” in a Contracting State under sub-paragraph (a) of this paragraph, activities conducted by a partnership in which that person is a partner and activities conducted by persons connected to such person shall be deemed to be conducted by such person. A person shall be connected to another if one possesses at least 50 percent of the beneficial interest in the other (or, in the case of a company, at least 50 percent 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, at least 50 percent of the beneficial interest (or, in the case of a company, at least 50 percent

of the aggregate vote and value of the company's shares or of the beneficial equity interest in the company) in each person. In any case, a person shall be considered to be connected to another if, based on all the relevant facts and circumstances, one has control of the other or both are under the control of the same person or persons.

(4) Notwithstanding the preceding provisions of this Article, if a company that is a resident of one of the Contracting States, or a company that owns at least 50 percent of the aggregate vote or value of such a company, has outstanding a class of shares:

(a) which is subject to terms or other arrangements which entitle its holders to a portion of the income of the company derived from the other Contracting State that is larger than the portion such holders would receive absent such terms or arrangements ("the disproportionate part of the income"); and

(b) 50 percent or more of the voting power and value of which is owned by persons who are not qualified persons,

the benefits of this Convention shall not apply to the disproportionate part of the income.

(5) A resident of one of the Contracting States that is not a qualified person pursuant to the provisions of paragraph (2) of this Article shall, nevertheless, be granted benefits of the Convention if the competent authority of the other

Contracting State determines, in accordance with the law of that other State, that the establishment, acquisition or maintenance of such person and the conduct of its operations did not have as one of its principal purposes the obtaining of benefits under the Convention.

(6) For purposes of this Article the term “recognized stock exchange” means:

- (a) the NASDAQ System owned by the National Association of Securities Dealers, Inc., and any stock exchange registered with the U.S. Securities and Exchange Commission as a national securities exchange under the U.S. Securities Exchange Act of 1934;
- (b) the Australian Stock Exchange and any other Australian stock exchange recognized as such under Australian law; and
- (c) any other stock exchange agreed upon by the competent authorities.

(7) Nothing in this Article shall be construed as restricting, in any manner, the right of a Contracting State to apply any anti-avoidance provisions of its taxation law.”.

#### **ARTICLE 11**

Article 21 of the Convention is omitted and the following Article is substituted:

“ARTICLE 21

Other Income

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

(2) The provisions of paragraph (1) shall not apply to income, other than income from real property as defined in paragraph (2) of Article 6 (Income from Real Property), derived by a resident of one of the Contracting States where that income is effectively connected with a permanent establishment or fixed base situated in the other Contracting State. In that case the provisions of Article 7 (Business Profits) or Article 14 (Independent Personal Services), as the case may be, shall apply.

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

**ARTICLE 12**

Article 22 of the Convention is amended by omitting in paragraph (1) “sub-paragraph (1)(b)” and substituting “sub-paragraph (1)(b)(i)” in each place it occurs.

**ARTICLE 13**

(1) This Protocol shall be subject to ratification in accordance with the applicable procedures of each Contracting State, and instruments of ratification shall be exchanged as soon as possible.

(2) This Protocol, which shall form an integral part of the Convention, shall enter into force upon the exchange of instruments of ratification and its provisions shall have effect:

(a) in Australia:

(i) in respect of withholding tax on dividends, royalties and interest that is derived by a non-resident, in relation to income derived on or after the later of:

(A) the first day of the second month next following the date on which the Protocol enters into force; or

(B) 1 July, 2003;

(ii) 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 Protocol enters into force; and

(b) in the United States:

(i) in respect of withholding tax on dividends, royalties and interest that is derived by a non-resident, in relation to income derived on or after the later of:

(A) the first day of the second month next following the date on which the Protocol enters into force; or

(B) 1 July, 2003;

(ii) in respect of other taxes, for taxable periods beginning on or after 1 January in the calendar year next following that in which the Protocol enters into force.

(3) Notwithstanding paragraph (2), Article 6 of this Protocol shall not apply to dividends paid by a REIT if the person beneficially entitled to the dividends is an LAPT (as defined in paragraph (4) of Article 10 (Dividends) of the Convention as amended by this Protocol) and the shares in respect of which the dividends are paid were:

(a) owned by the LAPT on March 26, 2001;

(b) acquired by the LAPT pursuant to a binding contract entered into on or before March 26, 2001; or

(c) acquired by the LAPT pursuant to a reinvestment of dividends (ordinary or capital) with respect to such shares.

In such case, the provisions of Article 10 (Dividends), as it was on March 26, 2001, shall apply.



IN WITNESS WHEREOF the undersigned, being duly authorized, have signed  
this Protocol.

DONE in duplicate at Canberra, this twenty-seventh day of September 2001.

FOR THE GOVERNMENT OF  
AUSTRALIA:

PETER COSTELLO

[Signatures omitted]

FOR THE GOVERNMENT  
OF THE UNITED STATES  
OF AMERICA:

J THOMAS SCHIEFFER

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*[Minister's second reading speech made in—  
House of Representatives on 21 March 2002  
Senate on 19 June 2002]*

(86/02)